BILL OF EXCEPTIONS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. [redacted] 163

JONES [illegible] TIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. [redacted] 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. [redacted] 165

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. [redacted] 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(24,240, 24,241, 24,242, 24,243)

MINN. STATE LIBRA[illegible]

(24,240, 24,241, 24,242, 24,243)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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a-12 In the Supreme Court for the State of Nebraska.

No. 17276.

JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

No. 17277.

BANK OF STAPLEHURST, Appellee,
v.
CHARLES E. YATES et al., Appellants.

No. 17278.

UTICA BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

No. 17279.

THOMAS BAILEY, Appellee,
v.
CHARLES E. YATES et al., Appellants.

STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court within and for said state, hereby certify that this volume No. 1 hereby identified as Exhibit "A" referred to in my certificate of authentication attached to the transcript, forwarded to the Clerk of the United States Supreme Court in each of the above entitled cases, and consisting of pages numbered from 1 to 691 inclusive, is a true full and complete transcript of volume No. 1 of the Bill of Exceptions in said cases as the same now appears on file in my office.

Witness my hand and the seal of said Court at Lincoln, Nebraska, this May 21, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

* * * * * * *

13 And afterwards on the 28th day of May, 1902, there was filed with the Clerk of said Court a certain Stipulation in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
v.
CHARLES W. MOSHER et al., Defendants.

THE JONES NATIONAL BANK, Plaintiff,
v.
CHARLES W. MOSHER et al., Defendants.

UTICA BANK, Plaintiff,
v.
CHARLES W. MOSHER et al., Defendants.

THOMAS BAILEY, Plaintiff,
v.
CHARLES W. MOSHER et al., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward county, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to the stipulation and governed by the ruling of the Court, shall be offered and produced and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in-so-far as it may be pertinent and competent to any of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; and such evidence being properly applied to any one or to all of the parties to the stipulation as the facts of the *Court* may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the ruling and directions of the Court, subject to the objections of either party.

14

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute, error *form* the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings on error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions, and which may be filed and used

in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Att'ys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def's Yates, Walsh Estate & Hamer Estate.

* * * * * * *

15 *Deposition — Jno. W. McDonald.*

Mr. NORVAL: The stipulations and agreements of the parties upon the former trial of these cases in this court are still continued in force.

We now offer in evidence the testimony of John W. McDonald, as found in Volume 3 of the Bill of Exceptions of the former hearing in this court.

Mr. ROSE: The defendant Thompson objects to the introduction of any evidence in this case for the reason that the petition, and each of them in the several cases, do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant David E. Thompson; and because the facts set forth in the pleadings and established of record are not sufficient to warrant a recovery against the defendant Thompson.

Objection overruled.
Defendants and each of them Except.

Mr. BISHOP: The defendants Yates and Hamer each object to the introduction of any testimony in either of the cases for the same reasons assigned by Mr. Thompson.

Objection overruled.
Defendants and each of them except.

16–45 Testimony of JOHN W. MCDONALD read from former record as follows:

Q. You may state your name.
A. John W. McDonald.
Q. You are Receiver of the Capital National Bank of Lincoln, Nebraska?
A. Yes, sir.
Q. You may state when you were appointed.
A. I don't believe I can tell you that without looking up. I think it was in the summer of 1898 sometime. I think I would have to look up my commission to be right sure about that.

* * * * * * *

46 (Exhibit "A" received in evidence, as follows:)

(Exhibit "A" attached here.)

Q. I hand you original certificate of deposit Number 23593, of the Capital National Bank, and Exhibit "B," and ask you to state whether or not Exhibit "B" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes I think it is, so far as I can see.

Q. Do the original and copy bear any endorsements?

A. Yes.

We now offer in evidence Exhibit "B," being a photographic reproduction of certificate Number 23593 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "B" is as follows:)

47 (Exhibit "B" attached here.)

Q. I hand you original certificate Number 24452 of the Capital National Bank, and Exhibit "C," and ask you to state whether or not Exhibit "C" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

Q. Do the original and copy bear any endorsements?

A. Yes.

We now offer in evidence Exhibit "C," being a photographic reproduction of certificate Number 24452 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Exhibit A.
L.A. Rickett
N.P.

Exhibit A,

$50,000

Capital National Bank

CLEVELAND

Dec 28 1893

J. E. Odell Jr.

Fifty Thousand

PAID

E. A. Merrow

21379 NOT SUBJECT TO CHECK.

Exhibit "B"
P.A. Richie
N.P.

Exhibit "B"

$40.000 00

Capital National Bank

LINCOLN NEB.

Dec 9th 1890



J. E. Hill State Treasurer has deposited in this Bank

Forty Thousand Dollars

payable to the order of himself on return of this properly endorsed

PAID
NOV 3 1892
CAPITAL NATIONAL BANK
LINCOLN NEB

No 23593 NOT SUBJECT TO CHECK.

Cashier

47

Ex Exhibit C
R. A. Ricketts
N. F.

$100.250.00

Capital National Bank

LINCOLN, NEB.

Apr 24 1891



J. E. Hill Trus. has deposited in this Bank
One Hundred Thousand Two hundred & fifty Dollars
payable to the order of self on return of this Certificate properly
endorsed.

No 24452 NOT SUBJECT TO CHECK.

C. W. Mosher Cash

J E Hill Trus
by C. W. Mosher
Trus of Neb Relief Fund

Ex Exhibit C
R. A. Ricketts
N. F.

47

Interest at ____ per cent. per month.
If left ____ months
to accumulate until maturity

Exhibit "D"
L.L. Rickett
N.P.

Exhibit x D

Capital National Bank

INDIANA

24937 NOT SUBJECT TO CHECK

(Exhibit "C" is as follows:)

48 Q. I hand you original certificate Number 24937 of the Capital National Bank, and Exhibit "D," and ask you to state whether or not Exhibit "D" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in Eidence Exhibit "D," being a photographic reproduction of certificate Number 24937 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "D" is as follows:)

Q. I hand you original certificate Number 24941 of the Capital National Bank, and Exhibit "E" and ask you to state whether or not Exhibit "E" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

49 A. Yes I think it is, so far as I can see.

Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in evidence Exhibit "E," being a photographic reproduction of certificate Number 24941 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "E" is as follows:)

Q. I hand you original certificate Number 25097 of the Capital National Bank, and Exhibit "F," and ask you to state whether or not Exhibit "F" is a true and correct photographic reproduction of the original certificate together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in evidence Exhibit "F," being a photographic reproduction of certificate Number 25097 of the Capital National Bank, and attach the same to the deposition of the witness and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "F" is as follows:)

Q. I hand you original certificate Number 25047 of the Capital National Bank, and Exhibit "G," and ask you to state whether or not Exhibit "G" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

Q. Do the original and copy bear any endorsements?

A. Yes.

We now offer in evidence Exhibit "G," being a photographic reproduction of Certificate number 25047 of the Capital National Bank and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

Lancaster Co Capons

$1000.00

Capital National Bank

LINCOLN, NEB.

July 20 1891



J. E. Hill & Bro has deposited in this Bank

One thousand & no/100 Dollars

payable to the order of self on return of this Certificate properly endorsed.

No. 24941 NOT SUBJECT TO CHECK.

P. Brumbaugh Cash

Exhibit "E"
R.A. Ricketts
Ex Exhibit "E"

49

Ex Exhibit 7.
L.A. Pickett
NP.
25097

150.00

Capital National Bank

CANCELLED

Aug 17 1891

Pay to the order of Lee Hing Thong & Co

Fifty and 00/100 Dollars

in payment of this certificate properly

endorsed

No 25097 NOT SUBJECT TO CHECK

Exhibit x 7.

50

$37.975

Capital National Bank

LINCOLN, NEB.



Aug 5 1891

J. E. Hill Esq has deposited in this Bank
Thirty Seven Thousand nine hundred seventy five Dollars
payable to the order of self on return of this Certificate properly
endorsed

№ 25047 NOT SUBJECT TO CHECK.

51

Exhibit "G"
Ex. Rec'd
N.P.

$50.00

Capital National Bank

LINCOLN, NEB.



Nov 18 1891

PAID
MAY 21 1892
Capital National Bank
LINCOLN, NEB.

PAID
MAY 21 1892
CAPITAL NAT'L BANK
LINCOLN, NEB.

J. E. Hill Esq

Fifty Thousand 5 0 Dollars

payable to the order of self on return of this Certificate properly endorsed.

№ 25636 NOT SUBJECT TO CHECK.

J. E. Hill Esq

51

51 (Exhibit "G" is as follows:)

Q. I hand you original certificate Number 25636 of the Capital National Bank, and Exhibit "H," and ask you to state whether or not Exhibit "H" is a true and correct photographic reproduction of the original certificate together with all endorsements thereon?
A. Yes, I think it is, so far as I can see.
Q. Do the original and copy bear any endorsements?
A. Yes.

We now offer in evidence Exhibit "H," being a photographic reproduction of certificate Number 25636 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a parr of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "H" is as follows:)

52 Q. I hand you certificate number 25862 of the Capital National, and Exhibit "I," and ask you to state whether or not Exhibit "I" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?
A. Yes, I think it is, so far as I can see.
Q. Do the original and the copy bear any endorsements?
A. Yes.

We now offer in evidence Exhibit "I," being a photographic reproduction of certificate Number 25862 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "I" is as follows:)

Q. I hand you the original certificate Number 25861 of the Capital National Bank, and Exhibit "J," and ask you to state whether or not Exhibit "J" is a true and correct photographic reproduction of the original certificate, together with all endorsements thereon?

A. Yes, I think it is, so far as I can see.

53-57 Q. Neither the original nor the copy bear any endorsements?

A. No.

We now offer in evidence Exhibit "J," being a photographic reproduction of certificate Number 25861 of the Capital National Bank, and attach the same to the deposition of the witness, and make it a part thereof, and also make it a part of the deposition of the witness John E. Hill, whose testimony is taken at the same time.

(Exhibit "J" is as follows:)

* * * * * * *

58 EXHIBIT "A1."

$50,000.00.
Date, December 23, 1899.
Order of, J. E. Hill, Treas.
Applicant, —— ——.
Int., —.
No. 21379.

EXHIBIT "B-1."

$40,000.00.
Date, 12-9, 1890.
Order of J. E. Hill.
Applicant, X—— ——,
Int., X—.
No. 23593.

$3711475

Capital National Bank

LINCOLN, NEB.

Dec 22 1891



T. C. Hill Treas

has deposited in this Bank

Thirty seven thousand one hundred and seventy five Dollars

payable to the order of Self on return of this Certificate properly endosed

No 25862 NOT SUBJECT TO CHECK.

25862

PAY ... ACCOUNT

TREASURER of STATE of NEBRASKA

52

Exhibit
F.A. Richards
N.P.

Exhibit x J.

$38.11½ 75

Capital National Bank

LINCOLN, NEB.

Dec 27 1890

Pay to the order of Miss Estelle Richards Seventy five Dollars

payable to the order of Miss Estelle Richards

endorsed.

Interest at 6% per month after maturity

PAID
DEC 29 1891
CAPITAL NATIONAL BANK

No 25861 NOT SUBJECT TO CHECK.

EXHIBIT "C-1."

$100,250.00.
Date, Apr. 24, 1891.
Order of J. E. Hill, Treas.
Applicant, X—— ——,
Int., X—.
No. 24452.

EXHIBIT "D-1"

$14,650.00.
Date, July 18, 1891.
Order of J. E. Hill, Treas.
Applicant, 11445.
Int., X—.
No. 24937.

59 EXHIBIT "E-1."

$10,000.00.
Date, July 20, 1891.
Order of, J. E. Hill, St. Tres.
Applicant, X—— ——,
Int., X—.
No. 24941.

EXHIBIT "F-1."

$50.
Date, Aug. 17, 1891.
Order of J. E. Hill, Treas
Applicant, Int.
Int., X—.
No. 25097.

EXHIBIT "G-1."

$975.00.
Date, Aug. 6, 1891.
Order of, J. E. Hill, Treas.
Applicant, X—— ——,
Int., X—.
No. 25047.

EXHIBIT "H-1."

$50,000.00.
Date, Nov. 18, 1891.
Order of J. E. Hill, Treas.
Applicant, X—— ——.
Int., X—.
No. 25636.

60 EXHIBIT "I-1."

$37,114.75.
Date, 12-22, 1891.
Order of, J. E. Hill, Treas.
Applicant, —— ——.
Int., —.
No. 25862.

EXHIBIT "J-1."

$38,114.75.
Date, Dec. 22, 1891.
Order of, J. E. Hill, Treas.
Applicant, —— ——.
Int., —.
No. 25861.

EXHIBIT "K-1."

$5.00.
Date, Jan. 7, 1889.
Order of, G. M. Bartlett.
Applicant, —— ——.
Int., —.
No. 19272.

EXHIBIT "L-1."

$5.
Date, Dec. 24, 1889.
Order of, J. E. Hill.
Applicant, —— ——.
Int., —.
No. 21386.

61 Deposition of JOHN E. HILL read in evidence from the record in the former case, by Mr. NORVAL, as follows:

Q. Where do you reside, Mr. Hill?
A. Lincoln, Nebraska.
Q. How long have you resided in Lincoln, Nebraska?
A. Eleven years.
Q. You may state what official position, if any, you ever held in the state of Nebraska?
A. I held the position of State Treasurer.
Q. From what time, and to what time, did you hold the position of State Treasurer of this state?
A. From the first week in January, 1889, to the first week in January, 1893.
Q. During the time you were holding the office of state treasurer of this state, and while the Capital National Bank, located at Lin-

coln, Nebraska, was in business, did you have any business relations or dealings with the Capital National Bank?

A. I did, as state treasurer.

Q. I now hand you Exhibit "A," which was identified by Mr. McDonald, Receiver of the Capital National Bank. You may examine that certificate, which bears number 21379, dated December 23rd, 1889, and payable to the order of J. E. Hill, Tr., for the face value of $50,000, and state if you ever had any transaction of that character with the Capital National Bank as state treasurer, or in any other capacity?

A. I have no recollection of having any transaction of that character.

Q. You may state if you as state treasurer, or otherwise, deposited $50,000, with the Capital National Bank of Lincoln, Nebraska, on December 23, 1889, and received the original certificate of which Exhibit "A" is a copy?

A. I did not.

62 Q. You made no deposit of that kind or character at that time?

A. No sir.

Q. You may state if you ever received from the Capital National Bank, or any one for the Capital National Bank, the amount specified in this certificate, to-wit: $50,000, on January 6, 1893, or at any other time, in payment of the same?

A. I did not.

Q. You may state whether you ever authorized anyone to draw that amount, the amount of that certificate, from the bank for you as state treasurer, or otherwise?

A. No sir, I never authorized anyone.

Q. You may state if you ever endorsed this certificate, or authorized anyone to endorse it for you?

A. No sir, I did not, nor authorized anyone to do it for me.

Q. I now hand you Exhibit "B," which has been identified by the preceeding witness, Mr. McDonald, receiver, which is certificate of deposit for $40,000, dated December 9, 1890, and payable to J. E. Hill, State Treasurer, bearing number 23593, and signed by C. W. Mosher, Pt., and state if you ever saw that certificate before.

A. I have no knowledge of ever seeing this certificate.

Q. You may state whether or not the certificate, Exhibit "B," which I have just handed you, and which is referred to in the preceding question, represented a business transaction between you as state treasurer, and the Capital National Bank of Lincoln, Nebraska?

A. Yes, it did.

63 Q. You may state if you deposited with the Capital National Bank of Lincoln, Nebraska, the amount specified in Exhibit "B" on the date therein specified?

A. Yes sir, there is no question but what the amount was deposited.

Q. You may state if you drew from the Bank the amount men-

tioned in the certificate about the date of its stamp "paid" o
face of the certificate, as state treasurer?

A. Yes, the amount evidently was drawn.

Q. How is that?

A. Yes, sir.

Q. I now hand you Exhibit "C," which was identified by
preceeding witness, Mr. McDonald, receiver, which bears date
24, 1891, payable to the order of J. E. Hill, Treas., for the
value of $100,250.00, bearing number 24452, and ask you to
if you ever saw that certificate?

A. I have no remembrance of seeing that certificate.

Q. You may state Mr. Hill, if that certificate was ever in
possession as state treasurer, or otherwise until it was produced
by the receiver today?

A. No sir, that never was held by me as state treasurer.

Q. You may state whether that represented a transaction betw
you as state treasurer, or any one for you as state treasurer, with
Capital National Bank?

64 A. No sir, I never had any such business transaction.

Q. You may state if you at that time, or at any ot
time, had a transaction with the Bank for that amount as s
treasurer or otherwise?

A. No sir.

Q. You may state if you, or any one for you, or in your beh
deposited that amount with the Capital National Bank at t
time?

A. They did not.

Q. You may state whether you, or any — authorized by you
state treasurer, or otherwise, draw that money on behalf of the st
treasurer, or yourself?

A. No sir.

Q. Looking at the back of Exhibit "C," you may state if the
dorsement upon the back of that in the following words: "J.
Hill, Treasurer, By C. W. Mosher, Treasurer of the Neb. Rel
Fund," was placed on there by your authority, your knowled
your direction or your consent?

65 A. It was not.

Q. You may state if any portion of the money stated on t
face of the certificate, Exhibit "C," was paid to you by the Bank,
to anyone for you, as state Treasurer, or otherwise?

A. It was not.

Q. Was the endorsement placed on there by you?

A. It was not.

Q. Handing you Exhibit "D," which was identified by the pr
ceeding witness, Mr. McDonald, receiver, bearing date July 18, 189
for $14,650, and numbered 24937, you may state if that represente
an actual transaction between you as state treasurer, or otherwis
and the Capital National Bank?

A. It does not.

Q. You may state if you deposited with the Capital Nationa

Bank on the date the certificate bears, July 18, 1891, $14,650.00, or any portion of it?

A. I did not.

Q. You may state if any funds, any amount of money, was ever at any time paid to you as state treasurer, or otherwise, or to anyone else for you, in payment of Exhibit "D"?

66 A. There was not.

Q. You may state if you at any time ever endorsed, or authorized any one to endorse, Exhibit "D"?

A. I never endorsed it, and authorized no one to endorse it for me.

Q. Is there any endorsement on the back?

A. No, there is no endorsement on the back.

Q. I now hand you Exhibit "E," which is a certificate drawn for $10,000, bearing number 24941, dated July 20, 1891, payable to J. E. Hill, St. Treas., and will ask you to state whether that represents a transaction between you as state treasurer, or otherwise, with the Capital National Bank on that day?

A. It does not.

Q. You may state whether you upon that day, or any other time deposited the money therein mentioned, or any portion of it?

A. I did not.

67 Q. You may state if on the 6th day of August, 1891, or any other time, the Capital National Bank, or any one for them, paid to you, or anyone for you, the amount of money, or any portion of the money, mentioned in the Exhibit?

A. They did not.

Q. You may state whether that was ever endorsed by you, or any one for you?

A. It was not endorsed by me. There is no endorsement on it.

Q. Now handing you certificate of deposit issued by the Capital National Bank for $50,000, bearing date August 17, 1891, payable to the order of J. E. Hill, Treas., bearing number 25097, and identified by the preceeding witness, Mr. McDonald, Receiver, as Exhibit "F," I will ask you to state whether or not you had any transaction of that character at that time?

A. I did not.

Q. You may state whether or not you made a deposit of the amount mentioned in that certificate, or any portion of it, at that time or at any other time?

A. I did not.

68 Q. State whether or not on January 6, 1893, or at any other time, there was paid to you, or for you, by the Capital National Bank, or any one for the Bank, the amount specified in this certificate, or any portion of it, as state treasurer or otherwise?

A. There was not.

Q. You may state if there is an endorsement upon the back of certificate, Exhibit "F"?

A. No sir.

Q. I now hand you Exhibit "G," which is a certificate that was identified by the preceeding witness, McDonald, Receiver, bearing date August 5, 1891, drawn for $37,975, payable to the order of J. E.

Hill, Treas., bearing number 25047, and will ask you to state if you deposited, or your office deposited, that amount with the Capital National Bank at that time?

A. Yes, sir.

Q. You may state if the amount of funds, the full amount for which that certificate bears upon its face, was paid to you by the Capital National Bank, or its officers?

A. It was.

Q. And the endorsement upon the back of Exhibit "G" is made by who?

A. Made by myself, by my deputy, George M. Bartlett.

69 Q. Your authorized deputy?

A. Yes, my authorized deputy.

Q. And the full amount mentioned on the face of that certificate was actually paid to the state treasurer in satisfaction of the certificate?

A. It was paid, yes sir.

Q. Handing you Exhibit "H," which was identified by the former witness, Mr. McDonald, Receiver, being a certificate of deposit issued by the Capital National Bank for $50,000, dated November 18, 1891, payable to the order of J. E. Hill, Treas., bearing number 25636, I will ask you to state if you as such treasurer, or otherwise, deposited the amount of money specified in the certificate at that time, or at any other time, or any part thereof?

A. I did not.

Q. You may state if you as state treasurer, or otherwise, or any one for you as state treasurer, or otherwise, received from the Capital National Bank, on May 21, 1892, the $50,000 specified in this certificate, or any part of the same.

—. No sir.

Q. You may state Mr Hill, turning to the back of Exhibit "H," if that endorsement, "J. E. Hill, Treas.," was written by you or ony of your deputies, or anyone authorized by you?

70 A. It was not written by me, nor did I authorize any person to write it.

Q. And neither yourself, nor the state treasurer, received any portion of the funds?

A. They did not.

Q. Handing you Exhibit "I," being certificate of deposit issued by the Capital National Bank, dated December 22, 1891, for $37,114.75, payable to the order of J. E. Hill, Treas., and numbered 25832, and being the certificate identified by the preceding witness, Mr. McDonald, Receiver, you may state if you deposited as state treasurer the amount of money mentioned therein upon that date?

A. I did.

Q. You may state whether or not the Capital National Bank on December 13, 1892 paid you the full amount of money specified in Exhibit "I"?

A. They did.

Q. And you may state, turning to the back of Exhibit "I" whose endorsement is on the back?

A. That was my endorsement as state treasurer, by my deputy, George M. Bartlett.

Q. That is a genuine endorsement?

A. Genuine endorsement,—no question about that.

Q. Handing you Exhibit "J," which is an exhibit that was identified by the preceding witness, Mr. McDonald, Receiver,

71–76 which is a certificate of deposit issued by the Capital National Bank for the face value of $38,114.75, bearing date December 22, 1891, payable to the order of J. E. Hill, Treasurer, and bearing number 25861, I will ask you to examine the same, and state if you know whether or not the amount of money specified in the certificate was deposited by you, or anyone for you, as state treasurer, or otherwise, with the Capital National Bank?

A. There was no such amount deposited by me, nor any portion of it, nor for me, nor by me.

Q. You may state whether or not you received from the Capital National Bank, or anyone representing the Capital National Bank, either by yourself, or otherwise, as state treasurer, or otherwise, the amount of money mentioned in the certificate, or any portion of it, on December 22, 1891, or any other time?

A. I did not.

Q. Turning over the certificate, please examine the back, and state whether there is any endorsement on the back of the same?

A. No endorsement appears on the back of it.

Q. You may state whether you ever endorsed it or transferred it, or authorized any one to do so?

A. I did not.

* * * * * * *

77-82 Ex.'s A, B, C, D, E, F, G, H, I, AND J.

Plaintiff now offers in evidence, and asks the Notary to make copies thereof in writing, or photographic copies, Exhibits "A," "B," "C," "D," "E," "F," "—" "H," "I," and "J," together with all endorsements and memoranda thereon, and that the same be severally attached to and made a part of the deposition of Mr. Hill.

* * * * * * *

83 Deposition of D. J. CARNES read in evidence as follows:

Direct examination.

Read by Mr. NORVAL:

State your name, age, residence and occupation.

A. My name is D. J. Carnes; age fifty four years; resident Sycamore, Illinois; occupation, practising lawyer

Q. State how long you have resided at Sycamore, Illinois.

A. Ever since November, 1873.

Q. Are you acquainted with C. W. and W. W. Marsh?

A. I am.

Q. How long have you known them?

A. Well ever since I came here to town.

Q. Where have they resided during that period?

A. C. W. Marsh has resided all the time in the Township of De Kalb adjoining the Township of Sycamore. W. W. Marsh, I think, has had his residence here in the city of Sycamore all the time. His home has been here. He has been away portions of the time.

—. Are you acquainted with the financial standing of C. W., and W. W. Marsh?

A. I am.

Q. And have you been acquainted with their financial standing and property worth since January 1st, 1885 and up to and including the present time?

A. I have.

Q. You may state what relation, if any, you have sustained to C. W. and W. W. Marsh during the time stated in the last preceding interrogatory?

84 A. I was one of their attorneys in troubles following the failure and continued to be so until they were practically through with those troubles. I have been engaged for W. W. Marsh in some matter or matters all the time since then. Have had no professional business to do for C. W. Marsh for some time past.

Q. You may state, if you know, whether or not the parties above mentioned ever failed in business, and if so, give the date as nearly as you can.

A. I know that those parties failed sometime in the Summer of 1894, if I remember it. I can't give the exact date without looking at memoranda. The Marsh Binder corporations in which their principal interests were, made an assignment at that time and that involved the Marsh Harvester Corporation in which they had interests and the firm of C. W. & W. W. Marsh in which name they had other properties and their own individual properties in such a way that they were unable individually or jointly in each of those capacities to pay their debts.

Q. You may state, if you know, whether or not the firm of C. W. & W. W. Marsh have been solvent and able to pay their indebtedness since January, 1885?

A. They have not.

Q. You may state if you were acquainted with the Marsh Harvester Company, during the time it existed at Sycamore, Illinois?

A. I was from the time I came to Sycamore in 1873, and more particularly after I was admitted to the bar in September, 1875. The corporation antedates my acquaintance with it. The

85 Marsh Harvester Company was located at Sycamore, Illinois. Its principal office and manufacturing plant was located there.

Q. You may state if you are acquainted with the financial standing and solvency of the Marsh Binder Company from January 1885 up to and including this time?

A. I was and am. I am not sure that that was the technical name of the corporation. It was the name it went by.

—. You may state what you know as to the solvency or insolvency of the Marsh Binder Company within the dates mentioned in the preceding interrogatory?

A. Well on January 1st, 1885, that corporation was in the hands of an assignee under an assignment that had been made under our State law in the preceding year. I was one of the attorneys for the assignee, and without looking up particular data I could say that I know the assignee did not realize assets enough to pay in full the preferred claims of the laborers.

Q. Do you know whether or not there were sufficient assets of the firm to pay any portion of the general creditors of the firm or corperation?

A. I am positive that there was nothing whatever paid and no asset to pay anything whatever of the general creditors' debts.

—. Were you acquainted with the Sycamore Marsh Harvester Manufacturing Company located at Sycamore, Illinois?

A. Yes, sir.

Q. How long did your acquaintance extend?

A. That was the original company that antedates my residence here and was nominally in existence until the assignment of the Binder Company but its business was transferred to the Binder company. I knew the company all the time from my first residence here and knew its affairs quite intimately after the time I was admitted to the bar in 1875.

86 Q. You may, if you know, state whether or not the Marsh Manufacturing Company did any business in the way of manufacturing any machinery or commodities, or articles, after January 1st, 1885?

A. It did not.

Q. You may state whether or not you were conversant with the assets, the financial responsibility, of the Sycamore Marsh Harvester Manufacturing Company from January 1st, 1885 up to the present time.

A. I was and am.

Q. You may state what it was.

A. It has not been a going concern since that time. Has had no asset of value since that time and has been always since that time, unable to pay any debt whatever.

Q. You may state if you are acquainted with the Marsh Binder Manufacturing Company of Sycamore, Illinois.

A. I was.

Q. And how long has your acquaintance been with the company?

A. I know that from the time it organized, there was only one corporation that was known here by the name of the Marsh Binder Company. I think its full technical name was the Marsh Binder Manufacturing Company, and any answer that I make here responsive to inquiries about the Binder Company refers to that corporation, by whatever its technical name may be.

Q. You may state how many companies or corporations there were in which the Marshes were interested in the manufacturing of farm machinery at Sycamore, Illinois?

A. There was originally the Marsh Harvester Company, as com-

monly called. Its technical names was, I think, the Marsh
87 Harvester Manufacturing Company. The assets of that company were transferred for the most part to the Marsh Binder Company, as commonly called. Its technical name was, I think, Marsh Binder Manufacturing Company. There was also the firm of C. W. & W. W. Marsh that did some manufacturing on the side, so to speak, in connection with the business of those two corporations.

Q. And then aside from the technical name that you have just given in answer to the preceding interrogatory, there was no other corporations or firms transacting business at Sycamore, Illinois, or manufacturing machinery at this place, other than those you have given in which the Marshes, either C. W., or W. W., were interested?

A. Not that I know of. Of course either one of those men may have had some other little interest in some other business here, but nothing of any consequence.

Q. And what do you say as to the colvency or insolvency and the ability of the Marsh Binder Manufacturing Company to pay and discharge its obligations from and since January 1885, up to and including the present time?

A. It has been unable to discharge any obligation since the 1st of January, 1885, except, as I have said, the assignee did work out of the assets after January 1st, 1885, some small amounts of money that were applied on the preferred claims of laborers against the corporation.

Q. And those payments were made under the provisions of your local law?

A. They were made under the provisions of our State Insolvency law.

88–90 Q. You may state if you know whether or not either the firm of C. W. & W. W. Marsh, or the individual members of the firm, or the Marsh Harvester Manufacturing Company, or the Marsh Binder Manufacturing Company, were, any or either of them possessed of property sufficient to pay their obligations since January 1st, 1885, and up to and including the present time?

A. They were not, as I understood it. I would not be able to positively say that in the last two or three years, that C. W. Marsh, for instance, might not have some assets to pay a debt but I know there were executions outstanding, following the failure in 1884, for large amounts that were and so far as I know, always have been uncollected and regarded uncollectible, that were against the property of these several concerns.

Q. You may state if you know, you can approximately, about the amount of the indebtedness of which executions have been unsatisfied.

A. I could not give figures without looking up documents and records. I know they were large amounts, running up into a good many thousands of dollars.

* * * * * * *

91 Q. To what failure do you refer in answer to the last cross interrogatory?

A. I refer to the time when the Binder company made an assignment for the benefit of creditors in the Summer of 1884.

Q. You stated you were acquainted with the firms above mentioned and corporations above mentioned having commercial or farmers' papers as collateral security and that you knew something of its character. You may state what was the character of the paper, if you know, that was used by the C. W. & W. W. Marsh
92 Company, The Sycamore Marsh Harvester Company, and the Marsh Binder Company and given as security which they or one of them owe the parties.

A. The commercial paper that these three concerns used here immediately before the failure in securing people, I know considerable about through efforts of myself and others to collect it and my recollection is that parties holding it did not succeed in collecting more than twenty-five or thirty per cent of the face value of the papers.

Q. You may state if you know anything about the character of the assets of the C. W. & W. W. Marsh, the Sycamore Marsh Harvester Company, and the Marsh Binder Manufacturing Company which were owing by parties in other states and especially in the state of Nebraska.

A. What time?

Q. During the years 1884 and thereafter.

A. I know that the assets of the Marsh Harvester Company by way of the commercial paper, were mostly old for the reason that that company had gone out of active business some time before that date. They were consequently poor by reason of their age and efforts that had been made to collect out of those assets. I know that the paper of the Marsh Binder Company was most of it given on sale of what we know as the low down binder and that the machine proved a failure and the payment of the paper was resisted and, therefore, that paper became very poor paper. The paper of C. W. & W. W. Marsh was, I think, a good part of it, old and my recollection is that it was not any where near as much in amount as the other concerns. I do not recollect distinctly now what they manufactured and such, but I know in a general way that all the paper any and all of those had in the Summer of 1884 was very poor commercial paper.

Q. And do you know of efforts being made to collect the several kinds of papers you have described in the preceding answer?
93 A. Yes sir, I do.

Q. And state what efforts, if any, were made and give results.

A. The paper that was turned in as collateral immediately before the failure went into the hands of various parties here. Quite a good deal of it went through this office, and more of it went through other offices that I was familiar with. Efforts were first made to collect by sending to Banks, or local collectors, and agents; then, afterwards a good share of that paper was put by various parties here into the hands of a bad debt collector at Rockford, and I know that he had a very great amount of it. I have seen his books and lists

and was interested in some of it myself. The paper was handled by him for quite a while, efforts made to collect it by having men in the field, securing it or collecting it, or doing anything to aid in getting it in better shape, and the upshot of all these methods of collection was, as I have said before to get from twenty five to thirty percent of the money on these several kinds—on the face value of the paper.

(Signed) D. J. CARNES.

* * * * * * *

94 Deposition of P. M. ALDEN offered and read in evidence as follows:

Direct examination.

By Mr. NORVAL:

Q. State your name, age, residence and occupation, and business.

A. My name is P. M. Alden; sixty seven years old; residence Sycamore, Illinois; not at present engaged in active business; banker by profession.

Q. State how long you have resided in Sycamore, Illinois.

A. Since 1855, with the exception of about four years in Chicago prior to the time of the fire in 1871.

Q. You may state if you are acquainted and have been acquainted with the firm of C. W. & W. W. Marsh, the Marsh Binder Manufacturing Company and the Sycamore Marsh Harvester Manufacturing Company—corporations?

A. I am well acquainted and have been for the past thirty years at least, or from the time of the incorporation of the said companies.

Q. Were you acquainted with the above named companies and corporations prior to 1883?

A. I was.

Q. You may state what was the business of the firm and companies named, at that time?

A. The business of C. W. & W. W. Marsh was mainly in managing and looking after business of the Marsh Binder Manufacturing Company. They had some little outside business of their own in a small manufacturing way, but their main business was as managers for the Binder company.

Q. And what was the business of the Marsh Binder Manufacturing Company and the Sycamore Marsh Harvester Manufacturing

95 Company?

A. Manufacturing binders—reapers and binders. They did some other manufacturing of farm implements.

Q. And where were their factories and business located—at what point?

A. In Sycamore, Illinois.

Q. Are they still in business?

A. They are not.

Q. When did they cease doing manufacturing business?

A. It was in June '84. Can't give the date—June '84.

Q. And do you know the occasion of their going out of business?

A. I do.

Q. You may state what that occasion was, and how they went out of business?

A. Judgements were obtained in the adjoining county for quite a large sum, other claims immediately presented and pressed for collection at that time, and the shops were at once closed.

Q. And in what manner were they closed?

A. I think by the levy of the executions in the hands of the sheriff of this county.

Q. Do you know anything about their conveying any property or making any assignment?

A. I know they did later on.

Q. About when was that?

A. I think within a very few days. I should say the same week.

Q. And since that time do you know whether they have transacted any business—any manufacturing business, or anything of that kind?

A. They have not.

Q. Neither as a firm or corporation?

96 A. They have not.

Q. You may state, if you was associated in any business in which the Marshes, C. W. & W. W., or either of them, was connected in capacity of banker or otherwise?

A. I was.

Q. State your relations with them in that capacity.

A. In the years 1872-'73, the Marshes became large stockholders in the Sycamore National Bank of Sycamore, of which bank I was cashier from its opening, for more than twenty years. Both became directors at the time of purchase of stock and so continued until they sold said stock, prior to about 1883.

Q. You may state if you were well acquainted with the financial worth and standing of the firm of C. W. & W. W. Marsh, also of the Marsh Binder Manufacturing Company, and the Sycamore Marsh Harvester Manufacturing Company at the time of the failure in 1884.

A. I was.

Q. You may state what was their financial condition at that time as to solvency or otherwise, and each of them, in August 1884.

A. They were insolvent.

Q. Each, the firm and corporations?

A. Yes, sir.

Q. You may state if you know what has been their conditions since that time, since August 1884 and up to and including the month of February, 1893, as to solvency or otherwise.

A. They continued to be entirely insolvent.

97 Q. You may state, if you know, whether or not there was such a company, either a firm or corporation, as the Marsh Binder Company?

A. There was such a company,—so called.

Q. And was the Marsh Binder Company solvent or insolvent?
A. Insolvent.
Q. From what time?
A. From the time of the failure in June 1884 up to the present time.
Q. You may state if there was such a firm or corporation as the Sycamore Marsh Harvester Company?
A. Not to my knowledge, except the one so-called.
Q. You may state, if you know, whether or not executions have been returned upon judgments rendered against the firm of C. W. & W. W. Marsh, Sycamore Marsh Harvester Manufacturing Company and the Marsh Binder Manufacturing Company, unsatisfied?
A. They have.
Q. You may state, if you know, whether or not the Sycamore Marsh Harvester Manufacturing Company was in business as such in the years 1885-1886-1887-'88-'89-1890-1891-1892-1893?
A. It was not.
Q. You may state, if you know, whether or not the firm of C. W. & W. W. Marsh was in business as such in the years 1885, '86-'87-'88-'9-1890-1891-1892, and 1893?
A. They were not.
98 Q. You may state whether or not the Marsh Binder Manufacturing Company was in business at any time from January 1885 up to and including the month of March 1893?
A. It was not.
Q. You may state with what bank, if you know, the firm above named and the companies and corporations above named, transacted their business in Sycamore, Illinois, at the time of their failure.
A. Yes, I do.
Q. Name the bank.
A. The Sycamore National Bank.
Q. That was the bank with which you were then connected?
A. It was, yes sir.
Q. And how did you obtain your knowledge as to their financial standing and conditions for the years you have testified? Briefly.
A. The bank made them loans continually and received from outside banks and parties many items for collection.

Cross-examination:

Read in evidence as follows:

Q. Have you any personal knowledge of assets in any other state than the State of Illinois, which at one time have belonged to the corporations or the firm named, prior to their failures that you have testified about?
A. I have some knowledge.
Q. Is it not true that large amounts of commercial paper given by non-residents of the State of Illinois, had before the failures mentioned, been assigned to their creditors?
A. It is true.
99 Q. Is it not true that the National Capital Bank at Lincoln, Nebraska, held a large amount of such commercial paper prior to the failure of those corporations,—prior to 1885?

A. It is true.

Q. Have you any knowledge as to the amount or face value of such commercial paper?

A. I cannot state the amount, excepting it was quite a large sum total.

Q. You can approximate the amount.

A. I cannot state the date. It was sometime prior to the date of failure. They held at least $200,000 in such papers.

Q. These corporations that you have mentioned at the time of the failures mentioned went into the hands of assignees, did they not?

A. The Marsh Binder Manufacturing Company did. I am not sure as to the others.

Q. And the assignee made no attempt whatever to collect any of the commercial paper you have referred to as having been assigned by these corporations or by this firm prior to the failures?

A. I would say not to my knowledge.

Redirect examination.

Read in evidence by Mr. NORVAL:

Q. What knowledge did you have of the collateral papers in the hands of the Capitol National Bank of Lincoln?

A. I cannot give the dates, but I was there in person sometime, a year or two prior to the failure, and with Mr. Mosher and the cashier I was shown a large amount of the paper.

Q. How long was that before the failure of C. W. & W. W. Marsh, the Sycamore Marsh Harvester Manufacturing Company, and
100 the Marsh Binder Manufacturing Company?

A. As I have stated, I cannot give the exact date. I would say two years prior to that time.

Q. Then you have no knowledge of whether or not the Capitol National Bank held any paper as collateral to the indebtedness of C. W. & W. W. Marsh and the several Binder and Harvester Companies at the time of the failure in 1884?

A. Only as I am informed they had some.

Q. And you have no knowledge,—personal knowledge—of their holding any collateral for any indebtedness of C. W. & W. W. Marsh, the Sycamore Marsh Harvester Manufacturing Company, and the Marsh Binder Manufacturing Company in the years 1885, '86-'87-'88-'89-'90-'91-'92 and '93?

A. I have not.

Q. Do you know whether or not any sum was realized out of the collaterals which you say was held by the Capitol National Bank against the several Marsh companies at the time you were there, some two years before the failure of the Marsh companies here in 1884?

A. I have not. I do not know that anything was collected.

Q. Do you know, or did you know the value of the collateral that was put up with the Capitol National Bank of Lincoln, Nebraska, prior to the failure of the several Marsh companies at Sycamore, prior to 1884?

A. Judging from subsequent events, I would think the papers were not worth over twenty-five cents on the dollar.

Q. And you have no knowledge of any collateral given by any of the Marsh companies above named to the Capitol National Bank for indebtedness which was made and incurred after the fail-

101 ure of the Marsh companies at Sycamore in 1884?

A. I have not.

Q. You have never examined any of the collateral notes which you say were in the Capitol National Bank at Lincoln, Nebraska, were there as collateral, or were they being collected upon the account of Marsh Brothers, Mosher & Company?

A. They were there as I understood it and was told, both for collection and collateral for debts, to the bank as I understood it.

Q. And do you know that the proceeds were paid when collected upon the indebtedness of the several Marsh companies?

A. I know nothing whatever as to that matter.

Q. You have never examined any of the collateral notes which you say you saw there some two years before the failure of the several Marsh companies, which would be in the year about 1882, since the failure of the Marshes?

A. I would say not to my knowledge. I do not know that I did.

Q. Do you know anything of your own knowledge as to whether or not the assignee of the Marsh Binder Manufacturing Company attempted to collect the notes owned by the company after the assignment?

A. I understood from him that he was attempting to collect them.

Q. Do you know how he succeeded?

A. I do.

Q. What was the result of his efforts?

102 A. Very little was collected.

Q. Do you know whether or not any of the general creditors of the firm or company was paid anything under the assignment?

A. They were not paid.

Q. You may state if you know whether there was sufficient money to pay the preferred creditors, under the laws of the State of Illinois, which were the laborers?

A. There was not enough for that.

(Signed) P. M. ALDEN.

* * * * * * *

103–113 Second deposition of JOHN W. MCDONALD offered and received in evidence.

* * * * * * *

114 Q. I will ask you if you have in your possession as receiver of the Capital National Bank, and as a part of the nominal assets of that bank, notes executed by the Western Manufacturing Company to the Capital National Bank?

115 A. I have twenty four notes of $5,000 each, and two of $2,500 each, made by the Western Manufacturing Company.

Q. How are each of those notes signed?

A. Signed by the Western Manufacturing Company, by E. Hurlbut, Jr., Manager, except in one case, where there is a copy of the note, the original having been lost, and judgment for receiver's certificate having been allowed by the court; all of the rest are original notes.

Q. Do you know the signature to those notes?

A. Yes, I think I know Mr. Hurlbut's signature.

—. Are those notes signed in his handwriting?

A. Yes, I think they are.

Q. Do the notes bear any endorsement?

A. They all have endorsements.

Q. Do you know the handwriting of the endorser?

A. Many of them have more than one endorsement.

Q. You may state whether or not they bear the endorsement of C. W. Mosher as President?

A. All but two of them bear the endorsement of C. W. Mosher, President.

116 Q. Are you acquainted with the signature of C. W. Mosher?

A. Yes, fairly so. It has been a long while since I have seen it,—a long while since I saw him write it,—but I think I know his signature fairly well.

Q. Are those notes you have referred to a part of the assets of the Capital National Bank now in your hands?

A. Yes sir.

Q. Were those notes a part of the assets of the Capital National Bank at the time of its suspension, January 21, 1893?

A. Yes.

Q. Have those notes been placed in judgment by the Receiver of the Capital National Bank?

A. I cannot tell you without looking up the records.

Q. Has the receiver attempted to collect them?

A. I have not.

Q. If not, why not?

A. Because there is no one to collect them from. All efforts were exhausted by the former receivers to collect these notes.

117 Q. You may explain more fully what you mean by "no one to collect them from."

A. I never was able to discover that the Western Manufacturing Company had any assets of any kind.

Q. Do you know of such a company being in existence?

A. There was a company that bore that name, but I never understood that they had anything.

Q. Who, if anyone, constituted the Company, if you know?

A. I don't know.

Q. The company that bore that name, where did it do business?

A. I think in Lincoln.

Q. Where was its principal place of business?

A. I think in Lincoln.

Q. At what place of business in Lincoln?

A. Of my own knowledge I do not know. I only know by repute, that is all.

Q. What do you know by repute?

A. Well, I always understood it was one of Mosher's companies.

Q. Was there another Western Manufacturing Company that was regularly incorporated, of which M. D. Welch was an officer, or manager?

118 A. Yes, I think there was.

Q. That was not the company that executed these notes you have in your possession?

A. I think that was not the same company.

Q. You have made inquiry to ascertain if it were, have you, in your effort to ascertain whether these notes were collectible?

A. I think I said the former receivers exhausted their resources in trying to collect these notes, and I have never given them any attention at all. I understood them to be worthless.

Q. Have you satisfied yourself that they are worthless?

A. Yes.

Q. Utterly worthless?

119 A. Yes sir, and always were, that is my understanding.

Q. Do you know that the former receivers exhausted all remedies to collect these notes?

A. Yes, I am very sure they did.

Q. This company purporting to bear the name Western Manufacturing Company, which executed these notes, signed by E. Hurlbut Jr., Manager, was never in fact incorporated?

A. Yes, I think that was the case.

Q. And so far as you were able to ascertain or learn, never had any assets?

A. So far as I have been able to ascertain, none.

Q. And their paper and notes were never of any value?

A. No, never of any value.

Q. You may state, if you know, whether these notes you have produced were ever sold or discounted by the Capital National Bank to anyone?

120 A. They were rediscounted.

Q. You may state, if you know, to whom.

A. I would have to go over each of the notes separately.

Q. To whom generally were they sold?

A. One to the Mystic River National Bank of Mystic, Connecticut.

Q. Did this bank file that note with the receiver, and was it allowed by the receiver as a claim against the Capital National Bank?

—. Yes.

Mr. THOMAS: The notary may identify the note and the endorsement as Exhibit "68". (Note so identified.)

Q. I hand you Exhibit "68" and ask you if that is one of the notes concerning which you *had* testified?

A. It is.

Q. And is executed by the Western Manufacturing Company by E. Hurlbut, Jr., Manager?

121 A. Yes, sir.

Q. Was this note negotiated, and to whom?

A. The note itself does not show to whom it was sold.

Q. Does it show that it was sold?

A. Yes.

Q. I will ask you if it was endorsed and guaranteed by the Capital National Bank?

A. It was.

Q. Was this note filed with the receiver as a claim against the Capital National Bank?

A. It was.

Q. Was it allowed by the receiver as a claim against the Capital National Bank?

A. Yes, sir, it was.

Q. For what amount?

A. For $5,000.00.

Q. And what is the number of the receiver's Certificate?

122 A. 1085, to the Mystic River National Bank of Mystic, Connecticut.

Mr. THOMAS: The notary will identify this note as Exhibit "69". (Note so identified.)

Q. I hand you Exhibit "69" and ask you if that is one of the notes concerning which you have just testified?

A. It is.

Q. Executed to the Capital National Bank by the Western Manufacturing Company, by E. Hurlbut, Jr., Manager?

A. Yes.

Q. This is, and was, a part of the assets of the Capital National Bank at the time of its suspension?

A. It was.

Q. And is now a part of the assets in your hands as receiver?

A. Yes, sir.

Q. Was this note sold by the Capital [illegible]ional Bank, and sold by the bank and endorsed and guaranteed?

A. It was.

123 Q. Has that note been filed as a claim against the Capital National Bank with the receiver?

A. Yes.

Q. Has it been allowed and a receiver's certificate issued therefor?

A. Yes.

Q. What is the number of the receiver's certificate?

A. 1084, to the First National Bank of Hurley, Wisconsin.

Q. For what amount?

A. For $5,000.

Mr. THOMAS: The notary will identify note as Exhibit "70." (Note so identified.)

Q. I hand you Exhibit "70", and ask you if this is one of the notes executed to the Capital National Bank by the Western Manufacturing Company, to which you have just testified?

A. It is.

Q. By whom was that note signed?
A. Western Manufacturing Company, by E. Hurlbut, Jr., M'g'r.
Q. Is that now a part of the assets of the Capital National Bank, and was it a part of the assets at the time of its failure?
A. Yes.
124 Q. You may state if that note was sold, endorsed and guaranteed by the Capital National Bank?
A. Yes.
Q. State, if you know, to whom it was so sold and guaranteed?
A. First National Bank of Poultney, Vermont.
Q. You may state by whom the note is endorsed and guaranteed?
A. Capital National Bank.
Q. By its President, C. W. Mosher?
A. Yes.
Q. You may state if that note was filed with the receiver as a claim against the Capital National Bank?
A. Yes.
Q. Was it allowed as a claim against the bank?
A. Yes.
125 Q. For what amount?
A. $5,000.
Q. Was a receiver's certificate issued therefor, and if so what number?
A. Number 1072, to the First National Bank of Poultney, Vermont.
Q. In your testimony yesterday you referred to notes of the Western Manufacturing Company signed by E. Hurlbut, Jr., Manager, given to the Capital National Bank, and consisting of twenty four notes for $5,000 each, and two notes for $2,500. each, three of which were identified as Exhibits 68, 69, and 70. I now hand the remaining twenty three notes to the reporter and ask that they be identified as Exhibits commencing with number 71 and to be numbered consecutively up to and including number 93.

(Notes so identified.)

Q. I now hand you Exhibits numbered from 68 to 93 inclusive, except Exhibit 8[illegible], being the notes of the Western Manufacturing Company to which you testified yesterday, and ask you if you are acquainted with the signature of the maker attached to each of those notes?
A. Yes, I think I know the signature.
Q. Whose signature is it?
A. I think it is the signature of E. Hurlbut, Jr.
Q. In what capacity, if any?
A. It is signed Manager.
Q. Manager of what?
A. The notes are signed Western Manufacturing Company, E. Hurlbut, Jr., Mgr.
126 Q. You may state if these notes were executed to and taken into as a part of the assets of the Capital National Bank during its existence?

A. The books of the bank show that they were assets of the Capital National Bank.

Q. By the books of the bank, you mean the books of the Capital National Bank, which are in your hands as receiver?

A. Yes.

Q. And these notes just referred to were taken in by the bank, and carried by the bank during its existence as a part of its assets?

A. Yes.

Q. And these notes above referred to, and now in your hands, are in your possession as Receiver of the Capital National Bank?

A. They are in my hands as trustee.

Q. You may state fully what you mean by that.

127 A. The notes were rediscounted by the Capital National Bank, and they were turned back to the receiver to be collected by him if possible, the receiver issuing certificates for the amount of the notes to their respective owners.

Q. Is the same true of Exhibit number 86, where the original note has been lost?

A. Yes.

Q. And receiver's certificate has been issued for that note in the sum of $5,000?

—. Yes.

Q. Being Receiver's certificate number 1094?

A. Yes.

Q. These notes identified as Exhibits 68 to 93, inclusive were sold by the Capital National Bank prior to its suspension did you state?

128 A. Yes.

Q. Were these notes endorsed?

A. Yes.

Q. You may state if you are acquainted with the signature of the *endorsement* on each of the notes identified as Exhibits 68 to 93 inclusive?

A. Yes, I think so.

Q. Whose signature *do* each of those exhibits bear, that is, whose endorsement?

A. Endorsed by C. W. Mosher, President, except one note, which is endorsed Mosher & Outcalt.

Q. Which note was that?

A. Exhibit 91.

Q. These notes identified as Exhibits 68 to 93 inclusive had been sold, and were owned by parties other than the Capital National Bank at the time of its suspension and failure?

A. Yes.

129 Q. That is, they were not properly assets of the Capital National Bank at the time of its failure, but had been sold to divers persons, and endorsed and guaranteed by the Capital National Bank?

A. I think I would call them an asset of the Capital National Bank, even though they had been rediscounted. They are guaranteed.

Q. An actual or nominal asset?

A. Well, I suppose it would be largely a matter of opinion.

Q. These notes, had they been sold by the Capital National Bank to other parties?

A. Yes.

Q. And the title to the notes transferred and in these various parties who held the notes?

130–132 A. Yes.

* * * * * * *

133 Q. And you hold these notes now as trustee for the various eastern parties who own this paper?

A. Yes.

Q. Have these notes been allowed by the receiver as claims against the Capital National Bank?

A. Yes.

Q. For what amount?

A. Exhibits from number 68 to 91 inclusive are for $5,000 each, and 92 and 93 are for $2,500. each.

Q. These notes referred to have been allowed for these amounts by the receiver, and have certificates been issued by the receiver for those various amounts?

A. Yes.

134 Mr. THOMAS: We now offer in evidence Exhibits number 68 to 93, inclusive, including the endorsements on the back of each of said notes.

Ex's 68 to 93 received.

WITNESS: I hereby deliver the notes to the Notary to be attached to my deposition, but demand of the court that after the trial the notes be detached from the deposition and returned to me, free of expense.

* * * * * * *

135–141 Q. Are you able to state what items of the Capital National Bank's assets came into the hands of the receiver following its suspension?

A. Yes.

Q. Are you able to state what amounts have been realized by the receiver from these assets of the Capital National Bank?

A. Yes.

Q. Are you able to state the amount of liabilities against the Capital National Bank allowed by the receiver?

A. Yes.

Q. Are you able to state the amount of dividends that have been paid by the receiver to the creditors of the Capital National Bank on their several claims?

A. Yes.

* * * * * * *

142–145 Q. And are you able to state from an inspection of the books as they have been verified by your frequent exami-

nation of them, and comparing them with the actual condition of the receivership, as to what assets came into the hands of the receiver upon the failure and suspension of the bank, and what has been realized on them, what the liabilities of the bank were as allowed by the receivers, and what amount has been paid to the creditors on their various claims?

A. Yes.

Q. In other words, you have examined the entire books of the receiers, and have gone over them so frequently, that you know of your own personal knowledge that they correctly state and reflect the condition of the Capital National Bank while in the hands of the receivers at the time the various entries were made?

A. Yes, sir.

* * * * * * *

146 By Mr. THOMAS:

Q. I now repeat my original question, and ask you to state from an inspection of the books referred to what amount of assets came into the hands of the receiver classed as cash items on the books?

A. Do you want the aggregate, or do you want it in its two classifications?

Q. You may give it in its two classifications.

A. Cash items, good, $12,531.27; cash items, worthless, $799.41.

Q. Now you may state, if you know, the amount of cash of the Capital National Bank that came into the hands of the re-

147 ceiver at the time of the suspension of the bank, or following the suspension of the bank; that is, at the time the receiver took possession of the assets.

A. $15,385.87.

Q. You may state, if you know, the amount of assets that came into the hands of the receiver immediately following the suspension of the bank, classed as "overdrafts".

A. Doubtful, $17,834.63; worthless, $15,932.57.

Q. Total how much?

A. $33,767.20.

Q. You may state, if you know, the amount of assets that came into the hands of the receiver of the bank indicated on the books as bills of exchange?

A. Good, $3484.94; doubtful, $1456.08; worthless, $56.95; total $4997.97.

Q. You may state, if you know, the amount of assets that came into the hands of the receiver of the bank indicated on the books as furniture and fixtures.

148 A. $300.

Q. You may state the amount of assets which came into the hands of the receiver of the bank classed on the books as stocks and bonds.

A. $325.

Q. You may state the amount of assets that came into the hands of the receiver of the bank classed as excess bonds?

A. $5,000.

Q. You may state the amount of assets that came into the hands of the receiver of the Capital National Bank, which consisted of bills receivable, or notes?

By Counsel for Defendants:

Q. Let me inquire what book are you examining to ascertain that?
A. I am examining the record, the receiver's record.
Q. Receiver's books?
A. Yes, sir.

A. The good are $298,325.39; doubtful, $155,560.84;
149 worthless, $397,073.63; total, $850,959.86.

By Counsel for Defendants:

Q. In this amount is there included bills receivable or notes which had been rediscounted or sold, and which were merely held by the receiver as trustee for the various holders of the discounted paper?
A. All the rediscounted paper is included.
Q. Now you may state how much rediscounted or sold bills receivable was included in the sum of $298,325.39 to which you have testified?
A. $187,270.56.
Q. You may state how much rediscounted or sold bills receivable is included in the sum of $155,560.84, to which you have testified?
A. $29,375.14.
Q. You may state how much bills receivable or notes rediscounted or sold are included in the sum of $397,073.63, to which you have testified?

150 A. $114,714.16.

Q. Have you computed the total of rediscounted or sold notes?
A. $331,359.86.
Q. Then, in order to ascertain the actual amount of bills receivable or notes on hand at the time of the failure, and which came into the possession of the receiver, this sum of $331,359.86 should be deducted from the total of $850,959.86 of bills receivable shown to be on hand?
A. No, I don't think it should be deducted.
Q. This sum of rediscounted or sold notes amounting to $331,359.86 represented notes or bills receivable of the Capital National Bank which had been sold and endorsed by the bank, and which at the time of the failure of the bank were owned by various parties other than the bank, and was not a part of the bank's notes? State if that is correct?
A. Well, as a matter of bookkeeping that would have to be included with the bank's notes.
Q. As a matter of fact, did the bank own those notes at the time of its failure and suspension?

151 A. No, they did not.

Q. Then in order to ascertain the true and actual amount of notes or bills receivable which the bank owned at the time of its suspension, the amount of these rediscounts, amounting to $331,-

359.86 should be deducted from the total of $850,959.86 should it not?

Q. Yes, if you deduct that same amount from the liabilities of the bank; otherwise not.

Q. Are not those rediscounts, amounting to the sum of $331,359.86 liabilities of the bank, whether or not they would be a part of the bills receivable or not, by reason of the endorsement and guaranty of the bank?

A. Oh, no. You can't have the cake and eat it too.

Q. Is it true that these amount- of notes had been rediscounted and were outstanding as a liability of the Capital National Bank by reason of their endorsement and guaranty?

152 A. Yes, sir.

Q. And is it true that they were allowed by the receiver as a claim against the Capital National Bank?

A. Yes.

Q. And is it true that if the amount of these rediscounts or sold notes is worthless, that in that event the bank would be liable for the rediscounts on account of its guaranty, but would receive nothing from the collection of the notes?

A. Yes, that is true.

Q. Then, if these rediscounts, amounting to $331,359.86 are worthless, or were worthless, and nothing was realized upon them by the receiver, then they would not be valuable assets; yet notwithstanding that fact the amount of those rediscounts would still be liabilities of the bank by reason of their endorsement and guaranty by the bank?

A. I don't assume that they were worthless assets.

Q. I am assuming that now.

A. You can't assume anything of that kind in making up these statements. The receiver has assumed this with a whole lot which he has classed as worthless.

153 Q. If those rediscounts were worthless the result would be as in the former question asked?

A. No, no, as long as this paper is an obligation against the bank you must certainly class the bills as an asset, otherwise your books will not balance.

Q. That is true as a matter of bookkeeping, but if that asset were worthless, it would not affect the liability of the bank upon its endorsement or guaranty?

A. If you are getting at the value of the bills, then there might be something in your point, otherwise not.

Q. If we are getting at the value, the point is well taken, you think?

A. The value of the bills rediscounted would be a matter to go into just exactly as the bills which they had on hand. They must all go together, you cannot segregate them at all.

Q. These claims that have been filed against the Capital National Bank with the receiver on account of rediscounts have become charges or claims against the bank by reason of the fact that they

were guaranteed by the Capital National Bank; state whether or not that is true.

154 A. Yes, that is true.

Q. The liability has been incurred by reason of the endorsement and guaranty of the Capital National Bank?

A. Exactly, and the guaranty would be exactly the same if all of these banks to whom these bills were rediscounted had simply made a deposit in the Capital National Bank of the amount. It would not be exactly the same, either, there would be a double liability there.

Q. I think that answers that. Now you may state what assets were acquired by the receiver after the suspension of the bank?

A. Doubtful, $11,510.49; worthless, $19,428.91; good, $27,972.04; making a total of $58,911.44.

Q. Is there anything under this head classed as real estate?

A. Yes.

Q. You may state how much assets the receiver has received under this head?

155 A. $86,975.

Q. You may state if the receiver has come into possession of any assets that accrued after the failure of the bank and its suspension?

A. Yes.

Q. You may state, if you know, the amount?

A. $11,065.75.

Q. From what source was that received?

A. Oh, well, that was from various items, rent and interest; oh no, this is rent. I have another account——

Q. It consists of rent derived from real estate accruing after the failure of the bank?

A. Yes.

Q. What other account have you under this head?

A. Interest account.

Q. You may state, if you know, how much was realized from that source.

A. $10,498.93.

Q. That was realized on interest accruing after the failure of the bank was it not?

A. Yes.

Q. You may state Mr. McDonald, if anything was realized by the receivers from any other sources?

A. Stock assessments.

Q. You may state, if you know, how much was realized

156 from stock assessments?

A. $155,598.20.

Q. You may state what that consisted of, and how it was obtained?

A. An assessment of 100 per cent was levied on the stock.

Q. By whom was that levied?

A. By the Comptroller, and that much was paid.

Q. What was the purpose of the assessment?

A. To make up the deficiency in the assets.

Q. What made that necessary?

A. Because the law required it under the showing, I suppose.

Q. Under what showing?

A. They make up as soon as possible after the failure of a bank, as soon as the receiver becomes familiar with the assets, he makes an estimate of their value, and on that the assessment is made, if any. I presume it was so done in this case, but I don't know.

157 Q. After the receiver takes charge of the assets, if it is found that the assets are not sufficient to pay the liabilities an assessment is made on the stockholders?

A. Yes, sir.

Q. Now the amounts, referring to the assets on hand at suspension, to which you have testified, were the nominal value of those assets at that time, and not the actual value; state whether or not that is correct.

A. I have no knowledge of that at all. I was just telling you the custom that prevailed with failed banks. This deficiency statement was made up long before the time I had any connection with it, and I presume,——

Q. You stated in your examination this morning you knew how much had been actually realized from the various assets of the bank; I will now ask you to state, if you know, what was realized in cash by the receiver upon assets known as "other than bills receivable"?

A. From "other assets" which is the term used in our reports there has been collected the sum of $33091.31.

158 Q. You may state what items comprise this sum of $33,091.31?

A. Cash, $15,385.87; furniture and fixtures, $300; stocks and bonds $325; excess of bonds, $3250; Cash items, $1280.85; Bills of Exchange, $4778.02; Overdraft $4771.57.

Q. Now you may state, if you know, what was realized by the receivers from bills receivable or notes of the Capital National Bank?

A. $229,520.82.

Q. Can you give the items comprising that amount?

A. Well what do you mean, under what classification they are, and whether good or not?

Q. Yes.

A. Yes, I guess I can. $210,462.07 good.

Q. Of this amount of $229,520.82, which you say is the total received from bills receivable, you may state how much of that, if any, was collected for bills rediscounted, or notes that had been sold to other parties, and which were collected by the receiver merely as trustee for the various holders?

159 A. I could not tell that without going over the account in my ledger under the head of "loans paid and other disbursements" and picking out all of those items.

(Witness goes over account.,

Q. If you have gone over that account as stated, you may give the necessary information.

A. I find that loans paid and other disbursements account shows

that there was paid for rediscounted paper collected $188,020.56, which being deducted from the sum of $229,520.82 would give the amount realized on bills receivable belonging to the bank.

Q. Now you may state, if you know, how much was collected and realized by the receiver on account of "assets acquired after suspension"?

A. $105,902.95.

Q. Now you may state how much, if any, of this was realized from rents which accrued during the receivership?

A. Not any of it.

Q. That consisted of assets classed on the books as "other assets, both good, doubtful and worthless"?

A. Yes, sir.

Q. Now you may state how much was received by the receiver on account of rents which accrued after the suspension of the bank and during the existence of the receivership?

160 A. From premium, interest, rents, $20,299.56.

Q. The portion of this which comprises interest refers to interest which accrued after suspension?

A. Interest collected after suspension. I think it is possible that a little of it may have accrued prior to suspension.

Q. Can you give the items of rents and interest separately?

A. Yes, I think so. I find I am mistaken, that I gave the wrong amount. It is $21,564.68.

Q. And are there any deductions there for offsets?

A. The amount should be $21,549.56.

Q. Was any of that for premium on bonds?

A. No, that is just a name given the account, it is all for interest and rents.

Q. Accruing after suspension?

A. Well, mostly. I would not like to say that a small amount of interest might not have accrued prior to suspension.

Q. Substantially?

A. Yes.

Q. How much was realized by the receiver on account of assessments which were levied on stockholders, as referred to in a former portion of your testimony, in accordance with the order of the comptroller?

161 A. $155,598.20.

Q. Now is that all the moneys that have been received by the receivers from the assets of the Capital National Bank and the assessment on the stockholders since its failure on January 21, 1893, to this date?

A. Yes.

Q. Out of this amount, what disbursements have been made by the receivers, if you know?

A. Loans paid and other disbursements, $59,764.59.

Q. Now you may state what was the nature of these disbursements, what they were for?

A. Into that account is charged all moneys paid out for the betterment of the assets. No expenses are charged in that account.

Where taxes are paid, or repairs made to the property or a loan on a property is paid off; anything that betters the asset goes into that account.

162 Q. It does not include any general liability of the bank filed as a claim with the receiver?

A. No.

Q. What other items of expenditures or disbursements have been made by the receiver?

A. I have paid out in dividends $211,300.93.

Q. That is the total amount of dividends that have been paid to the creditors of the Capital National Bank up to date?

A. Yes, sir.

Q. What other disbursements have been made by the receiver?

A. Legal expenses, $49,616.33.

Q. What other amounts?

A. Receiver's salary, $20,985.

Q. Any other expenses, if so state.

A. Under the head of other expenses has been paid $12,774.41.

Q. Are those all of the disbursements that have been made by the several receivers?

A. Yes, sir.

Q. You may state how much, if anything, is on hand in your hands, or with the Comptroller of the Currency, belonging to the assets of the Capital National Bank?

163 A. $3261.02.

Q. You may state if you know what are the amounts of the various liabilities that have been allowed against the Capital National Bank?

A. Yes, I do.

Q. You may state what were the liabilities of the Capital National Bank at the time of its failure to various national banks as allowed by the receiver?

A. $47,759.56.

Q. You may state what was the amount of the liabilities of the Capital National Bank at the time of its failure to various state banks, and which amounts were allowed by the receivers and receivers' certificates issued therefor?

A. $114,349.62.

164 Q. The item to which you referred previous to this comprising $47,759.56, this has been allowed by the receiver, and receivers' certificates issued therefor?

A. Yes.

Q. You may state what were the liabilities of the Capital National Bank at the time of its failure on account of individual deposits which were allowed by the receiver and receivers' certificates issued therefor?

A. $392,639.64.

Q. You may state what were the liabilities of the Capital National Bank at the time of its failure on account of certificates of deposit outstanding, and for which claims were allowed and receivers' certificates issued therefor?

A. $517,999.49.

Q. Now you may state what were the liabilities of the Capital National Bank at the time of its failure for bills receivable or notes which had been sold, endorsed and guaranteed which were allowed by the receiver as claims against the bank and receiver's certificates issued therefor?

165 & 166 A. $331,359.86

Q. Now you may state if there were any other claims that the Bank was owing at the time of its suspension that were presented to the receiver, allowed by him, and receiver's certificates issued therefor, and if so state the nature of the claims and the amount allowed.

A. I know the total number of certificates allowed, the total number issued. When you divide that up the way you have here it becomes confusing.

Q. Consisting of what?

A. Also an item of $5500., and one of $954; claims in dispute $13,290.94.

Q. Is that all the liabilities, excepting the capital stock, Mr. McDonald?

A. Yes, I think so.

Q. And the capital stock was how much, at the time of its failure?

A. $300,000.

Q. That was classed as a liability?

A. Yes.

* * * * * * *

167 Q. You may state, Mr. McDonald what notes of the Western Manufacturing Company, signed by E. Hurlbut Jr., as manager came into the hands of the receiver as part of the assets of the Capital National Bank, and which were a part of its assets at the time of its failure, other than those to which you have testified as having been rediscounted or sold and came to you merely as trustee for the various holders?

A. I don't know without looking it up.

168 Q. You may look it up and state?

A. $125,000.

Q. Were there not some additional ones amounting to $25,000 more, making a total of $150,000 all together, that were turned over to Cobb & Harvey, attorneys for the receiver, and by them placed in judgment against the Western Manufacturing Company?

A. $125,000 is all the books show; that is all that I know, just what the books show.

Q. You would not be certain that there was not $150,000 all together?

A. I am very certain there is not, because the books would show it if there was, and the books tally with the copies of the notes I have. I have $125,000 in notes given to Cobb & Harvey, and that corresponds with the record, and I presume that is correct.

Q. Has anything been collected on these notes, any of them?

A. No.

Q. Will your testimony with reference to the notes of the Western

Manufacturing Company which had been rediscounted apply to these notes which had not been rediscounted, as to their value?

A. Yes.

169 Q. Is this the same company to which you testified as having executed the notes signed Western Manufacturing Company by E. Hurlbut Jr., Manager, and which had been rediscounted, and are now in your hands as trustee for the various holders?

A. Yes.

Q. And were those notes ever of any value?

A. I think not.

Q. Are those original notes in your possession now?

A. No, judgment has been taken on them.

Q. To whom were the notes delivered?

A. Turned over to Cobb & Harvey.

Q. As attorneys for the receiver?

A. Yes.

Q. And have the attorneys reduced them to judgment, if you know?

A. Yes.

Q. Now you may state what bills receivable, if any, came into the hands of the receiver as assets of the Capital National Bank, at the time of its failure of Charles W. Mosher its president?

170 A. $85,281.67.

Q. Have you succeeded in collecting anything on those notes?

A. No.

Q. They still remain in your hands unpaid and uncollectible?

A. Yes.

Q. You may state what notes of Edwin W. Mosher, or E. W. Mosher, if any, came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?

A. $107,085.45.

Q. Are those notes still in your possession as receiver?

A. Yes.

Q. Has any part of those notes, any portion of them, been collected?

171 A. Yes.

Q. How much?

A. On one note, on note numbered 134007 for $12,730.01, there has been $9426.60 paid.

Q. When was that paid, and by whom?

A. Well, that was paid April, 1893, from the sale of horses.

Q. Was that note secured by a mortgage on horses, which was foreclosed and the proceeds applied on this note?

A. Yes, I believe so.

Q. Is that all that has been realized on any of those notes of Edwin W. or E. W. Mosher?

A. Yes.

Q. You may state what notes of R. C. Outcalt, or Richard C. Outcalt, if any, came into the hands of the receiver as assets of the Capital National Bank at the time of its failure?

A. $54,166.66.

Q. Are those notes still in your possession as receiver?

A. No, they are not.

Q. Do you know where they are?

A. Why, they were turned over to the attorneys in trust for collection.

Q. They are still in your control as receiver, and part of the nominal assets of the Capital National Bank?

A. Yes, what I meant was that the original notes are not in my hands.

Q. Has any portion of those notes been collected?

172–174 A. On one note there has been an offset of $570.99.

Q. What note is that?

A. Note of $6240.

Q. Have any portion of those notes been collected?

A. No.

* * * * * * *

175 Q. You may state what note if any, of the Sycamore Marsh Harvester Company came into the hands of the receiver as a portion of the assets of the Capital National Bank at the time of its failure?

A. $4500.

Q. Is that note in your possession or under your control as receiver of the Capital National Bank?

A. Yes.

Q. Has any part of it been collected?

A. No.

Q. You may state if the note of Marsh & Hinds came into the possession of the receiver of the Capital National Bank as a part of the assets of the bank at the time of its failure?

A. $1000.

Q. Is that in your possession as receiver as a part of its assets?

A. Yes.

Q. Has any part of it been collected?

A. No.

Q. You may state what notes, if any, signed by the Marshes C. W., and W. W. Marsh, came into the hands of the receiver as a portion of the assets of the Capital National Bank at the time of its failure?

176 A. I find one note of $3600 signed by C. W. and W. W. Marsh; one note of $9,000 signed by Marsh Binder Manufacturing Company; and one note for $200 signed by James Marsh.

Q. Are those notes in your possession as receiver of the Capital National Bank, and a part of its assets?

A. Yes.

Q. Has any part of them been collected?

A. No.

* * * * * * *

177 Q. Among the assets of the Capital National Bank which came into the hands of the receiver, was there an item consisting of overdrafts of the bank at the time of its suspension?

A. Yes.

Q. You may state if among those items of overdrafts there was one of C. W. Mosher, president of the bank?

A. Yes.

Q. For what amount?

A. $2927.59.

Q. Was there one of Mosher & Outcalt, the president and cashier of the bank?

A. Yes.

Q. For what amount?

A. $8983.36.

Q. Was there one of J. E. Hurlbut, Jr.?

178 A. Yes.

Q. For what amount?

A. $1756.09.

Q. Was there one of the Western Manufacturing Company, of which Hurlbut was manager?

A. Yes.

Q. What amount?

A. $1361.79.

Q. Was there one of Stark & Mosher?

A. Yes.

Q. For what amount?

A. $1691.84.

Q. Are these items of overdrafts still in your possession as a nominal asset of the Capital National Bank?

179–185 A. Yes.

Q. Has any portion of them been collected?

A. No.

* * * * * * *

186–205 Q. I hand you certificates of deposit identified by the notary as Exhibits 109 to 146 inclusive, and ask you to state if these are some of the papers and documents of the Capital National Bank that came into your possession as receiver, and are now in your possession as receiver of the Capital National Bank?

A. Yes.

Mr. THOMAS: We offer in evidence Exhibits 109 to 146, inclusive.

206–217 Exhibits 109 to 146 Inc., received in evidence.

* * * * * * *

218 Q. You have in your possession certificates of deposit of the Capital National Bank, which have been identified by the Notary as Exhibits from 147 to 923½ inclusive?

A. Yes, sir.

Q. Are those certificates of the Capital National Bank outstanding and unpaid at the time of its failure?

A. Yes.

Q. Were those certificates filed with the receiver?

A. Yes.

Q. And you may state if the amount called for by each of those certificates was allowed by the receiver?

A. Yes.

Q. Was a receiver's certificate issued representing the amount called for in each of those certificates you have identified?

219–253 A. Yes.

Q. Have the certificates referred to as Exhibits 147 to 923½ inclusive been compared with the receiver's records to ascertain whether they agree with the amounts shown by the books of the receiver as having been allowed on the certificates?

A. Yes.

Q. And have the amounts specified in each of those certificates and for which they were each issued, been allowed by the receiver as a claim or charge against the Capital National Bank?

A. Yes.

* * * * * * *

254–272 Mr. NORVAL: We offer in evidence the deposition of RICHARD C. OUTCALT, as found in the Bill of Exceptions of the former hearing, Volume 3, at page 145 thereof.

* * * * * * *

273 Q. Now were there any minutes that you know of that were not kept in this book?

A. I don't remember.

Q. These minutes, so far as they go, are correctly stated?

A. So far as I know.

* * * * * * *

Plaintiff's now offer in evidence the following pages of Exhibit "26" which has been identified by Mr. Outcalt, namely: commencing at page 11, and continuing to and including page 67, and intermediate pages.

Exhibits offered received and read in evidence.

Q. Now, Mr. Outcalt, we hand you the following books of the Capital National Bank, identified by the notary as Exhibits 1 to 64 inclusive, and from 94 to 108, inclusive, and ask you to state if those are the books, records and documents of the Capital National Bank, the Marsh National Bank, and Marsh Brothers Mosher & Company?

A. Yes, those are the books.

Q. Those are the books in which the business of those several banks was kept and entered during the existence of the several banks referred to?

274–277 A. Yes, those are the same books.

Q. And all of the transactions of these several banks is contained in these various books you have identified?

A. Well, if you have a book missing, the transaction would not be in there.

Q. All you have identified were used by the bank in regular and ordinary transaction of its business?

A. Yes.

* * * * * * *

278 Deposition of LUTHER P. LUDDEN offered and read in evidence on behalf of the Plaintiffs, as follows:

Read by Mr. NORVAL:

Q. State your name, age, vocation and residence, giving street number.

A. Luther P. Ludden, 48 years old; 1336 D street, Lincoln, Nebraska; Clergyman.

Q. What church?

A. Lutheran church.

Q. At Lincoln?

A. At Lincoln. The church is located at 14th and F streets.

Q. How long have you resided in Lincoln?

A. Nearly thirteen years.

Q. You may state what official position you held in connection with the Nebraska State Relief Commission in the winter of 1890 and 1891?

A. I was a member of the board, and by the board made secretary and manager of the commission.

Q. And what relation did you sustain to the auditing committee?

A. I was chairman of the auditing committee of that board.

Q. You may state what funds, if any, were received from the state for the use of the Nebraska State Relief Commission at that time?

A. The legislature made two appropriations, one of $100,000 cash from the treasury, and one of $100,000 bonds. House Roll 79 was the cash, and 81 was the bonds.

Q. The cash was drawn by warrants on the state treasurer?

A. Yes, sir.

279 Q. The other $100,000 was by——

A. The bonds was turned over to the commission under the law, and sold by the commission, and the funds received therefrom deposited to our credit.

Q. Do you know whether or not the bonds were sold at a premium?

A. We received $250 premium.

Q. Then the amount received by the commission from the sale of bonds was $100,250.

A. Yes, sir.

Q. You may state if you know, where these funds were deposited. In what bank in Lincoln?

A. They were turned over by me to Mr. Mosher, the treasurer and he claimed to have deposited them in the Capital National Bank.

Q. What Mosher do you refer to?

A. C. W. Mosher, a member of the commission, and treasurer.

* * * * * * *

280 Q. You may state how the commission received this first $100,000 cash appropriation, in what way?

281 A. In state warrants from the state treasurer, two of them for $25,000 and one for $50,000.

Q. From whom did you get the warrants, the state treasurer or the auditor?

A. I think they were delivered to me by the state treasurer. I think I took them over and had them signed.

Q. You mean registered?

A. No, to have them signed. We do not register them. We disposed of them without registering.

Q. How did you dispose of them?

A. They were sold to John L. Carson.

Q. Who sold them?

A. I sold them to him, that is the board directed that they be turned over to Mr. Carson.

Q. What amount did you derive from the four warrants?

A. We received par for them.

Q. And what was done with the funds?

A. That money was turned over to Mr. Mosher, personally.

Q. At what place of business?

A. Two I paid right in the bank, and for one I gave him a check in our rooms; he was present at the meeting.

Q. At the Capital National Bank?

A. Two of them, and one was paid to him in the commission rooms in the state house.

Q. Can you give the dates?

A. The two warrants were turned over about the 24th or 25th of February, about that time in February,—about the 25th, and the third warrant of $50,000 was drawn somewhere about the 13th of March. I could not look them up because our books are destroyed. I give you my best recollection of them.

282–286 Q. The last $50,000 was paid by warrant drawn on that day?

A. Yes sir; I am not sure whether it was one or two warrants. They were drawn to accommodate the parties who took them. We received $50,000 in warrants on or about the 13th day of March, 1891.

Q. And the amount may have been in two warrants of $25,000 each?

A. Two or four, I would not say as to that. I presume the warrants are in existence somewhere, and they are the best evidence. I would not put my memory against written evidence.

Q. Was this money all checked out of the Capital National Bank, this $200,000?

A. No sir.

Q. What amount was checked out?

A. We had, in addition to this something like $800 in cash donations. It was all put in one fund, and we had something like $3551., left. I have not looked up the amount for two or three years.

Q. Then the $200,000 that was appropriated was all paid out by vouchers on the bank except how much?

A. Except the $3551.00. My impression is that it was either thirty-five or thirty-three hundred and fifty one dollars. It was over $3,000.

* * * * * * *

287 Mr. NORVAL: Plaintiffs offer to read in evidence from the Bill of Exceptions in the former case the testimony of S. K. HALE.

Direct examination.

Read by Mr. NORVAL:

Q. You may state your name, age and place of residence.

A. S. K. Hale: I am getting pretty old; I live in the city of Lincoln, and will be 54 years old in November. I live at Number 1519 "O" street, Lincoln, Nebraska.

Q. How long have you resided in Lincoln?

A. Oh, I have been in Lincoln anywhere from 26 to 28 years. I don't remember just when I did come here; twenty five years anyway.

Q. What in general you may state has been your occupation during your residence in Lincoln?

A. Well, I have been engaged in several different kinds of occupations. When I first came I was with A. D. Marshall & Company. They were in the coal and wood business and handled some grain. I kept their books one winter. Afterwards I took the business of F. H. Halsey of Atchison, Kansas, and I took care of his business there for six or eight months. He was in the same business, but handled grain largely. And from there I was connected with T. W. Lowrey. I think those are the initials.—Tom Lowrey. I kept his books about six months, I think it was. Then, the next place I went was to what they called the collection office of the Marsh Harvester people down here, (indicating), and it eventually drifted into the Capital National Bank; that is where it started; that was the foundation of it.

Q. About when was it that you entered the empl-y of the Marsh Harvester Company, I believe you stated that was the name?

288 A. I don't exactly remember how long I was there, but I should say it was anyway ten or 12 years; I think the bank failed in 1892.

Q. 1893?

A. 1893, well, you might say twelve years, I guess. I know I was there that long.

Q. What was the name of the firm in whose employ you first entered?

A. Marsh Brothers, Mosher & Company, if I remember correctly, was the name when I first went with them.

Q. And in what business were they engaged?

A. Well, they were engaged in the Banking business to some extent, and largely collections. The heavy part of the business was collections for the Marsh Harvester Company, which was running all over this country at that time. Of course when I went with them, they had simply only started, and their banking business was somewhat light outside of the collections.

Q. How long did this firm of Marsh Brothers, Mosher & Company continue to exist under that name?

A. That I am unable to tell you. Let me think a minute. I won't be positive, but it does occur to me that there were two changes

in the name of the bank before it eventually became the Capital National Bank, and the other one,—it has slipped my memory. I don't remember the style of the firm now.

Q. To refresh your recollection, I ask you if it was the Marsh National Bank?

A. Yes. First Marsh Brothers, Mosher & Company——

Q. How long did it continue to operate under that name?

A. Well, according to this book, it would be June, 30th, 1883.

Q. What book is that you refer to?

289 A. This is General Ledger No. 1, Marsh Brothers, Mosher & Company.

Q. And identified by the reporter as Exhibit "9"?

A. Yes sir, that is what he says there.

Q. In what name did it operate after that?

A. After that, the Marsh National Bank.

Q. When did it commence to go under that name?

A. It starts here according to dates, July 2, 1883.

Q. Now, when the business changed from Marsh Brothers, Mosher & Company to the Marsh National Bank, you may state if a new set of books was opened?

A. Yes sir, it seems to be a new book here.

Q. I will ask you if Exhibit Number "10", being Ledger Number 1 of the Marsh National Bank is the new ledger that was opened up at that time?

A. Yes sir.

Q. Are both the ledgers of Marsh Brothers, Mosher & Company and the Marsh National Bank, to which I have referred, in your handwriting, and were they written by you?

A. Part of this I know, these are my figures here (indicating).

COUNSEL FOR DEFENDANTS: What book is that?

A. In the ledger of Marsh Brothers, Mosher & Company.

Q. I will ask you to state Mr. Hale, where the balances that appear in red ink at the commencement of each new account in the Marsh National Bank ledger were taken from, if anywhere, if you know?

A. This balance there is Donnell, Lawson & Simpson, of New York. It was taken from General Ledger Marsh Brothers, Mosher & Company Number 1.

290 Q. And transferred to what book?

A. Transferred to Ledger 1, Marsh National Bank, on page 147.

Q. Now you may state what the figures in red ink on the first line from the top on page 147 of the Marsh National Bank Ledger, "149" refer to?

A. They refer to the page where this balance was taken.

Q. They refer to the page of Marsh Brothers, Mosher & Company's Ledger, from which it was transf-rred to the ledger of the Marsh National Bank?

A. Yes, sir.

Q. And referring to the ledger of Marsh Brothers, Mosher & Company, on page 149, on the last line but one of that page, where the

following appears:—"Balance, 147 7301.32", you may state what the figures 147 referred to?

A. They refer to the page on the Marsh National Bank ledger Number One.

Q. Do you find other accounts that have been transferred from the Marsh Brothers Mosher & Company ledger to the Marsh National Bank Ledger?

291 A. Yes sir, I have before me the Commercial National Bank of Chicago, which is transferred in the same way as the other.

Q. Do you find any other accounts that were transferred in this same manner?

A. Yes, sir.

Q. You may examine the two books, and state, if you can, whether accounts generally were transferred from Marsh Brothers Mosher & Company Ledger to the ledger of the Marsh National Bank?

A. Yes, those that I have examined here have been transferred from Marsh Brothers Mosher & Company to the Marsh National Bank.

Q. The transfers are in your handwriting?

A. Yes sir, those that I have examined so far.

Q. Are these ledgers some of the books that were kept by you while you were in the employ of Marsh Brothers Mosher & Company and the Marsh National Bank?

A. They are.

Q. You may state whether these transfers were made at or about the time the Marsh Brothers Mosher & Company formally became the Marsh National Bank?

A. Yes, I should say they were.

Q. Now, you may state if the assets, liabilities and accounts of Marsh Brothers Mosher & Company were transferred to the books of the Marsh National Bank, and became the assets and liabilities of the Marsh National Bank?

292 A. They were.

Q. I now call your attention to the account indicated as Stock & Bond Account, found on page 7 of Exhibit "10", being Ledger 1 of the Marsh National Bank, and ask you if you made the transfer of this account to this book from Ledger 1, Marsh Brothers Mosher & Company, page 659, being Exhibit "9"?

A. That is my writing, yes sir.

Q. Did you make the transfer from the one book to the other indicated?

A. I evidently did. Those are my figures.

Q. Is the balance on the first line of page 7, Ledger 1, Marsh National Bank, which reads as follows:—"July 2, Balance, 940", in the same condition as when you originally made it?

A. No sir, it certainly is not.

Q. You may state what, if anything, has occurred?

A. Why, there seems to be $50,000 off of it.

Q. You may state how that was taken off?

A. That I can't do.

Q. I will ask you to state in what physical manner it was taken off?

A. It has been done by an eraser, you know, scratched off.

Q. You may examine the account in the same Ledger 1, of the Marsh National Bank, known as Bills Receivable, and found on page 15, and state if there has been any change in the balance brought forward on the top of that page since you made it?

293 A. Yes sir, there has been a change made.

Q. You may indicate or state what change has been made.

A. There has been an addition there of $30,000.

Q. You may state how that change was made.

A. The change has been made by erasing the figure 4 and inserting the figure 7.

Q. Was that change made by you, Mr. Hale?

A. Well, that is something I could not be absolutely positive of.

Q. I hand you Exhibit number "1", being Journal of the Marsh National Bank, and ask you to examine this book and state if you find in it any entry, the effect of which would be to eliminate or take from the Stock & Bond Account the sum of $30,000 just referred to?

A. Stock & Bond Account does not appear here on this date anywhere, I see nothing.

Q. I will ask you to state from where, if anywhere, the items that appear on this book known as Ledger 1 of the Marsh National Bank are taken?

A. This is posted from the Journal onto the ledger.

Q. Are all the entries that appear on the ledger copied from entries that are made on the journal?

A. Yes sir, all that are in writing are.

Q. State if any entries can properly be made on the ledger that are not taken from the corresponding journal on that date?

294 A. No sir.

Q. Then you may state if the account of Stock & Bonds, or any other accounts, could be decreased or diminished unless there was an entry to that effect in the journal; by that I mean properly increased or diminished?

A. Well, no, I would say not, properly.

Q. During the time that you were keeping these books, you may state if you made any entries on the ledger, or made any changes in the figures on the ledger that were not justified or indicated by corresponding entries on the journal?

A. No sir, not to my knowledge.

Q. Do you find anything upon the journal shown you that would justify the change of the balance of the Bills Receivable account, taken from the Ledger of Marsh Brothers Mosher & Company at $248,029.33 and transferred to the Marsh National Bank at $278,029.33.

295 A. I do not.

Q. Now, I will ask you whether or not you made the change in Bills Receivable Account by which this was increased the

sum of $30,000 in transferring it from the Ledger of Marsh Brothers Mosher & Company to the ledger of the Marsh National Bank?

A. No sir, I don't think I did.

Q. I hand you now, Mr. Hale, Exhibit "18" and ask you to state if that is one of the books of the bank kept by you while you were in its employ?

A. Yes sir, it is.

Q. What is that book known as?

A. That is known as a daily balance book, of the Marsh National Bank, it says here; the cover is off.

Q. You may state if you were in the employ of the Marsh National Bank during the entire time it existed and did business in the name?

A. Of the Marsh National Bank?

Q. Yes.

A. Yes, sir.

Q. You may state if you were in the employ of the Capital National Bank during all of the time of its existence?

A. I was.

Q. Were you in its employ at the date of its failure?

A. I was.

Q. State generally what books you kept during the time you were in the employ of these three banking firms, or corporations?

A. I kept what was termed the general books of the bank; this daily balance book, cash journal, ledger, and balance book.

Q. Are these the books you have referred to and examined during your examination?

296 A. Those are a part of them.

Q. Is the book, Exhibit "18," I hand you one of the books of the bank which you kept?

A. Yes, sir.

Q. I will ask you to examine this book, commencing on page under date July 2, 1883, and state if you find any changes or alterations in any of the figures since the entries therein were made by you?

A. I do.

Q. You may note some of those changes.

A. There is this here in stock and bond account.

Q. Under what date?

A. July 2, 1883.

Q. What is the nature of the change?

A. There seems to be a change of $30,000, taken from stock and bond account and added to Bills Receivable account.

Q. In what manner was that change effected?

A. Simply taken from one account and added to the other.

Q. Do you mean erased or scratched out?

A. Yes, erased from stock and bond account, and the original figures in Bills Receivable erased and $30,000 added to it.

297–299 Q. Thereby increasing the Bills Receivable $30,000?

A. Yes, sir.

Q. The Bills Receivable account on that date is indicated in what manner?

A. "B-R."

Q. You may follow these two accounts, stock and bond account and Bills Receivable account, and note during how many days these changes occur?

A. From July 2, 1883 to July 27, 1883.

Q. Inclusive?

A. Inclusive, yes sir.

Q. Now I will ask you to examine the account of Bills Receivable on this same book, and state during how many days these changes are made in that account?

A. Twenty-two days if I count correctly, and I guess I do. I can give it in another way; from July 2, 1883, to July 27, 1883, inclusive.

Q. What is the general nature of this book you have referred to as a general balance book; what accounts were kept in it?

A. I can read them off.

Q. Just in a general way?

A. Capital stock, bills receivable, expense accounts and I think interest paid, and interest account, and such things as that.

Q. Did this book contain the accounts for the individual depositors?

A. No sir.

Q. Where was that kept?

A. That was kept in the individual deposit ledger.

Q. Where were the accounts with the country banks kept?

A. Well, they were kept,—just wait a moment. They were also kept on a deposit ledger.

* * * * * * *

300 Q. Would the interest paid book properly contain any entries excepting those that you have indicated, namely for disbursements on account of interest or exchange?

A. Yes, it would contain those entries.

Q. Would it properly contain other entries than those specified?

A. Why, I hardly think so. If I had the book before me I could very soon tell.

Q. Could any other entries be made on that book than for interest paid for the bank, regularly and properly?

301–320 Objection overruled.
Each of the defendants separately except.

A. Why, I don't think any entry could be properly made only for an expenditure of the bank in some way, you know, either interest paid on deposits, or something like that.

Q. And would those entries be debit or credit entries?

A. They would be debit.

Q. Those would all be debit entries?

A. Yes, sir.

Q. Could a credit entry be properly made to this account on this book?

Each of the defendants objects as incompetent, immaterial, and irrelevant; calling for the conclusion of the witness, and not the best evidence.

Objection overruled.

Each of the defendants separately except.

A. They could not.

* * * * * * *

321–351 Q. Is it not a fact that at the time of this change in those figures that S. G. Owen, the bank examiner, came here to Lincoln, and was examining and investigating to ascertain the condition of the Marsh National Bank, and whether the stock taken had been fully and properly paid, and discovered that some stock taken by Mosher had been paid by turning over to the bank $30,000 of stocks and bonds, and that Owen then objected to his paying for any stock in that way, and advised him to take it out and substitute some proper payment, as the Comptroller of the Currency, he thought, would not approve of the payment for the stock in that way, by stocks in another concern?

A. Well, I think that is true.

* * * * * * *

352 Deposition of LEONIDAS M. LAWSON as contained in former Bill of Exceptions in these cases, and found at Page 176 of Volume 1 thereof, read in evidence and objections and exceptions taken as herein noted:

Direct examination.

Read by Mr. NORVAL:

Q. State your name, age, occupation and place of residence.

A. Leonidas M. Lawson is my name; I am of lawful age; and I live in the Borough of Manhattan, City of New York, at No. 15 East 67th Street; I am not now engaged in active business, though I sometimes act as counsel in matters of law.

Q. You are the same Leonidas M. Lawson served with a subpœna in the matter of the taking of depositions o- yourself and others in the case of the Jones National Bank of Seward, Nebraska, against Charles W. Mosher and others, now pending and undetermined in the District Court of the Fifth Judicial District of Nebraska in and for Seward County, are you?

A. I am.

Q. And are you here in obedience to that subpœna?

A. I came in obedience to that subpœna.

Mr. LAWSON: I have important engagements for the day, and would request that my testimony be taken at some other time, as it is now very inconvenient for me.

Mr. BURR: It is agreeable to the plaintiff that further taking of these depositions be adjourned until tomorrow, Wednesday, May 21st, at the same time and place.

(Adjournment noted.)

LEONIDAS M. LAWSON, again being produced as per adjournment noted, testifies as follows:

Q. What business were you engaged in during the year 1884; and prior thereto?

A. In the banking business.

353 Q. Where?

A. In the city of New York.

Q. And under what name or style?

A. The style of the firm was Donnell, Lawson & Simpson.

Q. Up to what period or date were you engaged in the banking business under the firm name and style of Donnell, Lawson & Simpson?

A. To May 14th, 1884.

Q. What connection, if any, did you have with the firm?

A. I was a partner in the firm.

Q. State whether or not you were one of the managing partners of the firm.

A. Yes, I had to do with the general business of the firm, its management.

Q. And how long previous to May 14th, 1884, were you thus engaged?

A. Ever since the establishment of the firm, which was, I think, in about 1870.

Q. What happened or took place on the 14th of May, 1884?

A. The firm was compelled to suspend payment.

Q. In suspending payment what was done?

A. We immediately notified our clients, our customers, all over the country that we had suspended payment, and requested them to indicate where we should place any funds that were in transit coming to us for them.

354 Q. That isn't exactly what I mean. Was a receiver appointed?

A. Oh, yes, the firm made an assignment, and the assignee was Robert H. Weems.

Q. Made an assignment for the benefit of creditors?

A. Yes.

Q. What was the general nature of the business of the firm of Donnell, Lawson & Simpson prior to May 14th, 1884?

A. We conducted a general banking business; we received deposits and paid on check or draft, and made discounts for our customers.

Q. You were, I might say, a bank?

A. Yes, a bank, a general bank, general banking business.

Q. Are you familiar, or were you familiar with the Marsh National Bank of Lincoln, Nebraska?

A. I know the bank; it was one of our correspondents, or one of our clients; kept an account with us.

Q. Kept an account with you when?

A. I don't know when the account began, but they were keeping an account at the time of our suspension.

Q. Can you state of your own recollection whether or not they had an account with your bank at the time of your suspension, May 14th, 1884?

355 A. I can so state, and I know it is a fact that they did have an account at the time we suspended on May 14th, 1884.

Q. Do you recall about how much money they had on deposit with you standing to their credit on May 14th, 1884?

A. I think it was over $25,000, probably $26,000.

Q. Do you know whether or not they had any security for that $25,000 or $26,000?

A. I don't know positively, but I am pretty sure they did not.

Q. To what class of creditors did they belong?

A. They were general creditors.

Q. Were they what you would call one of your general country accounts?

A. Yes.

Q. On the 14th of May, 1884, what happened so far as pertains to the possession and control of the business, property — assets of the firm of Donnell, Lawson & Simpson?

356 A. Soon after the suspension the assignment was made for the benefit of our creditors, I think within a day or two, and Robert H. Weems was the assignee, and all the property and assets of the firm were taken possession of by the assignee, and he proceeded to administer upon them according to the laws of the State of New York.

Q. And about how long was he in possession of the business and assets and property of the firm of Donnell, Lawson & Simpson?

A. He retained control, possession and management of the business until the 20th of February, 1885?

Q. And on or about the 20th of February, 1885, what did he then do, if you know?

A. The property was turned back into the possession of the firm of Donnell, Lawson & Simpson, up to about the 20th of February 1885, the date when the assignee reassigned and reconveyed to the firm, what did the members of that firm have to do with the business, property, assets and affairs of the old firm.

Mr. NORVAL: The latter part of that answer is undoubtedly a question.

A. The members of the firm had nothing to do with the possession or control or management of the property, and the most they did was to advise the assignee as to any business that might be proper for them to advise him about in the settlement of the estate, and the members of the firm were engaged in inducing the creditors to assent to a settlement which would result in their resumption of business.

357 Q. Are Mr. Donnell and Mr. Simpson now living?

A. No, they are both dead.

Q. About when did they die?

A. Mr. Donnell died, I think, in 1891, and Mr. Simpson I think in 1896.

Q. Who were the members of the firm of Donnell, Lawson & Simpson?

A. Robert W. Donnell, George E. Simpson and myself.

Q. Do you know what property the firm of Donnell, Lawson & Simpson had, or the individual members of that firm, which was not assigned to Weems as assignee?

A. I know none.

Q. Did they have any property, to your knowledge other than that which was assigned?

A. None.

Q. Or means of paying their indebtedness other than out of the assigned estate?

A. None whatever; all property of every kind, nature and description of the firm of Donnell, Lawson & Simpson and the individual members thereof was assigned in possession as such assignee; the firm and its members had no property whatsoever.

Q. Do you know whether or not the firm of Donnell, Lawson & Simpson or the individual members thereof, paid any of the general unsecured creditors of the firm during the month of May, 1884?

358 A. I know that they did not.

Q. Did they make any partial payments to the creditors?

A. They made payments to no creditors whatever.

Q. And is that true of the whole period of time during which Mr. Weems was in possession as assignee?

A. Yes, that is true; during the time that the assignee was in possession no payment whatever was made by any member of the firm to any creditor.

Q. Do you know whether or not during this period, Mr. Weems as assignee made any payments to any creditors of Donnell, Lawson & Simpson?

A. He made no payments to the creditors of Donnell, Lawson & Simpson except to clear off the secured debts, the debts that the firm owed for which collateral had been pledged.

Q. Can you state whether or not the Marsh National Bank of Lincoln, Nebraska, had any collateral as security to their indebtedness?

A. They did not.

Q. Do you know whether or not during the month of May, 1884, the firm of Donnell, Lawson & Simpson or any member

359 thereof paid to the Marsh National Bank any sum of money whatever or gave to it any note of hand?

A. They did not; they paid no money to the Marsh National Bank and gave no obligation to it of any sort during that time.

Q. Can you tell me what Mr. Weems reassigned to the firm of Donnell, Lawson & Simpson on or about the 20th day of February, 1885?

A. When the assignee was discharged he reassigned to the firm of Donnell, Lawson & Simpson all of the property and assets which

he had received except what had been necessary to pay the expense of his administration as assignee and what had been necessary to pay off the secured loans.

Q. Are you or were you acquainted with or familiar with the Capital National Bank of Lincoln?

A. I know that that bank, the Capital National Bank, was the successor of the Marsh bank.

Q. And when did that succession take place?

A. About June or July, 1884.

Q. Upon resumption of business by the firm of Donnell, Lawson & Simpson, or prior thereto or afterwards, do you know whether or not that firm paid to the Marsh National Bank or the Capital National Bank any sum of money whatever on account of the claim of the Marsh National Bank against the firm of Donnell, Lawson & Simpson?

360 A. Yes, I know.

Q. Will you state whether they did or not?

A. No, they did not. About the time of the discharge of the assignee they executed notes due in one year and two years for the indebtedness to the general creditors.

Q. And what notes did they execute, if any, to the Marsh or Capital National Bank?

A. They executed notes to them just as to all other general creditors, one half of the amount of the indebtedness of Donnell, Lawson & Simpson to them represented in one note, due one year after the date, and the other half of the indebtedness represented by a note due two years after date.

Q. What other, further or different note or notes did the firm of Donnell, Lawson & Simpson execute to the Marsh or Capital National Bank?

A. None whatever.

Q. Do you know whether or not the note given to the Capital National Bank by the firm of Donnell, Lawson & Simpson for fifty per cent of the indebtedness of Donnell, Lawson & Simpson to the Capital National Bank due in one year from its date was ever paid?

A. I don't know.

Q. Do you know whether or not the second note was paid?

361 A. Yes, I know that was not paid.

Q. Do you know whether or not on the 14th day of October, 1884, the firm of Donnell, Lawson & Simpson made and delivered to the Capital National Bank of Lincoln, Nebraska, their two notes as follows: One note for $4,695.79 and the other for $5,084.76?

A. They made no such notes, I know I personally made no such notes, and from my intimate knowledge and management of the affairs of the business at that time I know that the other members of the firm made no such notes.

Q. Do you know whether or not the firm of Donnell, Lawson & Simpson made and delivered to the Capital National Bank of Lincoln, Nebraska, on the 20th day of July, 1885, their note for

$9,391.57, and again on the 24th of July, 1885, their note for $9,391.56?

A. I know that I personally made no such notes; and from my intimate knowledge of the management of the affairs and business at that time I know that the other members of the firm made no such notes.

Q. Do you know whether or not the firm of Donnell, Lawson & Simpson made and delivered to the Capital National Bank of Lincoln, Nebraska, on the 13th day of August, 1885, their note for $10,000., and on the same date their note for $20,300?

A. I know that I personally made no such notes, and from
362 my intimate knowledge and management of the affairs and business at that time I know that the other members of the firm made no such notes.

Q. Do you know of your own knowledge whether or not anything was paid to the Capital National Bank for or on account of the notes which I have just enumerated to you?

A. I know that nothing was paid upon those notes, the firm gave no such notes.

Q. Do you know whether or not anyone was authorized by the firm to give such notes?

A. No one ever had authority to execute such notes.

Q. Do you know whether or not during the month of May, 1884, any money was paid by the firm of Donnell, Lawson & Simpson or the individual members thereof to the Chemical National Bank of New York for and on account of the indebtedness due from Donnell, Lawson & Simpson to the Marsh National Bank?

A. I know of no such payments having been made.

Q. And if they had been made you would know of it?

A. I would have known it, yes.

Q. Were any payments made to anyone or any firm or corporation for or on account of this indebtedness of about $25,000
363 or $28,000 due the Marsh National Bank during the month of May, 1884, after the suspension of Donnell, Lawson & Simpson?

A. No such payment was made.

Q. Have you in your possession or under your control the books of the old firm of Donnell, Lawson & Simpson?

A. I have not.

Q. Where are they?

A. The books were destroyed and sold for junk a year or two ago; they had been kept a long time and I had paid the storage upon them imagining that perhaps sometime they might be useful in evidence, but I kept them so long and there had been no demand for them that I concluded it was useless expense to continue their custody, and I had them destroyed.

Q. And these are the reasons why they were destroyed that you have just given?

A. Yes.

Q. What was your connection with the firm of Donnell, Law-

son & Simpson after its resumption of business on or about February 20, 1885?

A. I was a partner in the firm.

Q. And what were your duties as such; general?

A. To look after the general business of the concern. I had to do with the general management of the business.

Q. And you were conversant and familiar with all its affairs and business?

A. I was. I knew all of its transactions.

(Signed) LEONIDAS M. LAWSON.

364 Deposition of WILLIAM AYRES, Jr., Read in evidence, as follows to wit:

By Mr. NORVAL:

Q. State your name, age, residence and occupation.

A. William Ayres, Jr., age, 37 years, residence 342 West 85th street, New York city; occupation banking.

Q. Of what institution are you now an employee?

A. Chemical National Bank of New York.

Q. And how long have you been in the service of the Chemical National Bank of New York?

A. Since October 4, 1880.

Q. And what is your official position now?

A. Clerk and assistant to the officers.

Q. And what are your particular duties?

A. With other capacities I have charge of the records.

Q. In the management of the affairs of the bank what comes under your immediate supervision?

A. Caring for the records, books of account, etc.

Q. Who has the immediate charge of all the records, both books of original entry, ledgers, correspondence, deposit slips, etc.?

A. I have.

Q. And how long have you had immediate charge of such records and books?

A. For twenty years.

Q. For twenty years last past?

A. Yes, 1882 to 1902.

Q. And during all that period have all the books, records and papers of the bank been in your custody and control?

A. Yes, sir.

Q. And who is charged with the responsibility of the safekeeping of these books and records.

365-375 A. I am.

Q. Are you or were you acquainted with the Marsh National Bank of Lincoln, Nebraska?

A. I was, with its account on our books.

Q. During what period?

A. In 1884 and for some time prior thereto.

Q. And were you acquainted with the Capital National Bank of Lincoln, Nebraska.

A. I was.
Q. During what period?
A. From the time of its organization.
Q. Down to when?
A. Its failure. I was acquainted with its account on our books.
Q. Did the Marsh National Bank of Lincoln, Nebraska, do business with the Chemical National Bank?
A. Yes, at that time,—1884.
Q. Up to about the last of May, 1884?
A. Yes, sir.
Q. Did the Capital National Bank of Lincoln, Nebraska, do business with the Chemical National Bank?
A. Yes, from about June 2, 1884, to the date of their failure; 1893 I believe.
Q. What was the nature of that business?
A. General Banking, receiving of remittances and charging to their account of all drafts, etc., drawn by them that were honored by us at that time.
Q. It was a general banking business—general banking account.
A. Yes.
Q. And you were, I might say, what is known as their New York correspondent?
A. Yes, sir.

* * * * * * *

376 Q. Assuming that the Marsh National Bank of Lincoln, Nebraska, charged the Chemical National Bonk with $10,000 on the 19th of May, 1884, with the memorandum against it "D. L. & S." have you been able to find a corresponding credit on the account of the Chemical National Bank by this process of elimination, which you have explained in your testimony?
377–380 A. I have not.
Q. From what you have been able to accomplish and learn in this elimination of the charges and credits kept between these two banks, are you able to state whether the Chemical National Bank ever received and gave credit to the Marsh National Bank against the Chemical National Bank on May 19th, 1884, with the memorandum marks against it, "D. L. & S." ?
A. Apparently the item in question was never received and credited to the Marsh National Bank.

* * * * * *. *

381–398 Q. And why is there not some identification mark before the item of $10,000 under the head of the Marsh National Bank, dated May 19th and identified by "D. L. & S."?

Defendants object, severally, as incompetent, irrelevent and immaterial.
Objection overruled.
Each of the defendants excepts.

A. Because it was impossible for me to reconcile it with any

credit which appeared on the account of the Chemical National Bank.

* * * * * * *

399 Mr. NORVAL: Plaintiffs now offer in evidence the testimony of Augustus D. Lynch taken at the former trial hereof, and found in the Bill of Exceptions Volume No. 1 beginning on page 8. Evidence offered received and read as follows:

AUGUSTUS D. LYNCH called on behalf of the plaintiffs, and being first duly sworn testified as follows:

Direct examination:

Read by Mr. NORVAL:

Q. Where do you reside, Major?
A. Washington, D. C.
Q. How long have you resided there?
A. Near seventeen years.
Q. What official position, if any, do you hold in connection with the Comptroller of the Currency, and the Treasury department of the United States?
A. I am Chief, in the division of "Insolvent National Banks."
Q. And as such officer, are you familiar with the records of that office, and the manner of keeping them?
A. Yes, I am.
Q. You may state of you have with you, in your official capacity, any of the records pertaining to the office of the Comptroller of the Currency?
A. I have.
Q. Will you produce them?

(Witness complying, produces a bundle of papers.)

Q. You may state by what authority, or by whose directions, the documents which you have produced were brought from the department?
A. By authority of William B. Ridgeley, Comptroller of the Currency.
Q. And for what purpose and object?

—. —.

400 Q. What was the occasion?

(Not answered.)

Q. When were they brought from Washington, and in whose custody have they been since that time?
A. I left there yesterday a week ago, and that have been in my custody ever since.
Q. And from whom did you receive them; and where did you receive them?
A. By direction of the Comptroller of the Currency I took them from the files of the office.

Q. And brought them here with you?
A. I did.
Q. And kept them in your possession until this time?
A. I have.
Q. And are they a part of the files and records in the office of the Comptroller of the Currency?
A. They are.

The following Exhibits identified: No's 942 to 948 both inclusive, and No's 958 to 971 both inclusive, and No.'s 972 to 976 both inclusive.

Q. I now hand you, Major Lynch, Exhibits 952-943 and 941 and ask you if they are a part of the files and records of the office of the Comptroller of the Currency at Washington?
A. They are. They were taken in this manner from the files, just as shown here.
Q. And brought by you from there, and have been since in your possession?
A. Yes, sir.
Q. I now hand you Exhibits 949 to 959 inclusive, and will ask you to state if they are a part of the files and records of the office of the Comptroller of the Currency at Washington, D. C.?
401 A. Yes, they are a part of the files of the Report Division.
Q. And they were brought by you from Washington and have been in your custody ever since as the custodian of papers for the treasury department?
A. They have been in my possession.
Q. And are still in your possession as such. I now hand you papers marked Exhibits No. 960 to 971 inclusive, and will ask you to state if they are a part of the records and files of the office of the Comptroller of the Currency at Washington, D. C.?
A. They form a part of the papers, they were in an envelope marked with a private mark.
Q. They are a part of the files, documents and records of the office of the Comptroller of the Currency?
A. Yes, sir. (Witness indicates private mark on envelope.)
Q. And they were brought by you from the department of the Comptroller of the Currency to this city last week, and in your custody?
A. They have.
Q. I now hand you Exhibit No. 972, and will ask you if that is a part of the records and files of the office of the Comptroller of the Currency at Washington, D. C.?
A. It is, yes sir.
Q. And the same is in your custody as stated in reference to the other papers?
A. Yes, sir.
Q. You may state, Major Lynch, if you know what has become,—or whether or not the proofs of publication of the statements that were made by the Capital National Bank prior to 1892 are in the Comptroller's office at Washington, or what has become of them.

A. They could not be found, and there is a rule of the office; of the bureau fixed by Col. Tren, when he was Comptroller
402 that after five years the published statements might be destroyed, on account of the space they took in the vaults, and he issued an order that they might be destroyed, and they are not in the files.

Q. And that has been the custom ever since?

A. Yes, sir.

Q. You have made diligent search through the files and they could not be found?

A. No, sir. That is the rule of the office. The Comptrollers regarded it as a departmental rule, but it was made by a Comptroller. There is an affidavit of the File Clerk, specially made, I don't know as it enters here, but he makes that verification.

By Counsel for Defendants:

Q. You say you made a search for the papers, or did you rely upon that rule that they were destroyed?

A. No the file clerk made an examination, who is charged with these publications. I also looked in the files.

Q. Did you make search for them?

A. Yes, sir.

Q. I will ask you whether you came here and brought these papers at the request of the plaintiff in this case?

A. The circumstances as I understand are these. Mr. Jones addressed a letter to the Comptroller of the Currency and requested certain papers to be sent here, or to him, in such manner as was proper, and the Comptroller upon his request sent them and designated me as his representative, the representative of the comptroller.

Q. You came here at their expense?

A. I did. The money was paid to the Comptroller. The office pays my expenses. They go into the Comptroller's hands and not mine.

Q. You spoke of Jones; is that the Jones of the Jones National Bank?

A. President of the Jones National Bank.

403 Q. Who sent you here to represent him?

A. The Comptroller of the Currency sent me here to present these papers to the court.

Q. As a representative of what department?

Defendants object, severally, as leading.

Objection Overruled.

Each of the defendants excepts.

A. I came as the chief of the Insolvent division, and known as the Currency bureau of the Treasury department.

Q. Is that connected with the Comptroller of the Currency?

A. The Comptroller is the Chief or head of the Currency bureau.

Q. Of the treasury department?

A. Of the treasury department.

Q. And you came as his representative?
A. I did.
Q. Representative of that department?
A. Yes, sir.

Witness excused.

Plaintiffs now offer in evidence Exhibit No. 942.

Each of the defendants objects as incompetent, irrelevant and i material, and no foundation laid for its introduction, and no pr of any notice having been brought to either of these defendants the writing of this letter.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 942 received in evidence.

Copy of Exhibit No. 942, is as follows:

"Office, Comptroller of Currency, Feb. 23, 1892.

LINCOLN, NEBR., Feb. 23, 1892.

E. S. Lacy, Washington, D. C.

DEAR SIR: Your letter of Feb. 15/92 received and considere The manner of conducting the Capital Nat. Bank of Lincoln, Neb for a length of time has not been *satisfactory* to me. I have had talk with C. W. Mosher and R. Outcalt, president and Cashier the subject and they promise that the management of the ban shall be improved. I think I can promise you there will be bett management. Your letter is a move in the right direction, it ind cates that we the directors should take a more positive position i the management which I for one shall do.

Resp. &c.,

E. P. HAMER.

Exhibit 942, O. P. H."

Exhibit 334.

404 MR. [illegible]RVAL: I also offer in evidence Exhibit No. 943.

The defendants and each of them object to the introduc tion of the exhibit for the reason that it is incompetent, irrelevan and immaterial, and no foundation laid for its introduction.

Objection overruled.

Each of the defendants except.

Exhibit No. 943, (Being Exhibit x943 in this case) received and read in evidence, as follows:

No. 2988.

Office Comptroller of Currency, Oct. 14, 1892.

"C. W. Mosher, Pres't. H. J. Walsh, Vice Pres't.
R. C. Outcalt, Cashier.

Capital National Bank, Capital $300,000.

To the Comptroller of the Currency, Washington, D. C.

DEAR SIR: In reply to your favor of Aug. 31-1892 would state that we fully answered you in Feb. last as regards the Mosher & Small loans, & am now making good progress towards cutting those items down to the limit.

As regards the Real Estate mortgages that is a part of the Small matter & both will be cleaned up at the same time. The dividend of July 1st was al- right; the expenses since then have exceeded income by reason of having paid taxes, & interest on certificates of deposits to an unexpected amount during July. The item of $8,000.00 losses referred to was an estimate of contin*h*ent losses & not any particular loss already incurred, but referred to some matters or process of liquidation, all items mentioned by you shall receive prompt attention.

Your truly,

(Signed) C. W. MOSHER,
R. C. OUTCALT, *Cashier.*
D. E. THOMPSON
E. P. HAMER
A. P. T. SHEARL,
R. O. PHILLIPS,
C. E. YATES.

Exhibit 335.

Exhibit x943.
Exhibit 943, O. P. H.

405 Mr. NORVAL: Plaintiffs offer in evidence Exhibit No. 944.

Mr. BISHOP: The defendants each separately object to the introduction of the exhibit for the reason that it is incompetent, irrelevant and immaterial, and no foundation laid for its introduction.

Objection Overruled.

Each of the defendants except.

Exhibit No. 944 Received and Read in evidence.

Office Comptroller of Currency, Feb. 23, 1892.

LINCOLN, NEB., Feb. 19th, 1892.

To the Hon. Comptroller of the Currency.

DEAR SIR: Referring to your letter of 16th to Mr. C. W. Mosher, President, we would say in regard to the item 50950.28 E. W.

Mosher, that this am't appears on the books to be a loan to him endorsed by C. W. Mosher and secured collaterally by note of many individuals in smaller am'ts aggregating the same am't made to E. W. Mosher.

The facts are that this account is made up with small notes taken in a territory from which comes the best products of the state, and considered a good field for a line of loans & E. W. Mosher was authorized to get good paper of this character for the bank, and such notes being made in the name of E. W. Mosher.

The officers of the bank requiring a guaranty of his discretion took notes of E. W. Mosher, which have been endorsed by C. W. Mosher making the notes of smaller am'ts collateral, thus making fewer a/cs to handle, but unfortunately losing sight of the requirements of Sec. 5200 touching limits of am't which we may simply say ought not to have been done and the matter has now received the attention of the Directors through instructions to place the whole matter in technical as well as financially proper shape as quickly as it may be done without loss.

The J. W. Small, 51752.53. This was originally a note
405 given by the Fairfield Exchange Bank of Fairfield, Neb., for $20,250.00 at the time secure by collateral notes. In course of time the loan was found to be weak and Pres't Mosher took additional security in shape of second mortgages on real estate, a lot of live stock &c. Mr. Small's bank and his own affairs fell into hard lines and failed in both respects.

The officers of the bank meanwhile had paid off first mortgages in the real estate to the amount of some $31,000 to make better the bank security. Other creditors of Small attacked the position of the bank as holding excessive security which resulted in litigation still unsettled, but through which the claims of this bank against some 2,700 acres of land has been declared a first lien. And it seems certain that the claim will be fully realized, or at farthest only a small loss can follow. The excessive am't of the a/c comes of erroneously charging the am'ts paid for raising liens on the real estate in same a/c instead of a special a/c therefor.

In regard to overdrafts. Since the examination this matter has had close attention and has been reduced to $13,537.84 at this date, and should never have been permitted inasmuch as the records of the bank will show specific instruction to the officers by resolution of the directors not to allow overdrafts.

Overdue paper. Instructions have been made to the officers to give both close attention and continuous efforts to correct this condition. It will be remembered however that the J. W. Small a/c constitutes a part of this am't which will hold a considerable sum in that condition until pending litigation is concluded.

Discount committee. The bank has always had a discount committee but about a year since Mr. W. W. Holmes died suddenly & left only one member. The place has now been supplied by
406 the appointment of Mr. E. P. Hamer. The Com. now being A. P. S. Stewart & E. P. Hamer.

Rediscounts. These have been cut down since examination from

137,234.16 to 50,844.14 and will probably be reduced considerably the coming three months. This condition was not taken on for purpose of increased business but to meet falling off in deposits from which all western banks suffered on account of the drouth of 1890.

It is the desire of the directors that the standing of this bank should in all respects be upon perfect footing in the Department and will at all times be pleased to have notification of any apparent neglect.

Yours Resp'y,

C. W. MOSHER, *Pt.*
C. E. YATES, *Director.*
R. O. PHILLIPS, *Director.*
D. E. THOMPSON, *Director.*
A. P. S. STEWART, *Director.*
E. P. HAMER, *Director.*
R. C. OUTCALT, *Director.*

Exhibit 333.

Exhibit x944.
Exhibit 944 O. P. H.

(Said Exhibit being endorsed as follows:) File No. —. C. No. 2988. From Capital Nat'l Bank, Lincoln, Nebr. Date, Feb'y, 19", 1892. Subject—Explaining loans, &c. Answered. —. Answered by. —. — Division.

Plaintiffs now offer in evidence Exhibit No. 960.

Mr. BISHOP: Each of the defendants separately object to the introduction of this exhibit the same being incompetent, irrelevant and immaterial, and no foundation laid for its introduction, and no proof of any notice having ever been brought to either of these defendants of the writing of this letter.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 960 received and read in evidence, (being identical with Ex. x960).

408

Ex. 960.

"Office of Comptroller of Currency.

Organization.—Form 3.—Ed. 7 5 98 4,500.

Oath of Directors.

STATE OF NEBRASKA,
County of Lancaster, ss:

We, the undersigned Directors of "The Capital National Bank of Lincoln in the state of Nebraska being citizens of the United States, and residents of the state of Nebraska do each for himself and not one for the other, solemnly swear that we will severally, so far as the duty devolves on us diligently and honestly administer

the affairs of said Association; and that we will not knowingly v
late, or willingly permit to be violated, any of the provisions of t
Statutes of the United States under which said Association has be
organized; and each for himself does solemnly swear that he is t
owner in good faith, and in his own right of the number of sha
of stock required by said Statutes, subscribed by him or standi
in his name on the books of the said Association; and that the sa
is not hypothecated, or in any way pledged as security for any lo
or debt.

Name.	Residence and post-office add
1 C. W. Mosher	Lincoln, Nebr
2 R. C. Outcalt	"
3. E. P. Hamer	"
4. R. O. Phillips	"
5. A. P. S. Stuart	"
6. D. E. Thompson	"
7. C. E. Yates	"

On this 8 day of February A. D. 1892 before me a Notary Pul
in and for the state and county aforesaid appeared C. W. Mosh
R. C. Outcalt, E. P. Hamer, R. O. Phillips A. P. S. Stuart, D.
Thompson and C. E. Yates, who ar- personally well known to
and took the foregoing oath and each subscribed the same in
presence.

[SEAL.] HAL C. LONG,
Notary Public

NOTE.—Each director when elected must take the oath of of
and under section 5147 E. S. R. S., it should be transmitted to
Comptroller of the Currency immediately after the election, etc.
Ex. 960. O. P. H."

(Endorsed on back is the following:) "2988.—Oath of Direc
of Capital National Bank of Lincoln Nebraska. 1892.

409–418 Mr. NORVAL: Plaintiffs now offer in evidence Exh
No. 951.

Mr. BISHOP: Each of the defendants separately object to the s
as incompetent, irrelevant and immaterial; no foundation laid
no proof of any notice having ever been brought to either of
defendants of the writing of this letter.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 951, received and read in evidence, (being ident
with Ex. x951.)

* * * * * * *

Ex. 961.

"Office of Comptroller of Currency.

Organization.—Form 3.—Ed. 75 98 4,500.

Oath of Directors.

STATE OF NEB.,
County of Lancaster, ss:

We, the undersigned Directors of "The Capital National Bank" of Lincoln in the state of Nebraska, being citizens of the United States, and residents of the State of Nebr. do each for himself and not one for the other solemnly swear that we will severally, so far as the duty devolves upon us, diligently and honestly administer the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said association has been organized; and each for himself does solemnly swear that he is the owner in good faith, and in his own right, of the number of shares of stock required by said statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

Name.	Residence and post-office address.
1. C. W. Mosher	Lincoln
2. A. P. S. Stuart	"
3. W. W. Holmes	"
4. D. E. Thompson	"
5. R. O. Phillips	"
6. C. E. Yates	"
7. E. P. Hamer	"

On this 4 day of March A. D. 1891 before me a Notary Public in and for the state and county aforesaid, appeared C. W. Mosher, A. P. S. Stuart, W. W. Holmes, D. E. Thompson, R. O. Phillips, C. E. Yates, and E. P. Hamer who are personally well known to me, and took the foregoing oath, and each subscribed the same in my presence.

[SEAL.]

J. W. MAXWELL,
Notary Public.

NOTE.—Each Director when elected must take the oath of office and under section 5147 U. S. R. S., it should be transmitted to the Comptroller of the Currency immediately after the election, etc.
Ex. No. 961—O. P. H.

(The following endorsement appears on the back thereof:) No. 2988 oath of Directors of The Capital N. B. of Lincoln, Neb. 1891.

419–431 Mr. NORVAL: Plaintiffs now offer in evidence Exhibit No. 972.

Mr. BISHOP: Each of the defendants objects to the introduction of this exhibit for the reason that the same is incompetent, irrelevant and immaterial and no foundation has been laid for its introduction.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 972 received and read in evidence. (Identical with Ex. No. x-972 hereof.)

EXHIBIT X972.

Enter Charter Number of Bank Here. No. —.

Bank Officers are requested to use the following form for printers' "copy."

Report of the Condition of The Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, 9th Dec., 1892.

Resources.

	Dollars.
Loans and Discounts	768,601.44
Overdrafts, secured and unsecured	6,217.74
U. S. Bonds to secure circulation	50,000.00
U. S. Bonds to secure U. S. Deposits	.....
Current expenses and taxes paid	14,286.28
Premiums on U. S. Bonds	.....
Stocks, securities, etc.	325.00
Banking house, furniture and fixtures	5,770.00
Other real estate and mortgages owned	38,617.92
Due from National Banks (not reserve agents)	17,800.33
Due from State Banks and Bankers	5,394.72
Due from approved reserve agents	107,090.01
Internal-Revenue Stamps	.....
Checks and other cash items	3,698.56
Exchanges for clearing house	8,841.16
Bills of other Banks	2,355.00
Fractional paper currency, nickels, and cents	298.71
Lawful money reserve in bank, viz:	
Specie	26,789.50
Legal-tender notes	17,431.00
Redemption fund with U. S. Treasurer (5% of circulation)	1,350.00
Due from U. S. Treasurer, other than 5% redemption fund	.....
Total	1,074,867.37
Total	.....

Liabilities.

		Dollars.
Capital stock paid in		300,000.00
Surplus fund		6,000 00
Undivided profits, less expenses and taxes paid		21,180.75
National Bank notes outstanding		45,000.00
State Bank notes outstanding		.....
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	
Due to Trust Companies and Savings Banks		.....
Due to approved reserve agents		.....
Dividends unpaid		.....
Individual deposits subject to check	356,139.33	
Demand certificates of deposit	158,545.88	
		643,632.24
Time certificates of deposit		.....
Certified checks		.....
Cashier's checks outstanding		.....
United States deposits		.....
Deposits of U. S. disbursing officers		.....
Notes and bills rediscounted		59,054.38
Bills payable, including certificates of deposit for money borrowed		.....
Liabilities other than those above stated		.....
Total		1,074,867.37

STATE OF NEB.,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15 day of Dec., 1892.

HAL. C. YOUNG,
Notary Public.

Correct—Attest:

C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

Blank items need not be published.

NOTE.—The banks are respectfully notified that by law their published reports must be copies of the originals; and they must therefore state separately the amount of deposits subject to check, of demand and time certificates of deposit, and of certified checks and cashier's checks outstanding. Certificates of Deposit representing

money borrowed must be included in and published as Bills Payable. Failure to do this may subject a bank to the expense of republication.

Ex. 972.
O. P. H.

Ex. A972.
M. D. CAREY,
Notary Public.

Ex. A972.
M. D. CAREY,
Notary Public.

Treasurey Department. Office of Comptroller of the Currency.

Form 200 (12-6-1901-50,000).

Publisher's Certificate.

(Enter Charter Number of Bank Here) No. 2988.

Please Observe the Following Requirements:

Cut the printed Report from the newspaper and attach here.

I. Each National Bank report must be published in a newspaper in the place where the bank is established; or if there be no newspaper in the place, then in the one published nearest thereto in the same county.

II. It must be published in the same form, and the same order of items as in the sample form on the back of this certificate, including the full title and location of bank, the affidavit of cashier, the notary's certificate, and the attestation of at least three directors.

III. Items which remain blank in the original may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

IV. The original report should not be delayed on account of publication, but should be forwarded at the earliest moment possible, and the published report can follow at a later date. The form herewith can be used to furnish "copy" for the printer.

(See sections 5211 and 5213 U. S. R. S.)

Paste so that no part can be torn away.
See Sample Form on the back of this Certificate.

STATE OF NEBRASKA,
County of Lancaster, ss:

On this 17th day of December, A. D. 1892, personally appeared before the undersigned, a Notary Public within and for said county

and State, —— ——, publisher of the Nebraska State Journal, a daily newspaper published at Lincoln, County of Lancaster, State of Neb., who, being duly sworn, states on oath that the Report of "The Capital National Bank" of Lincoln, in the State of Neb., a true copy of which is hereto annexed, was published in said newspaper in its issue of the 17th day of Dec., A. D. 1892.

H. D. HATHAWAY, *Publisher.*

Subscribed and sworn to before me this 17th day of December, 1892.

W. A. WILLIAMS,
Notary Public.

Forward Certificate to Comptroller of Currency as promptly as possible.

2-2353.

432 Mr. NORVAL: Plaintiffs now offer in evidence Exhibit No. 975.

Mr. BISHOP: Each of the defendants objects as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 975 received and read in evidence. (Identical with Ex. No. x-975 hereof.)

Ex. X-975.

Treasury Department.
Office of the Comptroller of the Currency.

WASHINGTON, May 14th, 1884.

Whereas, the Congress of the United States by an Act approved May 3, 1884, did authorize the Marsh National Bank of Lincoln" located in the city of Lincoln, County of Lancaster and state of Nebraska, to change its name to "The Capital National Bank of Lincoln" whenever the board of directors of The Marsh National Bank of Lincoln, shall accept the new name by resolution of the said board, and cause a copy of said resolution, duly authenticated, to be filed with the Comptroller of the Currency:

And whereas, the board of directors of "the Marsh National Bank of Lincoln" at a meeting called for the purpose on May 6, 1884, did vote to accept the change of name to "The Capital National Bank of Lincoln."

433 & 434 And whereas, the President, in accordance with section 1 of said act has executed a certificate under the corporate seal of the bank specifying the action taken by the directors of said bank as above, and their determination as to such change of name, and has caused the same to be recorded in the office of the Comptroller of the Currency.

Now therefore, I, Henry W. Cannon, Comptroller of the Currency do hereby declare that by virtue of said act the name of "The Marsh National Bank of Lincoln" is changed to "The Capital National Bank of Lincoln."

In testimony whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia, this 14th day of May A. D. 1884.

[Seal of the Comptroller of the Currency.]

H. W. CANNON,
Comptroller of the Currency.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Lawrence O. Murray, Deputy and Acting Comptroller of the Currency do hereby certify that the paper hereto attached is a true and complete copy of the original certificate of the Comptroller of the Currency, under date of May 14, 1884 approving change in name of the Marsh National Bank of Lincoln, Nebraska, to The Capital National Bank of Lincoln, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this twenty-fifth day of February A. D. 1899.

[Seal of Comptroller of Currency.]

LAWRENCE O. MURRAY,
Deputy and Acting Comptroller of the Currency.

Ex. 975.
P. 2.
X-975.

* * * * * * *

435 Mr. NORVAL: Plaintiffs now offer in evidence Exhibit No. 945.

Mr. BISHOP: Each of the defendants objects to its introduction for the reason it is incompetent, irrelevant and immaterial; no foundation has been laid for its introduction, and no not-ce of such a letter brought to the knowledge of these defendants or to the plaintiffs in this action.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 945 received and read in evidence. (Identical with Ex. No. X-945 hereof.)

S. 2988.

Treasury Department. Office of Comptroller of the Currency.

WASHINGTON, D. C., Sept. 8, 1891.

M. L. C.
E. A. D.

Mr. C. W. Mosher, President Capital National Bank, Lincoln, Neb.

SIR: The report of an examination of your bank, made on the 19th ultimo, has been received.

The following loans appear to exceed the limit prescribed by Section 5200 U. S. R. S.:

E. W. Mosher	$46,355.98
G. W. Small	56,478.20

It appears from the report that your bank holds real estate mortgages to secure the latter loan, which were acquired May 30, 1886.

Your attention is respectfully called to Section 5137 U. S. R. S. which provides that

"No such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

The examiner reports that when your last report of condition was made to this office, you had overdrafts amounting to $55,004.47 as shown by your books, while you only reported $12,418.97, and classed the remainder as loans and discounts.

Ex. 945.
P. 1.
Exhibit X-945.

436 You are respectfully informed that your reports and published statements should show the full amount of this item as it appears on the books of your bank.

The practice of allowing overdrafts should be avoided so far as practicable. Demand notes should be taken in all cases for temporary loans.

Overdue paper is reported amounting to $103,760.25 of which $14,000. is classed as "bad debts" as defined by Section 5204 U. S. R. S. Such of the overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension. The "bad debts" unless satisfactorily arranged in the meantime, should be charged off prior to declaring a dividend.

Your premium account should be charged off, as the 4½% U. S. bonds have no premium value in the market.

The examiner reports that you expect to sustain a loss of $2,000. upon the note of Donnell, Lawson and Simpson and $2,500. upon your suspended and overdue paper, which together with the $14,-

000.00 "bad debts" you intend to charge off before declaring a dividend.

It is noted that your current expenses exceed your undivided profits by $4,830.87.

It appears from the report that your bank has a large liability on account of notes and bills rediscounted, which the examiner states has been occasioned by the falling off in your deposits. It is respectfully suggested that some of your loans be called in as soon as practicable.

The examiner reports that your board of directors has held only two meetings during the past year, and there is no record of their having examined or approved of the loans and discounts.

It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

Respectfully yours.

R. M. NIXON,
Deputy and Acting Comptroller.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of R. M. Nixon, Deputy and Acting Comptroller of the Currency September 8, 1891 to C. W. Mosher, President of "The Capital National Bank of Lincoln." Nebraska, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 945, P. 2.
Exhibit X-945.

437 Mr. NORVAL: Plaintiffs now offer in evidence Exhibit No. 946.

Mr. BISHOP: Each of the defendants objects to its introduction, as incompetent, irrelevant and immaterial; no foundation laid for its introduction, and for the further reason that there is no proof of any notice of such a letter having been brought to the knowledge of these defendants, or to the knowledge of the plaintiffs in these actions.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 946 received and read in evidence. (Identical with Ex. X-946 hereof.

(See copy on next succeeding page.)

438 L. 2988.

Treasury Department.

Office of Comptroller of the Currency.

WASHINGTON, D. C., Jan. 30, 1892.

C. S. H.

Mr. R. C. Outcalt, Cashier, Capital Nat. Bank, Lincoln, Neb.

SIR: The report of condition of your bank on Dec. 2, 1891 is received, in which no entries appear in the following schedules on the back of the report: Bad debts, as defined in Sec. 5204, in Loans and Discounts.

Please inform me by return mail what amounts, if any, should be entered in these schedules.

You are respectfully requested in future to fill out all schedules on the back of the report, writing in the word "none" where there are no items to be entered.

A careful compliance with this request will save correspondence.

Respectfully yours,

R. M. NIXON,
Deputy Comptroller.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of R. M. Nixon, Deputy Comptroller of the Currency, January 30, 1892 to R. C. Outcalt Cashier of "The Capital National Bank of Lincoln" Nebraska, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 964.
Exhibit X-964.

439 Mr. NORVAL: Plaintiffs now offer in evidence Exhibit No. 947.

Mr. BISHOP: Each of the defendants objects to its introduction for the reason it is incompetent, irrelevant and immaterial; no foundation has been laid for its introduction, and for the further reason that there is no proof of any notice of such a letter having been brought to the knowledge of the defendants we (Mr. Rose and myself) represent, or to the knowledge of the plaintiffs in these actions.

Objection overruled.

Defendants each separately except.

Exhibit No. 947 received and read in evidence. (Identical with Ex. No. X-947 hereof.)

(See copy on next succeeding page.)

440 L. 2988.

Treasury Department.

Office of Comptroller of the Currency.

WASHINGTON, D. C., Feb. 5, 1892.

H.

Mr. C. W. Mosher, President, Capital Nat. Bank, Lincoln, Neb.

SIR: In the report of condition of your bank on Dec. 2 1891 there is included in the schedule of loans and discount $14,000 bad debts as defined by Section 5204 of the Revised statutes.

You are respectfully requested to advise me of the present condition of this paper.

Respectfully yours.

R. M. NIXON,
Deputy Comptroller.

Ex. 3*b*.

"DEAR SIR: Above notes have been charged off since last statement.

Yours resp'y,

C. W. MOSHER, *Pt.*"

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of R. M. *Dixon*, Deputy Comptroller of the Currency, February 5, 1892 to C. W. Mosher President of "The Capital National Bank of Lincoln" Nebraska, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 947.
Exhibits X-947 and "3*b*."

441 Mr. NORVAL: Plaintiffs now offer in evidence Exhibit No. 948.

Mr. BISHOP: Each of the defendants objects to the introduction of this exhibit for the reason that it is incompetent, irrelevant and immaterial; no foundation laid for its introduction, and for the further reason that there is no proof that any notice of such a letter was ever brought to the knowledge of these defendants, *or* to the plaintiffs in these cases.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 948 received and read in evidence. (Identical with Ex. No. X-948 herein.)

(Copy at next page.)

442 S. 2988.

Treasury Department.

Office of
Comptroller of the Currency.

M. L. C.
E. A. D.
G. M. C.

WASHINGTON, D. C., Feb. 16, 1892.

Mr. C. W. Mosher, President Capital Nat'l Bank, Lincoln, Neb.

SIR: The report of an examination of your bank, made on the 26th ultimo, has been received.

The following loans appear to exceed the limit prescribed by Section 5200 U. S. R. S:

E. W. Mosher	$50,950.28
G. W. Small	51,752.53

The examiner reports that you have some loans that have been carried along for a number of years, which he thinks should be collected as soon as practicable, and includes the above excessive loans in this class. He also thinks that Mr. Mosher's liability as an endorser is too large.

The agreement of Messrs R. C. Outcalt and C. W. Mosher to re
duce their liabilities, and in future adjust all accounts so that ove
drafts will be confined to those of a temporary nature, and also tha
they will close the bulk of their outside interests, and give their at
tention to the affairs of the bank, is received.

The examiner states that owing to these outside dealings the busi
ness of the bank has suffered.

Overdrafts are reported amounting to $60,936.78. Please in
form me to what extent these have been reduced since the examina
tion. The practice of allowing overdrafts should be avoided so fa
as practicable.

Overdue paper is reported amounting to $104,868.19 of whic
$14,500 is classed as "bad debts" as defined by Section 5204 U. S
R. S. Such of this overdue paper as is good should be collected o
made active by renewal, with satisfactory security for payment afte
a reasonable extension.

The examiner reports that losses aggregating $30,000, includin
the amount of "bad debts" reported above, were charged off durin
the examination.

The examiner reports that your by-laws require the board of di
rectors to meet only twice a year, and that they often only go through
the form of declaring a dividend, and do not examine the loans an
discount. He states that you have no discount nor examining com
mittee.

It is respectfully suggested that the conduct of the affairs of a na
tional bank is by law devolved upon the board of directors, and reg
ular and frequent meetings are therefore very desirable.

Ex. 948, P. 1.
Exhibit X-948.

443 It appears from the report that your bank was borrowin
$137,234.16 on notes and bills rediscounted, and that it ha
been borrowing money continually during the past year.

The examiner states that the amount of your borrowings hav
been largely reduced since his previous examination, and it is sug
gested that all this liability be paid off, and that the implied powe
to borrow money should be reserved for emergencies, and not ha
bitually used for the purpose of procuring banking capital.

The necessity for borrowing appears to have arisen from the ex
cessive loans made, and your first effort should therefore be to realiz
on these by reducing them to the lawful limit. Special effort shoul
also be made to collect or renew your overdue paper.

Please bring this communication to the attention of your boar
of directors for consideration, and for reply over their individua
signature.

Respectfully yours,

E. S. LACY,
Comptroller.

C. Ex. 944.

Certificate for Certified Copy.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, William B. Ridgely Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter of E. S. Lacy, Comptroller of the Currency, February 16, 1892 to C. W. Mosher President of "The Capital National Bank of Lincoln," Nebraska, and the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this twenty-ninth day of January A. D. 1902.

[Seal of the Comptroller of Currency.]

WM. B. RIDGELY,
Comptroller of the Currency.

Ex. 948, P. 2.
Exhibit X-948.

444 Mr. NORVAL: Plaintiffs now offer the testimony, from the Bill of Exceptions of the former trial of L. H. MORSE:

Direct examination.

Read by Mr. NORVAL:

Q. Where do you reside?
A. Lincoln, Lancaster county, Nebraska.
Q. And what is your business?
A. Newspaper business.
Q. Connected with what paper?
A. State Journal Company, at the present time.
Q. Have you been connected with any other newspaper in Lincoln?
A. From 1888 until 1894 I was connected with the Call Publishing Company, publishers of the Evening Call.
Q. That was a paper published in Lincoln?
A. Yes, sir.
Q. And in general circulation throughout the state?
A. Yes, sir.
Q. And from your connection with the State Journal can you state what the character of that paper is?
A. As to its circulation?
Q. Yes, sir.
A. It has a general circulation all over the state.
Q. Including Seward county?
A. Yes, sir.
Q. You may state, if you have knowledge, as to whether or not it

was the practice of the Call Publishing Company, while it published the Lincoln Call to keep files of its papers?

Defendants objects, severally, as immaterial.

Q. Did they keep a copy of the paper on file?

445 A. They did, yes sir.

Q. You may state if the State Journal has during your knowledge of its existence kept files of its daily papers?

A. Yes, sir.

Q. How long have you had knowledge of the exixstence of the Nebraska State Journal?

A. Oh, ever since I can remember.

Q. How long has that been?

A. Well, I would hate to say,—about '76 or '77,—along there some place.

Q. You may turn to the State Journal of 1886, and produce if you can the files of the State Journal for the month of January, 1886. You may state, Mr. Morse, if you have the files of the State Journal, showing a copy of the issue of the State Journal bearing date January 9th, 1887?

A. Yes, sir.

Q. Is that a copy of the State Journal issued on that date, (referring to paper in hands of witness) and of the regular edition of the Journal?

A. Yes, sir Now then, I only act as custodian of these files here and it is understood at the office that I am to bring them back with me, and you can just have these marked, and then you may take copies of them.

Mr. NORVAL: Plaintiffs now offer in evidence the issue of January 9th, 1887, or so much thereof as relates to the notice and statement of the condition of the Capital National Bank.

446 Defendants object, severally, to the introduction of the paper offered as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants except.

Notice published in the State Journal under date of Jan. 9th, 1887, received and read in evidence,—being Exhibit 977—(Exhibit X-977 hereof).

"*Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, December 28,* 1886.

Resources.

Loans and discounts	$737,426.12
Overdrafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stocks, bonds and mortgages	22,739.34
Due from approved and reserve agents	74,068.63
Due from other National Banks	56,215.29

Due from State banks and bankers	10,495.36
Real estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other cash items	13,742.02
Bills of other banks	3,712.00
Fractional paper currency, nickels and cents	216.42
Specie	27,308.00
Legal tender notes	10,400.00
Redemption with U. S. Treasurer, (5% circulation)	1,900.00
Total	$1,035,448.92

Liabilities.

Capital Stock paid in		$300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National bank notes outstanding		45,000.00
Individual deposits subj. to checks	$414,962.35	
Demand certificates of deposit	40,869.66	
Due to other National Banks	107,648.27	
Due to state banks and bankers	37,448.66	
		597,918.94
Notes and bills rediscounted		52,090.60
Total		$1,035,448.92

STATE OF NEBRASKA,
Lancaster County, ss:

I, C. W. Mosher, president of the above bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

Exhibit X-977.

* * * * * * *

447 Mr. NORVAL: We offer in evidence the notice published on that date and ask to have it marked Exhibit No. 978.

Each of the defendants object as incompetent, irrelevant and immaterial under the issues, and not the best evidence.

Objection overruled.

Each of the defendants except.

Exhibit No. 978 received and read in evidence, being Identical with Exhibit No. X-978 hereof:

Daily Nebraska State Journal, Lincoln, Saturday, August
448 6th, 1887.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, August 1, 1887.

Resources.

Loans and discounts		$908,623.31
Overdrafts	6,231.69	6,231.69
U. S. Bonds to secure circulation		50,000.00
Other Stocks, Bonds, Mortgages		15,231.
Due from approved reserve agents		75,139.86
Due from other National Banks		42,048.82
Due from State banks and bankers		5,624.17
Real estate, furniture and fixtures		5,650.00
Current expenses paid and taxes paid		2,192.88
Premiums paid		6,200.00
Checks and other cash items		45,349.70
Bills of other banks		1,570.00
Fractional Currency, nickels and cents		91.28
Specie		34,975.50
Legal tender notes		16,108.00
Redemption fund with U .S. Treasurer (5% of circulation)		2,250.00
Total		$1,217,386.21

Liabilities.

Capital Stock paid in		300,000.00
Surplus fund		16,000.00
Undivided profits		3,447.66
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$454,253.97	
Demand certificates of deposits	119,864.68	
Due to other National banks	201,760.43	
Due to state banks and bankers	77,059.47	
		852,938.55
Total		$1,217,386.21

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt, Cashier of the above named bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 5th day of August, 1887.

[SEAL.] J. W. MAXWELL, *N. P.*

Correct. Attest:
W. W. HOLMES,
D. E. THOMPSON,
C. W. MOSHER,
Directors.

Exhibit X-978.

* * * * * * *

449 Mr. NORVAL: We now offer in evidence the notice or report of the condition of the Capital National Bank, at Lincoln, Nebraska at close of business October 5th, 1887, and ask that the same be marked Exhibit No. 979.

The defendants severally object to the introduction of Exhibit No. 979, as no sufficient foundation laid; no allegation in the Petitions that any such report was ever made or published, and as incompetent, irrelevant and immaerial.

Objection overruled.

Exhibit No. 979 received and read in evidence as follows (Identical with Exhibit No. X-979 hereof:)

450 & 451 (Daily Nebraska State Journal, Lincoln, Tuesday, October 11th, 1887.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, October 5, 1887.

Resources.

ans and discounts		$832,190.33
erdrafts		2,590.53
S. Bonds to secure circulation		50,000.00
her stocks, bonds and mortgages		16,129.56
e from approved Reserve agents		74,162.21
e from other national banks		36,377.13
e from state banks and bankers		14,543.96
l estate, furniture and fixtures		7,100.00
rent expenses and taxes paid		5,753.47
miums paid		5,500.00
cks and other cash items		57,217.35
s of other banks		635.
tional paper currency, nickels and cents	87.70	37.70
ie		37,855.50
l tender notes		8,823.00
mption funds with U. S. Treas., (5% circulation)		2,250.00
Total		1,151,214.74

Liabilities.

Captial stock paid in		$300,000.00
Surplus fund		16,000.00
Undivided profits		9,862.78
National bank notes outstanding		45,000.00
Individual deposits subj. to check	$430,220.61	
Demand certificates of deposit	119,453.43	
Cashier's checks outstanding	4,159.04	
Due to other National banks	145,106.92	
Due to state banks and bankers	57,411.96	
Notes and bills rediscounted	24,000.00	
		756,351.96
Total		$1,151,214.74

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above named statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 10th day of October, 1887.

E. R. SMITH,
Notary Public.

Correct. Attest:
C. W. MOSHER,
W. W. HOLMES,
A. P. S. STUART,
Directors.

Exhibit X-979.

452 *Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, December* 9, 1892.

Resources.

Loans and discounts	$768,601.44
Overdrafts secured and unsecured	6,217.74
United States bonds to secure circulation *50,000*	50,000.00
Stocks, securities, etc	325.00
Due from approved Reserve agents	107,090.01
Due from other National Banks	17,800.33
Due from State banks and bankers	5,394.72
Banking house furniture and fixtures	5,770.00
Other real estate and mortgages owned	38,617.92
Current expenses and taxes paid	14 286.28
Checks and other cash items	3,698.56

Exchanges for clearing house	8,841.16
Bills of other banks	2,355.00
Fractional paper currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes	17,431.00
Redemption fund with U. S. Tr. (5% circulation)	1,350.00
Total	$1,074,867.37

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	356,139.33	
Demand certificates of deposit	158,545.88	
Due to other National Banks	81,574.14	
Due to state banks and bankers	47,372.89	
Notes and Bills rediscounted		643,632.24
		59,054.38
Total		$1,074,867.37

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt, Cashier of the above named bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December 1892.

HAL C. YOUNG,
Notary Public.

Correct. Attest:

C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

Exhibit X-980.

453 & 454 Q. You may state if you find the Ad of the Capital National Bank in the issue of that paper, the Nebraska State Journal bearing date, October 11th, 1887.

A. I do.

Q. You may state if that was published in the regular issue of the Nebraska State Journal of that time?

A. Yes, sir.

Mr. NORVAL: I now offer in evidence the advertising notice of the Capital National Bank, marked Exhibit No. 981.

Exhibit No. 981 received and read in evidence. (Identical with Exhibit X-981 hereof.)

"Capital National Bank,
Lincoln, Nebraska.

Capital, $300,000.00.

C. W. Mosher, President.
H. J. Walsh, Vice P't.
R. C. Outcalt, Cashier.

Directors:

W. W. Holmes, D. E. Thompson, C. W. Mosher, R. O. Phillips, E. P. Hamer, C. E. Yates, A. P. S. Stuart.

Exhibit X-981.

Acc'ts solicited, Banks, Bankers and Merchatns."

* * * * * * *

455 (Lincoln Daily Call, Lincoln, Nebraska, December 18th, 1888.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business Dec. 12*th,* 1888.

Resources.

Loans and discounts	$860,944.18
Overdrafts secured and unsecured	11,529.18
U. S. Bonds to secure circulation	50,000.00
Other stocks, bonds and mortgages	9,148.88
Due from approved reserve agents	83,964.65
Due from other national banks	38,539.83
Due from state banks and bankers	10,259.39
Real estate, furniture and fixtures	28,258.03
Premiums paid	4,000.00
Current expenses and taxes paid	21,112.31
Checks and other cash items	19,295.08
Bills of other banks	2,830.00
Fractional paper currency, nickels and cents	244.39
Specie	20,785.50
Legal tender notes	22,400.00
Redemption fund with U. S. Treas. (5% circulation)	1,730.00
Total	$1,185,238.42

Liabilities.

Capital Stock paid in		$300,000.00
Surplus fund		20,000.00
Undivided profits		37,614.80
National Bank notes outstanding		45,000.
Individual deposits subject to check	$397,275.24	
Demand certificates of deposit	117,922.95	
Cashier's checks	4,892.06	
Due to other National Banks	63,392.84	
Due to state banks and bankers	87,960.05	
Notes and bills rediscounted		671,443.19
		111,180.43
Total		$1,185,238.42

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1888.

J. W. MAXWELL,
Notary Public.

Correct. Attest:

C. W. MOSHER,
C. E. YATES,
W. W. HOLMES,
Directors.

Exhibit X-982.

* * * * * * *

456 MR. NORVAL: I now offer in evidence the report referred to by witness and ask to have same marked Exhibit No. 983.

Defendants object, severally, to its introduction for the reason that no foundation has been laid for its introduction; no allegations in the Petitions that any such a report was ever made or published, and for the further reason that the same is incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 983 received and read in evidence. (Identical with X-983 hereof.)

(Copy on next succeeding page.)

457 (The Lincoln Daily Call), Seventh Year, Lincoln, Nebraska, Saturday Evening, October 4, 1889. No. 95, Page 4.

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business Sept. 30th, 1889.

Resources.

Loans and discounts		$800,159.88
Overdrafts, secured and unsecured		6,372.45
U. S. Bonds to secure circulation		50,000.00
Other stocks, bonds and mortgages		21,954.94
Due from approved reserve agents		76,238.34
Due from other National Banks		42,329.97
Due from State banks and bankers		5,390.35
Real estate, furniture and fixtures		43,741.70
Current expenses and taxes paid		7,935.58
Premiums paid		3,750.00
Checks and other cash items		3,964.67
Exchanges for clearing house		12,844.22
Bills of other banks		2,240.00
Fractional paper currency, nickels and cents		643.06
Specie		33,029.75
Legal tender notes		12,333.00
Redemption fund with U. S. Treas. (5% of circulation)		1,500.
Total		$1,124,432.09

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		24,000.00
Undivided profits		14,211.73
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$324,391.90	
Demand certificates of deposit	165,222.06	
Cashier's checks outstanding	12,597.50	
Due to other National Banks	84,604.80	
Due to state banks and bankers	92,722.00	
		679,538.26
Notes and bills rediscounted		61,682.92
Total		$1,124,432.91

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt — of the above named Bank, do solemnly swear that the above named statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 4th day of October, 1889.

J. W. MAXWELL,
Notary Public.

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
W. W. HOLMES,
Directors.

Exhibit X-983.

* * * * * * *

458 Mr. NORVAL: We now offer in evidence the notes indicated by the witness, and ask to have it marked Exhibit 984. Defendants object, severally, to its introduction for the reason that no foundation has been laid for its introduction; no allegations in the Petitions that any such notice was ever made or published, and because it is incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

Exhibit No. 984 received and read in evidence. (Identical with X-984 hereof.)

(See copy at next page hereof.)

459

EXHIBIT X984.

(Lincoln Daily Call, Lincoln, December, 16th, 1889.)

Report of the Condition of the Capital National Bank, of Lincoln, in the State of Nebraska, at the Close of Business December 11, 1899.

Resources.

Loans and discounts	$808,781.26
Overdrafts, secured and unsecured	10,977.12
U. S. Bonds to secure circulation	50,000.00
Stocks, securities, claims *and* etc	41,954.94
Due from approved reserve agents	52,103.47
Due from other National Banks	22,423.53
Due from State Banks and bankers	18,564.82
Banking house, furniture and fixtures	5,770.00
Other real estate and mortgages owned	41,505.47
Current expenses and taxes paid	10,948.24
Premiums on U. S. Bonds	3,750.00
Checks and other cash items	8,330.76
Exchanges for clearing house	5,102.38
Bills of other banks	2,670.00
Fractional paper currency, nickels and cents	153.02
Specie	27,623.70
Legal tender notes	13,499.00
Redemption fund with U. S. Treas. (5% of circulation)	1,709.41
Total	$1,125,921.19

Liabilities.

Capital stock		$300,000.00
Surplus fund		24,000.00
Undivided profits		24,126.30
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$301,390.77	
Demand certificates of deposit	157,159.04	
Cashier's checks outstanding	2,695.20	
Due to other National Banks	51,283.67	
Due to state banks and bankers	70,087.40	
		582,616.08
Notes and bills rediscounted		150,184.74
Total		$1,125,927.12

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 11th day of December 1892.

J. W. MAXWELL, *N. P.*

Correct. Attest:
C. W. MOSHER,
A. P. STUART,
W. W. HOLMES,
Directors.

* * * * * * *

460 Mr. NORVAL: I now offer in evidence the report found in the Call just identified by the witness and ask that the same may be marked Exhibit 985.

The defendants severally object to its introduction because no foundation has been laid for its introduction, and no allegations in the Petitions in these cases that any such note was ever made or published; and because the same is incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants except.

Exhibit No. 985 is received and read in evidence. (Identical with Exhibit X-985 hereof.)

(Copy on next succeeding page.)

461

Exhibit X-985.

(The Lincoln Daily Call, Friday Evening, December 26, 1890.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 19th, 1890.

Resources.

Loans and discounts		$847,442.40
Overdrafts, secured and unsecured		9,330.20
U. S. Bonds to secure circulation		50,000.00
Stocks, securities, claims *and* etc		16,909.88
Due from approved reserve agents		116,166.05
Due from other National Banks		26,033.84
Due from State Banks and bankers		2,996.22
Banking house, furniture and fixtures		5,770.00
Other real estate and mortgages owned		55,099.59
Current expenses and taxes paid		16,304.98
Premium on U. S. Bonds		2,400.00
Checks and other cash items		2,222.50
Exchanges for clearing house		15,235.52
Bills of other banks		3,535.00
Fractional paper currency, nickels and cents		188.30
Specie		59,640.50
Legal tender notes		2,505.00
Redemption fund with U. S. Treas. (5% of circulation		2,250.00
Total		$1,234,030.88

Liabilities.

Capital stock		$300,000.00
Surplus fund		28,000.00
Undivided profits		33,585.80
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$364,123.01	
Demand certificates of deposit	270,168.96	
Cashier's checks outstanding	7,298.89	
Due to other National Banks	42,280.26	
Due to state banks and bankers	46,924.39	
		730,795.51
Notes and bills rediscounted		96,649.57
Total		$1,234,030.88

State of Nebraska,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, Cashier.

Subscribed and sworn to before me this 26th day of December, 1890.

J. W. MAXWELL,
Notary Public.

Correct, Attest.

C. W. MOSHER,
D. E. THOMPSON,
W. W. HOLMES,
Directors.

* * * * * * *

462 Mr. NORVAL: We now offer in evidence the notice referred to and ask that the same may be marked Exhibit 986.

Defendants severally object to its introduction because no foundation has been laid for its introduction; no allegations in the Petitions that any such report was ever made or published, and because it is incompetent, irrelevant and immaterial. Objection overruled.

Each of the defendants excepts.

Exhibit No. 986 received and read in evidence. (Identical with Exhibit X-986 hereof.)

(See copy at next succeeding page.)

* * * * * * *

463 (The Lincoln Daily Call, Saturday Evening, July 18, 1891. Page 4.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, July 9th, 1891.

Resources.

Loans and discounts	$898,011.57
Overdrafts, secured and unsecured	12,834.98
U. S. Bonds to secure circulation	50,000.00
Stocks, securities, claims *and* etc	2,913.49
Due from approved reserve agents	51,984.76
Due from other National Banks	23,946.91
Due from State Banks and bankers	2,880.04
Banking house, furniture and fixtures	5,770.00
Current expenses and taxes paid	3,815.30
Premium on U. S. Bonds	1,437.50
Checks and other cash items	5,662 26
Exchanges for clearing house	4,544.50
Bills of other banks	11,145.00
Fractional paper currency, nickels and cents	251.70
Specie	31,350.00
Legal tender notes	14,445.00
Redemption fund with U. S. A. Treas. (5% of circulation)	600.00
Total	$1,121,593.01

Liabilities.

Capital stock		$300,000.00
Surplus fund		30,000.00
Undivided profits		17,304.87
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$367,258.70	
Demand certificates of deposit	139,199.07	
Cashier's checks outstanding	3,229.16	
Due to other National Banks	54,426.22	
Due to state banks and bankers	47,783.89	
		611,897.04
Notes and bills rediscounted		117,391.10
Total		$1,121,593.01

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 18th day of July, 1891.

HAL C. YOUNG,
Notary Public.

Correct,—Attest:

C. W. MOSHER,
D. E. THOMPSON,
C. E. YATES,
Directors.

* * * * * * *

464 Mr. NORVAL: We now offer in evidence the notice published in the Call of that date, identified by the witness, and ask that the same be marked Exhibit 987.

The defendants severally object to its introduction for the reason that no foundation has been laid for its introduction, and no allegations in the Petitions that any such report was ever made or published, and the same is incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

EXHIBIT No. 987 Received and Read in Evidence:

(Identical with Exhibit X-987 hereof.)

(Copy at next succeeding page.)

465 (The Lincoln Daily Call, Thursday Evening, Octob
1891, Page 5.)

*Report of the Condition of the Capital National Bank, at Lin
in the State of Nebraska, at the Close of Business, September
1891.*

Resources.

Loans and discounts		$834,13
Overdrafts, secured and unsecured		4,25
U. S. Bonds to secure circulation		50,00
Stocks, securities, claims *and* etc		53,0
Due from approved reserve agents		52,78
Due from other National Banks		15,67
Due from state banks and bankers		9,52
Banking house furniture and fixtures		5,77
Current expenses and taxes paid		7,547
Checks and other cash items		7,060
Exchanges from Clearing house		5,873
Bills of other banks		630
Fractional paper currency, nickels and cents		249
Specie		26,653
Legal tender notes		18,984
Redemption fund with U. S. Treasurer (5% of circulation)		2,250
Total		$1,094,453

Liabilities.

Capital stock paid in		$4,300,000
Surplus fund		32,000
Undivided profits		14,785
National Bank notes outstanding		45,000
Individual deposits subject to check	$276,860.66	
Demand certificates of deposit	227,416.81	
Cashier's checks outstanding	3,914.82	
Due to other National Banks	40,262.69	
Due to state banks and bankers	55,641.64	
Notes and bills rediscounted		98,571.5
		604,096.6
		$1,094,453.7

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 1st day of October, 1891.

HAL C. YOUNG,
Notary Public.

Correct,—Attest:

C. W. MOSHER,
A. P. S. STUART,
E. P. HAMER,

* * * * * * *

466 Mr. NORVAL: We now offer in evidence the notice referred to and ask that the same may be marked Exhibit 988.

Defendants severally object to its introduction for the reason that no foundation has been laid for its introduction, and no allegations in the Petitions that any such notice or report was ever made or published and because the same is incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

EXHIBIT No. 988 Received and Read in Evidence:

(Identical with Exhibit No. X-988 hereof.)

(Copy on next succeeding page.)

467–471 (The Lincoln Daily Call, Lincoln, December 14th, 1891.)

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business, December 2nd, 1891.

Resources.

Loans and discounts	$870,255.72
Overdrafts, secured and unsecured	3,164.20
U. S. Bonds to secure circulation	50,000.00
Stocks, securities, claims *and* etc	53,513.49
Due from approved reserve agents	52,681.04
Due from other National Banks	11,701.37
Due from state banks and bankers	7,415.14
Banking house furniture and fixtures	5,770.00
Current expenses and taxes paid	12,881.93

Checks and other cash items	8,595.13
Exchanges from Clearing house	8,510.79
Bills of other banks	1,215.00
Fractional paper currency, nickels and cents	241.60
Specie	46,011.50
Legal tender notes	9,940.00
Redemption fund with U. S. Treasurer (5% of circulation)	2,250.00
Total	$1,143,946.88

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		32,000.00
Undivided profits		23,276.89
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$271,018.85	
Demand certificates of deposit	207,710.11	
Due to other National Banks	62,312.57	
	$77,432.32	
Due to state banks and bankers		618,473.85
Notes and bills rediscounted		125,196.14
		$1,143,946.88

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed in my presence and sworn to before me this 14th day of December, 1891.

HAL C. YOUNG,
Notary Public.

Correct. Attest:

C. W. MOSHER,
C. E. YATES,
A. P. S. STUART,
Directors.

Exhibit X-988.

* * * * * * *

472

Mr. F. S. Johnson.

Direct examination.

Read in evidence as follows:

Q. Where do you reside?
A. Milford, Nebraska.
Q. How long have you resided there?
A. About 22 years.
Q. What is your business?
A. Milling and Banking business.
Q. And what firm are you a member of, if any?
A. Of the firm of F. S. Johnson & Co.
Q. And was that firm in business and doing business as bankers and millers in June and July 1886?
A. Doing business then as millers.
Q. You may state if you are the senior member of the firm?
A. Yes, sir.
Q. And the manager?
A. Yes, sir.
Q. You may state if the firm, F. S. Johnson & Co., gave an obligation or note to the Capital National Bank, or to any one for the Capital National Bank in June or July, 1886, for $9,968?
A. No sir.
Q. You would have had knowledge of it if any such transaction took place?
A. Yes sir, I would have had knowledge of it if it had taken place.

473 Q. Did you ever owe that bank such a note, or pay the bank such a note?
A. No sir.

Witness excused.

* * * * * * *

474

George W. Post.

Direct examination.

Read in evidence by Mr. NORVAL as follows:

Q. Where do you reside, Judge?
A. York, Nebraska.
Q. How long have you resided in York?
A. Oh, something over twenty five years.
Q. What is your business?
A. I am a banker.
Q. You may state if you ever knew one E. W. Mosher, or Edwin W. Mosher?
A. Yes sir, I knew him.
Q. You may state where Mr. Mosher resided in the early 90's and latter part of '89 and '88?

A. He resided in York.

Q. You may state if you were acquainted with his financial and property condition and standing in,—commencing with 1890 and up to January 1893?

A. Yes, I was pretty well acquainted with it at that time.

Q. You may state if you know whether or not he was owing obligations at that time, during those years,—well from 1889 up to 1893.

A. Yes I know he was owing some obligations but I couldn't tell how many.

Q. You may state if you know, whether or not Mr. E. W. Mosher was solvent and able to pay his debts from 1890 up to January 1893.

475 A. I think I know, yes sir.

Q. Well, state what his condition was with reference to being able to pay his debts during that time, as to being solvent or insolvent.

A. I think he was insolvent.

Q. Did you know the firm of Stark & Mosher?

A. Yes sir.

Q. Did you know Mr. Stark, a member of the firm of Stark & Mosher?

A. Yes sir.

Q. You may state if you knew his financial condition during the same period that I have interrogated you about as to Mr. Mosher.

A. I have not as intimate a knowledge of his affairs as I had of Mosher's. I knew in a generaly way about him, but I have not as intimate personal acquaintance with his business that I had with Mosher's.

Q. Do you know whether he paid his obligations or not?

(The objections were sustained. No answer.)

Q. Do you know of the firm of Stark & Mosher, and their responsibility?

A. Yes sir, in a general way.

Q. You may state what that was.

476 & 477 A. I think they were irresponsible.

Q. And were you acquainted with one William A. Sharrar, who formerly lived at York?

A. Associated with Mosher there?

Q. Yes, sir.

A. Yes, I knew him.

Q. And did you know him during the period I have been interrogating you about?

A. Yes sir.

Q. Do you know his standing and property conditions during that period?

A. Yes sir.

Q. You may state what it was as to solvency or insolvency.

A. He was insolvent.

* * * * * * *

478

Mr. A. L. Clarke.

Direct examination.

Read in evidence by Mr. NORVAL:

Q. You may state your name.
A. A. L. Clarke.
Q. Where do you reside?
A. In Hastings.
Q. What is your occupation?
A. I am a banker.
Q. With what institution are you associated?
A. The First National Bank.
Q. You are President of that bank?
A. Yes sir.
Q. How long have you been its President?
A. Since its organization in 1881.
Q. And have you been President continuously from that date up to this?
A. Yes, sir.
Q. I will ask you to state if the First National Bank of Hastings, of which you are President, executed to the Capital National Bank of Lincoln, Nebraska, on or about the 20th day of July 1886 a note for the sum of $10,000.00.
A. It did not.
Q. Or at about that time?
A. No sir.
Q. Did the bank, of which you are president, the First National Bank of Hastings, execute to anyone for the Capital National Bank, such a note?

479–502 A. No sir.

Q. Did the First National Bank of Hastings ever execute to the Capital National Bank, or to anyone for that bank, a note for the sum of $20,000.00 during the month of June or July, 1886?
A. It did not.
Q. Did the First National Bank of Hastings, owe or pay to the Capital National Bank any such note?
A. No sir.

Witness excused.

* * * * * * *

503 Testimony of Mr. G. W. SHRECK offered and read in evidence.

Direct examination:

Q. Where do you reside?
A. York.
Q. What is your business at present?
A. I am in the real estate business.

Q. What official position did you hold in York county in 1890 and subsequent and prior?

A. I was sheriff of York county.

Q. How long were you sheriff?

A. From 1888 to 1893.

Q. You may state if you were well acquainted with one W. A. Sharar, who lived in York county?

A. Yes, sir.

Q. Were you acquainted with his financial standing up to 1893?

A. Yes, sir.

Q. You may state if you know whether or not he was solvent, or insolvent?

A. He was insolvent.

Q. And how long had he been insolvent?

A. Oh, for a number of years before that, I don't remember now.

Q. About how long had you known him?

A. I had known him about,—since 1880.

504 Q. And he has been insolvent ever since?

A. He has been insolvent since 1887 anyway.

Q. Did you know one, Mr. Stark that lived there, that was in business with Mr. E. W. Mosher?

A. Arthur M. Stark?

Q. Yes sir.

A. Yes sir.

Q. You may state how long you knew Mr. Arthur M. Stark.

A. I knew him since he came to York county I suppose, about eight or ten years. I knew him from the time he came there until he left.

Q. You knew him for about eight or ten years, now when did he leave there, about how long ago?

A. He must have left there along in 1892; somewheres along there,—from 1890 to 1892.

Q. With reference to the time of the failure of the Capital National Bank, which was on January 21st, or 23rd, 1893, how long had he left before that?

A. Oh, some two or three years before that, is my recollection.

Q. You may state if you knew anything about his financial condition while he resided there in York?

A. That is a pretty hard question to answer "yes" or "no."

Q. The question is, do you know?

A. Yes, sir.

Q. You may state what was his financial condition at that time with reference to solvency or insolvency.

A. He was always considered insolvent.

505 Q. And for how long?

A. I think during the whole time he was there.

Q. You may state if you were acquainted with one Edwin W. Mosher.

A. Yes, sir.

Q. How long did you know him?

A. Oh, I had known him for fifteen years or more.

Q. You knew him from the time he came to York?
A. Yes, sir.
Q. You were there when he came?
A. I think so, yes sir.
Q. And about when did he leave York?
A. He left York in 1893, I think.
Q. Before or after the bank failure, the Capital National Bank failure?
A. It was afterwards, I think.
Q. You may state if you were acquainted with his financial standing and condition from 1890 up to 1893, the time of the failure of the Capital National Bank?
A. Yes sir.
Q. You may state what his condition was as to solvency or insolvency.
A. From the latter part of 1890 to 1893 he was considered insolvent.
Q. From the latter part of 1890 to 1893?

Defendants object as incompetent, immaterial and calling for conclusion. Overruled. Exception.

A. Yes, that is, he was execution proof,—supposed to be.
Q. You haven't known him since then?
A. No sir, not since he left York.
506 Q. Has he ever returned to York, since he went away?
A. Not that I remember of.

No cross examination.

Witness excused.

507 Testimony of Mr. EDWARD HURLBUT, JR., read in evidence.

Direct examination:

Q. You may state your name.
A. Edward Hurlbut Jr.
Q. Where do you reside?
A. Hastings.
Q. How long have you resided there?
A. About two years.
Q. Are you acquainted with one Charles W. Mosher, formerly president of the Capital National Bank at Lincoln?
A. Yes sir.
Q. Have you ever been associated with him in any business?
A. Yes, sir.
Q. Were you associated with him in connection with a company commonly known as the Western Manufacturing Company?
A. I worked for Mr. Mosher, yes sir.
Q. When did that commence to exist?
A. In 1884 or 1885, I believe.
Q. When did it cease to do business?
A. We ceased to be in active business in 1888 or 1889.

Q. You may state who comprised that company, or firm.
A. C. W. Mosher.
Q. Was there anyone else?
A. No sir.
Q. What was the nature of your interest in the company?
A. I worked on a salary and a per cent of the profits.
Q. Did the company during its existence execute any notes payable to the Capital National Bank?
A. Yes sir.
Q. Who signed those notes for the Western Manufacturing Company?
508 A. I did.
Q. You may state what amount of notes the Western Manufacturing Company was owing the Capital National Bank at the time it ceased doing business in 1888 or 1889, when you say it did cease to do business?
A. My judgment would be,—I have no way of knowing definitely, but my judgment would be that there was from $25,000 to $35,000 worth of old notes.
Q. Did they make any notes, or did you on behalf of the company execute any notes to the Capital National Bank after the Western Manufacturing Company ceased to do an active business?
A. Yes, sir.
Q. Now you may state how long they continued, or how long you continued on behalf of the Western Manufacturing Company to execute notes to the Capital National Bank?
A. Until the failure of the bank.
Q. Until the failure of the Capital National Bank?
A. Yes, sir.
Q. You may state, if you know, how many notes, or the amount of notes of the Western Manufacturing Company of which you were manager, were held by the Capital National Bank, or had been rediscounted by the Capital National Bank, or both, at the time of its failure in January, 1893?
509–521 Q. For what amounts or denominations were those notes that you signed as manager of the Western Manufacturing Company, which were executed to the Capital National Bank?
A. They were mostly $5,000.00 each.
Q. Do you know what became of the notes after you executed them?
A. I do not.
Q. What did you do with the notes?
A. I gave them to Mr. Mosher.
Q. You may state if you know what became of the notes that those new ones were given to take up, or renew?
A. Sometimes when the notes would be renewed he would give me the old notes, but mostly he would not.
Q. How often do you remember that Mr. Mosher gave you the

old note when you executed for the company a new one in place of it?

A. I couldn't state how often. I know he gave me some, and sometimes he would tell me these notes were rediscounted.

* * * * * * *

522 Q. When this company was organized what capital if any did Mosher put into the company?

A. Why we borrowed from the Capital National
523 & 524 Bank $25,000.00

Q. Was that all that was put into the company?

A. That was all that was put in at that time.

Q. In other words did the company begin its existence on borrowed capital?

A. Yes, sir.

Q. Wholly.

A. Yes, sir.

Q. Now was the company financially successful or did you lose money?

A. We didn't make any money.

Q. Did you lose any money?

A. Yes, sir.

* * * * * * *

525–536 Redirect examination.

Read as follows:

Q. Do you know what was done with the notes you signed for this company after you executed them and delivered them to Mr. Mosher?

A. No, sir.

Q. Do you know whether they were issued as renewals of other notes or put into the bank as original paper?

A. I don't know only what I was told, that is all.

Q. You don't know whether they were used as rediscounts or otherwise, do you?

A. I do not.

Q. You made notes whenever requested to do so by Mr. Mosher?

A. Yes, sir.

Witness excused.

* * * * * * *

537 H. J. WHITMORE produced as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct examination.

By Mr. THOMAS:

Mr. ROSE: We will concede the qualifications of the witness as an accountant.

Q. State your name?

A. H. J. Whitmore.

Q. And your place of residence, and age?

A. Lincoln,—53.

Q. How long have you resided in Lincoln, Nebraska?

A. Since '81.

Q. What is your profession or occupation?

A. I am an attorney; also I have been a national bank examiner, and do some work as an accountant.

Q. You were on the witness stand in the trial of this case in 1902 in this court?

A. Yes, sir.

Q. How long were you a national bank examiner?

A. Four years; from 1894 until '99,—February '99.

Q. Ever act as Receiver for any national banks that had failed?

A. I was temporary receiver of a number of banks, and perman-t receiver of the First National Bank of Neleigh from 1899 to 1901.

Q. You may state — you made any examination of the books of the Capital National Bank of Lincoln, Nebraska?

A. I made an examination of the books of the bank in 1902 beginning I think in *in* April, 1902, and continuing for some weeks; and then in the last month or six weeks I have gone over the books to some extent.

538 Q. And have you made an examination of the books of the Marsh National Bank?

A. Such books as we had access to.

Q. And have you made an examination of the books of the Marsh Brothers and Mosher company?

A. To some extent. The ledger,—the general ledger.

Q. About how much time have you spent, did you think, all together in examining the various books of the three institutions, to which I have referred?

A. Oh, I couldn't say as to that,—about fifteen days recently, and probably six weeks eight years ago.

Q. Were any of the books of the Capital National Bank and its predecessors, the Marsh National Bank, and Marsh Brothers and Mosher in your custody a part of the time?

A. The books were brought up here in 1902 at the former trial, and the Comptroller through Mr. Lynch, an employee of the office, placed me in charge of the books during that trial; afterwards I had nothing to do with them; in fact I know that Mr. Jones was made custodian of the books after the trial ended.

Q. After they went out of your custody they were turned over to the custody of Mr. Jones, you mean?

A. Yes, sir.

Q. Now, Mr. Whitmore, have you made an examination of the Ledger of Marsh Brothers Mosher and company, and also of the Ledger of the Marsh National Bank, to ascertain what relation those books had to each other, in the manner—or as to whether or not one is the successor of the other?

A. I have.

Q. And are those books in court at this time?

A. Yes, sir.

Q. And the book identified here as Exhibit 9 by the reporter is that the ledger of the Marsh Brothers and Mosher company?

539 A. Yes, sir.

Mr. THOMAS: I ask the reporter to identify this record as Exhibit X-9.

Book so marked.

Mr. THOMAS: I ask the reporter to identify this book of the Marsh National Bank as Exhibit X-10.

Book so identified.

Q. Now are the books referred to here as Exhibits X-9 and Exhibit X-10, the two ledgers to which you have just referred?

Q. You may examine them, if you wish. (Witness examines records referred to.)

A. I will say that Exhibit X-9 is the General Ledger of Marsh Brothers Mosher and Company, and Exhibit X-10 is the General Ledger of the Marsh National Bank.

Mr. THOMAS: In the depositions that were taken before L. A. Ricketts, the notary identified these exhibits as,—our Exhibit X-9 here, he identified as 9, and our exhibit X-10 here, he identified as Exhibit 10, and the signature of the notary appears under each identification.

Mr. THOMAS: The plaintiffs then offer in evidence the following on the first page of the ledger referred to as Marsh Brothers Mosher & Company, and our Exhibit X-9 to-wit:

"Ex. 'A9'

Exhibit '9'

L. A. Rickets, N. P."

540 Mr. THOMAS: We offer in evidence the following portion contained on Page 1 of Exhibit X-10, being identified by the notary and the identification of the notary, Mr. Rickets before whom the depositions referring to these books were taken, and we ask that it be marked Exhibit "X10."

"Exhibit 10

Q. Now you may state, Mr. Whitmore, what you find by an examination of these two ledgers as to the relation they bore to each other.

A. Exhibit X-10 the first entries and corresponding accounts *is* a continuation of the entries in the Marsh Brothers Mosher and Company ledger, Exhibit X-9.

Q. You may state in a general way if the account- as they appear on Exhibit x-9,—the balances have been carried to ledger x-10.

A. The balances do not now appear to be the same.

Q. In what particular?

A. The account of Bills Receivable, and account called Collection Account, the Omaha National Bank account and the Bills of Exchange account.

541 Q. With reference to the remainder of the accounts, state if the balances as they appeared at the close of *Eld*ger Exhibit X-9 were carried forward as balances into Ledger X-10.

A. They were.

Q. In other words, did the assets and liabilities as they appeared in ledger, Exhibit x-9, become and were carried over as the assets and liabilities on ledger X-10 with the exception of the items you have referred to, and were shown on ledger x-10 at the beginning of the business which that ledger reflects?

A. Yes, sir.

Mr. THOMAS: I will ask the reporter to identify the first Journal of the Marsh National Bank as Exhibit x-1.

(Book so identified.)

Q. Now Mr. Whitmore, in referring to the several accounts which you say do not now appear to be the same in the two ledgers, that is, where the balance at the close of Ledger Exhibit X-9 as not shown to be the same as the balance carried over at the beginning of Ledger X-10,—you may state which is the first one that you find is not the same.

A. The first one is the account that is known as the Stock & Bond account.

Q. Now in the ledger x-9 how does that appear at the close of that ledger?

542 A. $30,540.00.

Q. At what page on the ledger does that appear?

A. Page 639.

Q. Of Exhibit x9?

A. Of exhibit X-9.

Q. What does that account show as the amount of stock and bonds owned at the close of that ledger account?

A. $30,540.00.

Mr. THOMAS: I offer in evidence Exhibit "aa" being Page 639 of this ledger Exhibit X-9.

Exhibit "aa" received in evidence as follows:

Stock & Bond Account.

1882.				
Jan.	6	370	7500.	
Mar.	15	428	300.	15300.
Apr.	21	461	7500.	
			15300.	15300.
July	1st Balance		15300.	
	24	639	7500.	
Aug.	23	565	30.	
Sep.	4	575	30.	
Dec.	4	61	60.	
	29	101	7500.	
May	9	321	60.	
Jun.	18	387	60.	
			30540"	

543 & 544 Q. Now to what page of the ledger, Exhibit x10 is that transferred?

A. Page 7.

Q. How does the balance at the beginning of that account appear, Mr. Whitmore,—in what amount?

A. 540.

Q. You may examine that account and state if there appears to have been any changes or erasures in the amount of the red ink balance.

A. The paper shows indication of erasure.

Q. At what place?

A. It shows the erasure of the whole of the original entry that was placed there.

Q. In how many columns?

A. In thousands, tens of thousands, and the other columns.

* * * * * * *

545 Q. Now referring again to this account of Stocks & Bonds to which we have referred, I will ask you if the General Balance book, which has been identified as Exhibit X-18, contains an entry with reference to this same account?

A. It does.

Q. And where does that appear?

A. On the fourth line of the first column; the column headed "Monday, July 2, 1883. The opposite page is numbered "1". There is only one side of the leaf paged.

Mr. THOMAS: I will ask the reporter to identify that line.

(Line Identified as Exhibit x-1030.)

Q. Now does that same account appear at pages 2, 3, 4, and 5 of this same balance book?

A. Yes sir, it does.

Q. Now at what amount does this balance book just referred to show the account of Stocks & Bonds?

A. It now shows at the opening of the account $540.00.

546 Q. Under what date does it appear that way, Mr. Whitmore?

A. Under the head of Monday, July 2, 1883.

Q. You may examine that entry under that date and state if you can tell whether or not there has been any erasures or changes in the amount of this account in this book.

A. I examined this account eight years ago and found that the original entry had been changed by erasure, and that erasure appears every day from the opening of this book until the date marked the 27th of July.

Q. And in what columns do those erasures appear, with reference to hundreds, thousands or tens of thousands.

A. Thousands and tens of thousands.

Q. And under the date of Monday, July 9, 1883, I will ask you

to examine that and state what appears there in the,—opposite the account in Stocks and Bonds account.

A. Under date of Monday July 9th, the item appears as "0540".

Mr. THOMAS: We offer in evidence the Exhibit X-1030, to include the headings, giving the day of the week and the month date and year above each item of the Stocks & Bonds account.

Entry offered is received and read in evidence.

(EXHIBIT X-1031.)

Stock- & Bonds a/c.

Monday July 2/83
540
Friday July 6/83.
540
Tuesday July 10/83
1081.66
Friday July 13/83
1666.74
Monday July 16/83
1666.74
Thursday July 19/83
1753.95
Monday July 23/83
1753.95
Thursday July 26/83
1946.06
Monday July 30/83
1946.06

Tuesday July 3/83
540.
Saturday July 7/83.
540
Wednesday July 11/83
1081.66
Saturday July 14/83
1666.74
Tuesday July 17/83
1666.74
Friday July 20/83
1753.95
Tuesday July 24/83
1946.06
Friday July 27/83
1946.06
Tuesday July 31/83
1946.06

Thursday July 5/83
540.
Monday July 9/83
0540
Thursday July 12/83
1081.66

Wednesday July 18/83
1666.74
Saturday July 21/83
1753.95
Wednesday July 25/83
1946.06
Saturday July 28/83
1946.06

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Q. Now Mr. Whitmore, I will ask you to state if you are a
to tell as an expert about when those erasures were made, and g
your reasons for your conclusion.

A. I wouldn't attempt to state the hour and minute, or possib
the day when those changes were made, but the book shows that t
entries were originall- made a certain amount. That went on un
about the 27th of July when the erasures ceased, and all the accoun
where the charges were made appear the same way. The conclusio
is that the entries were made correctly when they opened the book
and that after nearly a month they concluded that they desired
make a change, and they did it in this way by erasing those amoun
and transferring to other accounts.

* * * * * * *

548 Q. Now Mr. Whitmore, from where are the entries tha
appear on the ledger of the Marsh National Bank taken, tha
is, what kind of entries does that ledger contain and where do the
come from?

A. Well the entries upon the ledger are supposed to come from
the Journal.

549 Q. Is the ledger a book of original entry?

A. The ledger is not a book of original entry.

Q. And can an entry properly appear upon the ledger that is not
taken from the journal?

A. Well in transferring from one ledger to another, of course the
opening entries on a ledger would be made without reference to
the Journal; the transfer of the balances.

Q. That would be a mere transferring of balances which are in-
dicated in red ink?

A. Yes, sir.

Q. But after that transfer has been made from one ledger to
another then can an entry properly appear on the ledger that is
not taken from the Journal?

A. No, except as to cash, but the cash in a bank Journal is merely
the balance to make the two sides agree.

Q. That is the Cash Journal never contains any entry that them-
selves are written out as cash?

A. No sir.

Q. But the balance at the end of the day is simply assumed to be
cash.

A. The difference between the debit and credit sides of the Jour-
nal is supposed to be the cash on hand.

Q. Now have you examined the Journal of the Marsh National
Bank, identified by the reporter as Exhibit X-1, to see if there is
any entry in that Journal to justify the changing of the Stocks &
Bonds accounts from $30,540 to $540?

A. I have.

Q. And what do you find?

550 A. I found no foundation in the Journal for making
any change in the account.

Q. Now, Mr. Whitmore, I will ask you to state what you found

with reference to the account of Bills Receivable as it appears on the ledger of the Marsh National Bank, identified as Exhibit x-10?

A. I found that changes were made in the account the same as in the Stocks & Bonds account.

Q. And does that account appear on the Balance Book to which you have just referred?

A. Yes sir, it does.

Q. Where does it appear on the Balance Book, Exhibit x-18?

A. The seventh line from the top.

Q. What page?

A. Page 1.

Q. And how many days does that change occur?

A. From the 2nd of July, 1883 to the 27th of July, 1883.

(Exhibit X-1031 Identified.)

Mr. THOMAS: We offer the following portion of Exhibit X-18, namely, the line indicated as X-1031, as it appears on pages 1, 2, 3, 4 and 5, together with the headings and the dates at the top of the pages.

Entries offered received and read in evidence. (Exhibit X-103.)

B/R

Monday July 2/83
278,029.33
Friday July 6/83
292,445.75
Monday July 9/83
298,839.41
Thursday July 12/83
299,650.41
Monday July 16/83
291,938.08
Thursday July 19/83
301,429.69
Monday July 23/83
300,183.08
Thursday July 26/83
297,973.08
Monday July 30/83
297,819.

(EXHIBIT X-1031.)

Tuesday July 3/83
286,835.30
Saturday July 7/83
298,108.16
Tuesday July 10/83
299,420.41
Friday July 13/83
293,155.01
Tuesday July 17/83
292,623.08
Friday July 20/83
301,260.08
Tuesday July 24/83
300,908.08
Friday July 27/83
297,044.
Tuesday July 31/83
298,194.00

Thursday, July 5/83
287,250.30

Wednesday, July 11/83
299,445.41
Saturday July 14/83
291,357.66
Wednesday July 18/83
300,277.69
Saturday July 21/83
300,920.08
Wednesday July 25/83
300,073.08
Saturday July 28/83
297,694.00

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Q. I will ask you, Mr. Whitmore, what changes appear to have been made on the Balance Book under the dates just referred to.

A. Tens and hundreds of thousands changed.

Q. And continues that way for how many days?

A. On up to the 27th.

Q. Now I will ask you to state if the accounts on the Balance books for these various dates balance?

552 A. Yes, sir, the assets and liabilities equal each other.

Q. And do you find any other changes having been made,—erasures or changes made in any other accounts except in Stocks & Bonds and Bills Receivable?

A. I think those two were the only ones that the changes were made in.

Mr. Rose: To make changes in any other way, it would have thrown it out of balance.

A. If they hadn't added to some other account what they took out of one, it would.

Q. Now calling your attention to the transfer of the ledger account, Bills Receivable, from the Marsh Brothers, Mosher and Company ledger, to the ledger of the Marsh National Bank, I will ask you if there appears to have been any change in this account as it appears on the Marsh National bank ledger?

A. The ledger shows a change has been made in the amount.

Q. In what column?

A. Well it is the column of the amounts on page 15,—the left hand column.

Q. Does that appear on page 15 of Exhibit X-10?

A. X-10, yes sir.

Q. And does the balance appear to have been changed on page 16 of the same account?

A. The balance brought forward is changed.

Q. Now you may state, Mr. Whitmore, what effect those changes had as to these two accounts, the Stocks & Bonds account and the Bills Receivable account?

553 & 554 A. The Stocks & Bonds account appears on the Marsh National Bank books as thirty thousand dollars less, and the Bills Receivable as thirty thousand dollars more than they appeared on the books of Marsh Brothers Mosher and Company.

Q. Now have you examined the Journal of the Marsh National Bank on the dates on which these changes appear to ascertain if there was any entry upon the Journal that would justify a change in the amount of Bills Receivable to the amount of this $30,000?

A. To what date do you refer?

Q. From July 2nd until the 27th,—as far as the changes occur.

A. I am unable to find anything on the Journal of the Marsh National Bank which would justify a change of the amount in these two accounts.

* * * * * * *

555 Q. And how was the transfer made in this particular bank, when it was made,—the Marsh National Bank?

A. Apparently it was simply a transfer of the balances from one ledger to a new ledger, and then later on these balances were changed for some reason and the accounts shifted.

Q. Now have you examined the account of stocks and bonds as it was carried on the ledger of Marsh Brothers, Mosher & Co.?

A. Yes, sir.

Q. To escertain some of the items that entered into it to make the balance of $30,450?

556 A. I have.

Q. You may state what items entered into that account.

Q. Before you answer that question. From what book did you get that information?

A. From the ledger of Marsh Brothers Mosher & Company.

Q. The one that is in court here at this time?

A. Yes sir, Ledger No. 1, page 639.

Q. Now you may state.

A. I can't give the exact amount of $30,540.00 as it appears upon the books of Marsh Brothers Mosher & Company, but examining that account, the stocks and bonds account, and what was known as the C. W. & W. W. Marsh account on the same ledger, I find that at different dates in 1882, there were four items of $7500.00 each that went into the stocks and bonds account and were credited to this W. W. Marsh, or Marsh Binder Manufacturing Company, on page 9 of the Ledger, and the C. W. & W. W. Marsh account appears on page 8 of the same ledger, and the only thing I can say is that that Stocks & Bonds account seemes to be made up of items transferred from these two accounts,—Marsh Binder Manufacturing Company, and C. W. & W. W. Marsh. The Journal of Marsh Brothers Mosher & Company has never been in my possession and I have never had a chance to examine that.

557 Q. Mr. Whitmore, have you examined the books of the Marsh National Bank to ascertain if they disclose an account with Donnell, Lawson & Simpson?

A. Yes, sir.

Q. You may state what the books show, giving the dates.

A. I don't know whether I understand that question, Mr. Thomas.

Q. I asked you if you had examined the books of the Marsh National Bank with reference to whether it contains an account with Donnell, Lawson & Simpson.

A. I said I had.

Q. In what books does that appear?

A. It appears in the General Ledger, and from time to time in the Journal of the Marsh National Bank, and also in the——

Q. Are those books in court?

A. Yes, sir.

Q. Now state what the books show with reference to that account.

A. I find that they had a running account with Donnell, Lawson & Simpson of New York carried on their General Ledger and from time to time in their Journal and also as an item in their Daily Balance Book. From the General Balance book that account was ap-

parently one which they used as a checking account for the
558 purpose of drawing drafts upon New York.

Q. Does that account appear in——

A. Ledger 1, page 159.

Q. That is the Exhibit referred to as X-10?

A. It is in Exhibit X-10 at page 159.

Q. The account begins at page 147 and extends to page 160?

A. That was the account; it includes page 159.

Q. You may state what that account discloses as to the indebtedness of Donnell, Lawson & Simpson to the Capital National Bank?

A. It doesn't disclose anything about indebtedness to the Capital National Bank.

Q. I mean the Marsh National Bank.

A. It shows that there were numerous debit entries made, charges against the Donnell, Lawson & Simpson account, and also a good many credits to their account, and the account was finally closed out.

Q. How was the account finally closed out on the books to which you have referred?

A. On the 9th of May, 1884, the Balance Book shows an erasure in this account—changes of the figures in the thousands and tens of thousands columns—also on Saturday May 10th—those erasure and changes continue until the 19th of May and then there is a credit on the ledger of $10,000 to this account, which makes the Balance Book then agree with the Ledger. On the 19th of
559 May, the Chemical National Bank of New York is charged with $10,000 and Donnell, Lawson & Simpson was credited with $10,000. On the 26th of May the Commercial National Bank of Chicago is charged with $10,000 and Donnell, Lawson & Simpson credited with $10,000. On the 27th of May Donnell, Lawson & Simpson are credited "To balance account" with $8,174.70 and on that day a note of C. W. Mosher, or what purports to be a note,—No. 5629, is put in the bank for the same amount $8,174.70, and that balances the account.

* * * * * * *

560 Q. Now I will ask you to state if you have examined the books of the Marsh National Bank and the Capital National Bank to ascertain if any notes, or Bills Receivable of Donnell, Lawson & Simpson entered into the assets of either of those banks?

A. I have.

Q. And have your prepared from the books a schedule showing the amounts and numbers of notes, and dates when taken, and when indicated as paid by the books?

A. I think I have a correct ledger account of the Bills Receivable of Donnell, Lawson & Simpson, as they appear in the books of the Capital National Bank.

Q. And from what books was that statement or schedule compiled?

A. From the Journals, Discount Registers, and the Discount Blotters.

Q. Can you give the result of that investigation in schedule form?
A. Yes, sir.
Q. You may state your conclusions as to what notes were taken in, as to the notes of Donnell, Lawson & Simpson, giving the date and the number of the note and the amount.

561 A. September 8th, 1884, I found a note marked Donnell, Lawson & Simpson, No. 5629, for $8,338.20 was entered as paid. This number refers to a number of the Marsh National Bank; when the Capital National Bank was organized and took over the business of the Marsh National Bank they apparently continued the same number of notes the same way as the Marsh National had, and if you refer to the Journal,—the first Journal of the Capital National, you will find that the first note is the next number in numerical order after the last one taken in the Marsh National, and this note I found was taken by the Marsh National Bank and apparently transferred over with the assets to the Capital National Bank.

At the time that note was paid on September 8th, 1884, a new note, No. 6526 for $8379.05 was taken. Then on October 14th 1884, No. 6841 for $5,084.76 was taken, and the previous number 6526 was paid, and also a Number 6842 for $4695.79 was taken in. That left in the bank then $9,780.55 of the Donnell, Lawson & Simpson paper. On May 7th, 1885 two notes were taken, Numbers 8448 and 8449, the first one for $9391.46 and the other one for $9351.57. The amount of the first note was on this day,—the exact amount,—credited to the Commercial National Bank of Chicago, and the amount of the second note was credited on the same day to the Chemical National Bank of New York. That made $28,563.68 of paper of Donnell, Lawson & Simpson that was in the Capital National Bank on May 7th, 1885. On July 13th, No. 8449 and No. 8448 were marked as paid. I don't know what or how they were paid, but on the same day what was known as the Bills of Exchange Account was charged with $16,358.15.

Then on July 20th a note, number 9133, $9391.57 was taken being the exact amount of No. 8449 which had been paid on the 13th of July, and on that day Bills of Exchange were credited with the same amount they were charged with on the 13th of July, $16,358.15.

562 Then on July 24th, No. 9157 for $9,391.56 was taken, being the same amount as No. 8448, marked paid on the 13th of July. On August 13th, 1885 No. 9157 and No. 9133, the last two notes and the two earlier notes, No. 6841 and No. 6842 were all marked as paid. No. 6842 was paid for $388.98 more than it was taken for apparently; whether they added interest at some time I don't know, and on this day No. 9356 for $10,200 and No. 9357 for $20,300 were taken. In other words $28,952.66 were credited as paid, and $30,500 charged as taken on that day. This left a balance of paper apparently of $30,111.02, but as a matter of fact they had notes amounting to $30,500. This difference of $388.98 makes the difference in the balance.

On March 2nd, 1886—that $30,000 continued then until, March 2nd, 1886 when No. 9356 was paid in part and the sum of $5,000

was credited. On March 3rd, the balance of this number $5.200 was marked as paid, and the same amount, $5,200 was charged to the Chemical National Bank of New York. That left $19,911.02 of paper, according to the ledger account, but really it was over $20,000 because of this credit.

December 27th, No. 30289 for $9300 was entered as taken and Stocks & Bonds and Warrant account was charged with the same amount, $9300., and then this note was transferred to another Discount Register, and given a different number when it was transferred. In fact it had two other numbers. When they transferred from one part of the Discount Register to another they sometimes changed the number.

On the 28th of December, 1886 No. 9357 for $20,300 was paid—marked as paid—and the same amount on that day was charged to the Chemical National Bank of New York, $20,300. That left $8,911.02, according to the ledger balance. On June 17th, 1891 a note for $9300 was marked paid. That would be all of the notes and would leave an overdraft of $388.98. The notes had been over-
paid that amount, but that is merely the ledger account, the
563 way I have it, because I couldn't find anything on the Journal to justify this charge, or addition of $388.98. Now if this was put on the other side the account would balance. These are all the transactions of paper of Donnell, Lawson & Simpson that I was able to find on the books of the Capital National Bank.

Mr. ROSE: What date were they finally eliminated from the books of the bank?

A. June 17th, 1891.

Q. What would that make the total of Bills Receivable that passed through the bank?

A. $103,864.06 on the one side, but adding the $388.98 would make the total $104,253.04.

Mr. ROSE: What is the significance of totaling that?

A. I simply make the totals to prove my work when I get through.

Q. That has no relevancy to the highest amount that was carried by the bank at any time?

A. The highest amount was $30,500 at any one time.

Q. Now referring to the charge of $10,000 to the Chemical National Bank and credit to the account of Donnell, Lawson & Simpson, I will ask you if you have examined the books of the bank under date of May 19th, 1884, to ascertain whether the books themselves indicate that this charge to the Chemical National Bank was the source of the credit to Donnell, Lawson & Simpson?

A. I have.

Q. And does that appear on page 533 of the Journal under date of May 19th, 1884, and on page 358 of the ledger?

564 A. On page 358 of the ledger of the Marsh National Bank, in the account with the Chemical National Bank of New York, under date of May 19th, 1884 was a charge of $10,000 which was marked "D. L & S", and on the Journal for the same day at page 533 is a charge to Chemical National Bank, marked "D. L & S" $10,000.

Q. You may state what in your opinion that entry indicates, "D. L. & S"?

A. D. L. & S., I should say refers to Donnell, Lawson & Simpson. On page 532 of the Journal of the same day, May 19th, Donnell, Lawson & Simpson, written out in full, was credited with $10,000, but the source of the credit is not indicated on the Journal.

Q. Do you find on that same page of the Journal, Page 533 another charge to the Chemical National Bank, marked the same way "D. L. & S"?

A. Yes, sir.

Q. And on the same page of the Journal is there another charge to the Chemical National Bank of $3,048.88 Marked "D. L. & S"?

A. Yes, sir. And also one of $2,000 on the next line below.

Q. Now, Mr. Whitmore, I will ask you if in the Ledger of Marsh Brothers, Mosher & Company, there wasn't contained an account known as "Collection Account"?

A. Yes, sir.

Q. What was the amount of that as carried on the Ledger of Marsh Brothers Mosher & Company

565 A. $14,573.32.

Q. Was that account transferred to the Ledger of the Marsh National Bank?

A. Yes sir, it was.

Q. In what way and for what amount?

A. The same amount.

Q. After it was transferred to the books of the Marsh National Bank, was it also sometimes known as the account of Marsh Brothers Mosher & Company?

A. It was called "Collection Account, Marsh Brothers, Mosher & Co.", is the heading on the first page of the Ledger, and then on subsequent pages it was "Coll. Marsh Brothers, Mosher & Co", two pages, and on the third and fourth page it was "M. B. M & Co. Coll. a/c".

Q. Was that a debit or credit account as it appears on the books, at the time of its transfer?

A. It appeared as a resource of Marsh Brothers Mosher & Company, and also of the Capital National Bank.

566 Q. Of what amount?

A. $14,573.32.

Q. Were there any changes made in that account subsequent to its transfer to the ledger of the Marsh National Bank?

A. There were no changes made in the ledger account, but it did not appear upon the General Balance Book in the same amount as it appeared upon the ledger.

Q. Explain the discrepancy or difference.

A. It was $10,000 less on the General Balance Book than it was upon the Ledger, and apparently at the same time the figure "1" was erased, changing it from $14,573.32 to $4,573.32.

Q. In what book do those changes appear?

A. In the General Balance book.

Q. The book you have before you in court?

A. Yes, sir.

Q. Now did that throw the General Balance book out of Balance?

A. No the books are not out of balance.

567 Q. What other account then was changed to keep them in balance?

A. Apparently no change made in the nature of an erasure in any account, but the balance of the Omaha National Bank on that day seems to be $10,000 more than it was transferred at. Page 297 of the Ledger of the Marsh National Bank, the balance transferred was $2,436.82 and on the General Balance book the balance is $12,436.82.

Q. You refer to the account of the Omaha National Bank, do you, Mr. Whitmore?

A. Yes, sir.

Q. Does that indicate that $10,000 was deducted from the Collection Account, so-called, and $10,000 added in the account of the Omaha National Bank?

A. One account is $10,000 more than it appears on the Marsh Brothers, Mosher & Co. book and the other is $10,000 less, and there is an erasure of the figure in the tens of thousands column in the collection account as it appears on the Balance book.

Q. Does the Journal indicate any entries which would justify the decrease in the Collection Account, or the increase in the Omaha National Bank account at the time these changes occurred?

A. It does not.

Q. What would that indicate—would that indicate that there was any legitimate transaction of the bank which would

568 increase the one account and decrease the other in that amount?

A. Well it would indicate that there had been a shifting of the balances?

Q. What do you mean by that?

A. That is that they had changed the amount that they had in the Omaha National Bank and increased that amount, and reduced the amount they had in Collection Account.

Q. But the point I want to get at is this: Where there is nothing upon the Journal showing that anything was sent to the Omaha National Bank, would it indicate that they had actually sent that amount in money, or anything of value?

A. There is nothing on the Journal to indicate any reason for the changes.

Q. You mean there is nothing on the Journal to indicate that the Omaha bank got anything of value?

A. There are no entries at all with reference to this transaction on the Journal.

Q. What would they indicate to an expert bookkeeper as to the justification of those changes?

A. The Ledger balances of those two accounts is different from the balances carried on this General Balance book; this is supposed to be a correct copy of the balances that appear upon the ledger. Now

the balances do not agree. One or the other then is a false balance, and this one shows upon its face that it has been mutilated.

The COURT: It shows a decrease of the Bills Receivable to the extent of $10,000 and an increase of the credit in the Omaha National Bank of that amount, with nothing in the Journal to justify that entry?

569 A. Yes sir. Not the Bills Receivable account but the Collection Account. It decreases the amount in the Collection Account and increases the amount of their credit in the Omaha National Bank, and there is nothing in the Journal to indicate it.

Q. The fact that the Journal doesn't indicate it,—what would you say whether there was anything to indicate it or justify the increase in the Omaha Bank?

A. I should say there was no transaction at all.

Q. What was that Collection Account so far as you have been able to ascertain from the books?

A. I don't know what that Collection Account is. It is called Collection Account, Marsh Brothers Mosher & Company. It shows an amount of money paid out, apparently, on an investment of the Capital National Bank. Now in a Collection Account there couldn't very well be any investment. In the ordinary account if a bank receive an item for collection it is entered on its books,—its Collection Registers, which are not a part of the books of account of a bank. For that reason if they receive any money on account of that collection they will buy a draft from the bank and remit to their customer, less the exchange, or they will credit it to the account of the customer, and in that case it would be a liability of the bank. It would be a deposit, and I have never found a bank that had an account called a "Collection Account" where they had paid out more money than they had received. Banks don't ordinarily pay out their money on collections until they collect the money.

570 Q. Could an actual Collection Account be really an asset of the bank, or legitimately overdrawn?

A. It could not, if properly kept. If paper was sent to a bank and they bought it, then it would be paper of the bank, and it would be in some other form.

Mr. ROSE: You don't know what the account was, then as I understand you?

A. No, I don't. I can't conceive what it was.

Q. Mr. Whitmore, was there carried on the books of the Capital National Bank an account known as Bills of Exchange?

A. Yes, sir.

Q. Where does that appear?

A. It appears upon the ledger of the Capital National Bank,—the different ledgers, and also on the Journal at various places.

Q. I will ask you if you made an examination of the books of the Capital National Bank with reference to this account?

A. I have examined it, yes, sir.

Q. Have you examined it particularly with reference to an entry on December 14th, 1885?

A. Yes, sir.

Q. Was there a charge to that account on that day?

A. There was charged to that account on December 14th, 1885 an amount $29,968, Journal B pages 204 and 5 are the day's transactions.

Q. And are you able to ascertain by an examination of the Bills Receivable that day what items entered into that amount?

571 A. Well I find on that day a number of notes of the Marsh Harvester Company were marked paid and Bills Receivable account credited with the amount; the aggregate shows $29,968 of Bills Receivable paid, and the same amount charged to Bills of Exchange on that day.

Q. That is, the Bills Receivable account is decreased and Bills of Exchange increased that amount?

A. Decreased and increased, yes, sir.

Q. Now what items comprise this item of $29,968 of Bills Receivable,—that is, have you investigated to determine that by an examination of the books?

—. —— ——.

Q. And are the books from which you ascertained that here in court?

A. Yes, sir.

Mr. Rose: What do you mean by here in court?

A. They're here in the court room.

A. No. 10418	Marsh Binder Company	$4,668.
10461	Marsh Binder Company	5,000.
10475	"	2,500.
10502	"	2,500.
10511	"	5,000.
10519	C. W. & W. W. Marsh	3,600.
10525	Sycamore Marsh Harvester Company	2,000.
10529	Marsh	2,500.
Total		$29,968.

Q. Now you may tell the court what the nature of the Bills of Exchange account is, if you can determine from the books.

572 A. I don't know what it was. It might have been what is called an "Items in Transit" account that some banks keep, where they receive checks upon banks, country banks for instance with which they have no regular account, and they have no correspondent to whom they can send that item and receive credit directly, so they send it direct to the bank on which it is drawn; they take it as a cash item, enter it on their books and have a register for that purpose, and then it goes into the total of what they call their "Items in Transit," and when they get returns from that item, they enter it in this account as a payment on that particular item. Now some small banks carry such items as cash items, that is, they put a ticket in the cash drawer and carry that ticket until the returns come for the payment of the item, but in the larger banks they have an account that they call "Items in Transit" or

"Transit Account" or some similar name, but I never found one that was called a Bills of Exchange account.

Q. Does this so-called Bills of Exchange account appear to be of the nature which you have indicated, that is, would you say from the items that are charged there that it was such an account,—the size of the items?

A. Well from some of the entries in the account it looks like an account of items that they have taken as I have suggested, because there are entries in it every day, both debit and credit entries, and usually in varied amounts, small amounts and odd amounts. Sometimes there were several items put in together—small amounts, that would indicate that it was an account intended to keep these cash items in, but in this case of $29,968 of Bills Receivable paid, and then the same amount is charged up to Bills of Exchange, knowing what I know about the Marsh Harvester Company, why I would say it was used to conceal transactions in part; it may have
— part legitimate but part of it was for the purpose of con-
573–575 cealing things that they didn't care to have shown.

Mr. ROSE:

—. It would not eliminate any of the assets?

A. No, sir.

Q. You say Bills of Exchange account was charged with $29,968 in one sum?

A. Yes, sir.

Q. And that would indicate that it was not used to indicate items in transit as you have explained?

A. Well it might indicate items in transit, even if they had one large amount.

Q. But that is not likely?

A. Oh, they usually have a Register in which they enter each of those items.

Q. Did you find that this Bills of Exchange account is later credited with this identical amount?

A. Now on July 20th, 1886, Journal "B," pages 636-7 I find Bills Receivable taken, a total that day on the Journal of $46,853.56, and among them were notes as follows:

No. 19947,	First National Bank, Hastings	$10,000.
20613,	First National, Kearney	10,000.
18578,	F. S. Johnson & Co	9,968.

These three notes aggregate $29,968.00 and Bills of Exchange is credited on that day with $19,968, and on July 29th, with $10,000, which brings back the same total of credit to the Bills of Exchange account as was charged on December 14th, 1885.

* * * * * * *

576 Q. Are the books to which you refer in court at this time?

A. Yes, sir.

A. The First National Bank of Hastings, the note appears on the Register as The First National Bank of Hastings. The First Na-

tional Bank of Kearney the note appears on the Register as the First National Bank of Kearney, and the F. S. Johnson & Company note appears as F. S. Johnson & Company on Bills Receivable Register "B." Now on the payment of these notes, Journal "B," page 756, on the 11th line from the top, shows No. 18,578, part, $2,000, and on that line between the number and the amount the words "Syc. M. H. Co., was written in in lead pencil. The name of the maker of that note is not otherwise designated on the Journal of payment. That was the F. S. Johnson & Company note.

Mr. ROSE: Is that Journal here?

A. Yes sir.

Mr. ROSE: At what page?

A. 756, Journal "B."

A. (continued. Now on page 770 of Journal "B," the same number 18578, $7,768.00 and in lead pencil between the number and the amount is "Syc. M. H. Co." Now on page 772 of the same Journal, "B," the fifth line from the top appears No. 18578, $200.00, and in ink the word "Johnson" followed by "Syc. M. H. Co." That pays up all of number 18578 F. S. Johnson & Company. Now on Journal "C" page 126, No. 19947 is paid; that is marked "Hastings First National, $10,000. On page 180 of Journal "C" fifth line from the top is 20613, $2,500, "pt" in ink before, and Marsh is in ink with a line drawn through it and the word Kearney written in ink following it. So that the entries on page 180 Journal "C" fifth line from the top "20613 Marsh Kearney, Pt $2,500.00" and on page 202 15th line from the top, "20613 Marsh $7,500." are the same numbers. This number 20613 was entered on the Bills Discount book as First National Bank of Kearney.

577–587

Q. And in the Journal in that name?

A. I- don't show in the Journal when it was taken.

Q. Did you examine the Bills Receivable blotter?

A. We have no blotter for that time, and the names don't appear on the blotter.

Q. That is, they don't appear on the Journal?

A. They don't appear on the Journal, nor on the blotter.

Q. Now did you examine the books of the bank to ascertain if at the time the notes appear to have gone into the bank, as shown by the books, or when they appear to have been paid whether there was any interest received for them, or paid by the maker, or received by the bank?

A. I have examined the book I have here, their "Interest Received" book for July 20th, 1886.

Q. I will ask the reporter to identify that book as Exhibit X-29.

(Book so identified.)

Q. Is that date, July 20th, 1886, the date that the books of the bank shows these several notes were taken in that bank and made a part of its assets?

A. It is.

Q. What do the books indicate as to whether or not any interest was received on account of those notes?

A. No entry of any interest having been received on account of either of those three notes.

* * * * * * *

588 H. J. WHITMORE re-called.

Direct examination (continued).

By Mr. THOMAS:

Q. Mr. Whitmore, in the books of the Capital National Bank was there kept what was known as an "Interest Paid" account?

A. They had an account that was called "Interest Paid" account.

Q. Are you able to tell from an examination of the books what sort of an account that was; what items it contained,—what is the purpose of such an account, what function has it?

A. Well it is keeping a record of the item of interest paid by the bank upon certificates of deposit, and perhaps to depositors who received interest on open deposits—generally all items of interest or discount paid by the bank.

Q. And that shows on the books of the bank how,—as a debt or credit entry?

A. That would be a resource.

Q. As a debit account?

A. Yes, sir.

Q. And did the Capital National Bank and Marsh National Bank keep such an account on their books?

A. Yes, sir.

Q. Now what is done with that account at the end of the year, the annual periods when dividends are declared?

Mr. ROSE: Defendants severally object as no foundation laid, and incompetent. Objection overruled. Each of the defendants excepts.

A. It's customary with banks to throw that into the earnings account, or undivided profit account; they accumulate or gather together, in practice, the earnings of the bank, and then the expenses of the bank are charged against that account. And, then the balance or difference, if there is any, in the account is carried along as the earnings account, or undivided profit and it may be
589 disposed of by the payment of dividends and a portion carried to surplus, or used to charge off items of loss if there are any.

Q. Is the "interest paid" account, so-called, an expense account?

A. It is considered an expense account.

Q. Classed with wages and other expenses,——

A. The same as salaries, wages and rent and insurance and stationery and postage, and so forth.

Q. And at the end of the dividend declaring period this account,

as an expense account is charged against the earnings, or undivided profits accounts.

A. That is the way banks usually treat it. Sometimes they throw the expense and earnings into what is called an "Undivided Profits account," and sometimes it is used simply to,—simply the expenses are charged against the earnings. The earnings are, from day to day, thrown into one account; they simply carry what they call an earnings, or undivided profits account, and all their earnings are accumulated in one account in some banks.

Q. How was it done in this bank?

A. In this bank they kept separate accounts of the different expenses, as salaries, or wages, or interest paid, and then an account of earnings, of interest received, and they seem to have disposed of a portion of this account by throwing it into an undivided profit account at certain periods.

Q. What periods?

590 A. They seem to have done it about every six months.

Q. At the dividend declaring periods?

A. Well of course they seem to have declared dividends about the time they did this. Banks may have different periods for declaring dividends; they might not always use the calendar year; that is they might not declare the first of January or the first of July; some banks have other periods that they use; it depends sometimes upon when a bank began business.

Q. Mr. Whitmore, you have made an examination of a part of the books, I think you stated, and documents here in Mr. Jones' possession,—are those the books and documents here in Mr. Jones' possession, to which he has just testified?

A. Yes, sir.

Q. Now did this bank, the Capital National Bank or the Marsh National Bank keep what is known as an interest paid account?

A. It did.

Q. I will ask you if you found in your examination of the books of the bank any credits to the "Interest Paid" account?

A. It did.

Q. Were there any credits to that account which were not charged against the undivided profit account, or the earnings or any similar account, as it should be if the account had been properly charged off?

591 *Q.* I found a good many credits to the interest paid account which were not charged to the undivided profits account.

Q. Or any similar account?

A. Yes sir.

Q. Now what is the effect of a credit to the interest paid account Mr. Whitmore?

A. Well the effect of a credit to an interest paid account is to reduce the amount of interest paid, apparently, or to reduce the amount of that item, or the expenses of the bank, unless it is the closing entry which throws the account into the undivided profit account.

Q. How does a credit to the interest paid account affect the apparent net profits?

A. If the interest paid account is reduced any amount improperly, then of course the amount to be charged to the undivided profit account or earnings account would be reduced and that would increase the apparent profits of the business.

592 Q. Now you may state giving the amounts and dates, and the books where found, of any credits you have found to this "Interest Paid" account that were not apparently charged off or against the undivided profits or any similar account.

A. December 29, 1884, $813. April 14, 1888, $2,500.00. June 9, 1888, $1,500.00. November 16, 1888, $2,500.00. June 28, 1889, $10,000.00. September 30, $7,000. March 19, 1890, $5,000.00. May 16, 1890, $1,500.00. May 19, 1890, $2,000. May 21, 1890, $1,500. June 3, 1890, $2,500. September 25, 1890, $5,000. December 27, 1890, $10,000. April 9, 1891, $800. May 2, 1891, $7,200. June 20, 1891, $10,000. September 25, 1891, $14,000. January 2, 1892, $2,103. May 4, 1892, $5,000.

Q. Have you totaled it?

A. The total is $90,916.44.

Q. In any case were any of those items to which you have just testified charged against the undivided profits account, or any similar account?

593 A. I have not discovered that any of these items I have named have been charged against the Undivided Profit or any similar account.

Q. Or in any way deducted from the gross earnings of the bank?

A. They have not been deducted that I can discover from the gross earnings of the bank.

Q. From where do you get this information, from an examination of what books?

A. Examinations of the ledgers, and all of the Journals that I could find. One period, September 30th, 1889, and March 19, 1890, and also June 28, 1889—the Journals for that period are not here, and has never been in my possession. I have been unable to find that and was unable to find it when I first examined the books. I presume there was a Journal. The ledgers refer to journal pages, but the letters,—the journals as lettered here appear to be regular, A, B, C, D, E, F and G, but there seems to have been a Journal between D and E. It ought to have been lettered, but what it was, or whether there was such a journal I am unable to state, except that the books indicate that there was such a journal.

Q. But as to thes- three items you gathered your information from the ledgers?

A. Yes, sir.

The COURT: In your opinion what disposition was made of the item of $90,000 of interest paid, or in what manner was it accounted for by the officers of the bank?

A. Well as to that I am unable to state, except in a num-

594 ber of instances,—most of the insta-ces where these amounts were credited to the Interest Paid account, I find a similar

amount charged the same day to some other account, as for instance, June 28th, 1889,—$10,000. Now that same amount is charged to Stocks & Bonds on that day, and the amount of $7,000 on September 30th, that amount is charged to Real Estate on that day, and then there is some of these amounts there that are charged to the Chemical National Bank, and then the amount of $2,500 on June 3rd, 1890, the same amount seems to have been charged to real estate.

The COURT: Would that indicate Stocks & Bonds, or Real estate purchased, or a deposit to the Chemical National on that date?

A. It would indicate that they had bought Real Estate, or bought Stocks & Bonds, or had remitted to the Chemical National Bank these various amounts; that is, the entry in these several accounts would indicate that charged to the accounts.

Q. Now Mr. Whitmore, as a matter of fact could an item of $10,000 of interest paid be legitimately exchanged for real estate or Stocks & Bonds or anything else?

A. I think that is self evident that they couldn't use expenses to make investments with.

Q. In your opinion as an expert, Mr. Whitmore, and from your examination of the books, do you believe and is it your opinion that these credits to the Interest Paid account were honestly made, or that anything of value went into the bank in their place?

A. My judgment is that these credits were not properly made.

By the COURT:

Q. Do the books show real estate purchased that day, or Stocks and Bonds purchased that day, or a remittance to the Chemical National Bank to account for those sums?

595 A. It is not possible for anyone to tell whether Real Estate was really bought to this amount or not; there is simply an entry of so much charged against the real estate account. Now the figures are there in that amount, but they did not itemize on the Journal and the- did not itemize on the Ledger; it is simply a real estate debit of that amount. Now if they had on their ledger or journal put down a description of the real estate bought that day then it might have been traced. I might say for the information of the court, that the ledger account with the Chemical National Bank on May 16th has apparently been reconciled by someone, and I notice a number of items are marked "T out" in pencil apparently on both sides of the item. The 16th of May, 1900, $1,500 is one of the items that is marked in that way, and also——

Q. Have you made an examination of any of the Certificates of Deposit that were issued by the bank and compared them with the books of the bank with reference particularly to the certificates that were shown on the books to have been, but where the certificates themselves as filed with the Receiver shows them to be outstanding and unpaid and a liability of the bank at the time of its failure?

A. I have.

* * * * * * *

596–599 Q. Well now have you found any certificates outstanding, as I say, that were shown paid on the books of the bank?

A. I found a number of certificates that were marked paid on the certificate register.

Q. Have you a list of those giving the number and the amounts, and so forth?

A. Yes, sir.

Q. Those that were unpaid and outstanding at the failure of the bank?

* * * * * * *

600 By Mr. THOMAS:

Q. Now you may give the list I asked for.

A. The list of certificates for which Receiver's Certificates were issued and which were marked "Paid" on the Certificate Register are:

17458, January 9, 1888 Effie B. Mosher, $210. Marked Paid June 6 '89.

17987, May 1st, '88, E. J. Randall, $1,700. May 2nd, 1888.

Mr. NORVAL: That is the date paid.

A. Yes sir, marked "Paid".

20292, June 19, '89 S. J. Gardner, $6,000. marked Paid Sept. 26 '89.

23922, Fe-. 2, '91, Thomas Farrell, $1,015., marked paid Feb. 21, '91.

24541, May 9, '91 Lydia Greenman, $371.66,—May 19, 1891.

Mr. NORVAL: Marked paid.

A. Yes, the last date is the date marked paid.

24590, May 16, '91 E. Hellen, $641.60, Aug. 22, '91.

24852, July 6, '91, N. Johnson, $1,300,—Aug. 3, '91.

24977, July 25, '91, Jno. A. Peterson, $250., July 30, '91.

25003, July 29, '91, Lydia Greenman, $230. March 31. I think there is no year given to that one.

25053 Aug. 10, '91 Thomas Farrell, $1,032.12, Sept. 14, '91.

25129, Aug. 22, '91 James T. Hibbs, $200, Sept. 14, '91.

25130 Aug. 22, '91 James T. Hibbs, $250. Sept. 21, '91.

25324 Sept. 24" '91 —— —— $2,423.97, Sept. 28, '91.

And then the Certificate Register is missing from that time on.

In the next book: No. 26142 Fe-. 4, '92 $300, Mar. 3" '92.

601 Q. The Certificate of Deposit Register after that date, you say you haven't found?

A. Well the next succeeding one apparently is gone.

Q. Just give us the total of that last schedule.

A. I foot it $15,954.35.

Q. Did you make an examination of the accounts with the several different depositors of the bank, on open account?

A. Yes, sir.

Q. How were those accounts kept in a general way?

A. They were kept on what is known among bankers as the Boston Daily Balance book.

Q. I should have asked you, instead of that, with reference to the account of Certificates of Deposit, instead of open accounts.

A. Well the Certificate of Deposit account is kept in the—the general debit and credit account is kept in the Individual Deposit Ledger of the bank, No. 2.

Q. How many such accounts had they on the books when the bank failed?

A. I think there were three accounts.

Q. How were they designated?

A. Numbers 1, 3 and 4. (1, 3 and 4).

Q. Please state to the court the condition of those accounts at the time the bank closed, January 21, 1893?

A. Account No. 4 showed outstanding certificates to the amount of $97,301.27. The account No. 1 showed a red ink balance of $508.11,—What would be called an overdraft. Account No. 3 showed a red ink balance of $10,527.45, or an overdraft.

602 Q. When a deposit is made in the bank, Mr. Whitmore, and a certificate of deposit is issued for that deposit, how is that shown on the books in these various accounts,—does it show as a credit?

A. They showed each certificate, or apparently the practice was to show each certificate by the amount as a separate item of credit, or deposit in this individual deposit book in the certificate account, and then when certificates were paid they were treated the same as a check by a depositor and charged to this account.

Q. The amount of the certificates outstanding would be a credit to this particular account would they?

A. Yes, sir.

Q. And could a certificate of deposit account, properly and honestly kept, be overdrawn?

A. No sir.

Q. Why not?

A. Because the certificates are paid as they are presented and they are cancelled. When a certificate is issued the account then is credited with the amount of that particular certificate. Now, if a bank had issued $50,000 of certificates up to a certain time, and had paid none of those certificates, then they would show a credit balance there of $50,000. Now if a certificate,—one of these certificates came in to be paid,—the bank stopped issuing certificates we will say—and these certificates came in to be paid, and paid as presented they would be charged as a check against this account and the balance would be reduced from time to time until all of the certificates were paid, and then the account would be as I say, balanced out, the debit entries would equal the credit entries and there would be nothing due.

Q. And it couldn't be overdrawn.

A. Not if properly kept. The books showed, Mr. Thomas,
603 $97,301.27 of certificates outstanding, but if you deduct the amount of the red ink balances in the other two accounts from the credit balance, then you would have left $86,265.70.

Q. And that is the manner in which they did keep that account;

they deducted the overdrafts from the credits in carrying to their General Balance Books?

A. In making up the total of deposits for their General Balance Books, the overdrafts were always deducted from the amount of the credit balances, because in their General Balances they never showed the overdrafts as part of their assets, but they indicated the overdrafts at the bottom of the page in red ink entry. Of course the individual deposit overdrafts are a resource.

Q. But the result of that would be to understate the liability on account of the certificates outstanding, wouldn't it?

A. Yes, it would reduce the amount, because, as I say, these certificate accounts couldn't properly be overdrawn.

Q. Then if Certificate account No. 4 had $97,000 outstanding and they deducted from that overdrafts and reduced it to $86,000 that would be showing $11,000 less than that particular account showed.

A. Yes, sir.

Q. And if there were actually $97,000 in certificates outstanding in this account, then if it were carried to the General Balance book at $86,000 that would be $11,000 less than the certificates of deposit outstanding.

A. Yes sir, if it were carried in that way.

Q. Well isn't that the way it was carried?

A. No sir.

Q. How was it carried?

A. They carried individual deposits and certificates of deposit as one item.

604 A. (continued). All the overdrafts, individual and certificate overdrafts were lumped together and deducted from the total of the credit balances—individual as well as certificates.

Q. And the balance was carried forward to the General Balance book?

A. Certainly, but there was no separation on the General Balance book of the individual deposits from the certificates of deposits.

Q. Then the general balance book understated the certificate accounts to the extent of the overdrafts?

A. The effect of it would be to understate the amount of their liabilities.

Mr. Rose: But it wouldn't specify liabilities or certificates of deposit?

A. No.

Q. It is not specified on the General Balance book at all is it?

A. No sir.

Q. To get at it you would have to go to the Individual deposit ledger?

A. Yes sir, I have stated that.

Q. Did you examine the Balance book containing the Certificate of Deposit account with reference to January 6th, 1893?

A. Yes, sir.

Q. And also the Certificate Register in connection with it?

A. The Register that was in use at that time, yes sir.

Q. Now what do the books show as the certificates of deposit outstanding on account of the certificate of deposit account No. 4, on January 6th, 1893?

605 A. On the morning of January 6th, the certificates outstanding, as shown by the books amounted to $15,231.58.

Q. Were any certificates paid on this day, and charged to this account, No. 4?

A. Yes, sir.

Q. And were any certificates paid that day that had been issued at a prior date?

A. Yes, sir.

Q. Now you may state what certificates were paid that day, as shown by this account, giving the number of the certificates and the amount.

Q. The items that were marked paid in the account itself were $315, $200, $150, $100, $6,000, and two items of $50,000 each.

Q. Making a total of how much?

A. $106,765.00. I found by examining the certificate register that two certificates that were issued that day had been marked paid the same day on the register. The amounts agreed with the amounts that were entered in the ledger account and I therefore assume that those two certificates were paid the same day they were issued, because of the fact that they were marked paid on the certificate register as of that day, and the fact that the same amounts appear in the account itself. Now the other certificate numbers—I will give the numbers of thos- certificates—No. 28458 for $315.00 was issued a day or two prior to that time. The Certificate register—if Mr. Jones will get it—that last Certificate register—and No. 28455, for $200.00—those were issued just a day or two prior to this time, and the certificate register showed that they were entered as paid that day. No. 28470, $150.00 and 28469 for $100.00 were issued on the 6th. No. 28464 for $6,000 was issued the day before I think, and marked paid on the 5th. Then I looked for certificates of

606 the amount of $50,000 that were paid on this day and I found a schedule that I had made before and checked over that numbers 21379 for $50,000 was paid—stamped paid on that day, and number 25097 for $50,000 was also stamped paid on that day. Those two certificates are here in court.

Q. Now I will ask you if Exhibit No. X-146 is one of those certificates, No. 21379?

A. Yes sir, Exhibit X-146 is number 21379.

Q. And is Exhibit X-145?

A. Another of those certificates, No. 25097.

Q. Now did you examine into the history of those two certificates No. X-145 and X-146 to ascertain when those were issued by the bank?

A. Yes, sir.

—. Now when was Exhibit X-145, No. 25097 issued by the bank?

A. August 17th, 1891.

Q. For what amount?

A. The certificate shows on its face $50,000.

Q. And did you examine the Certificate of Deposit Register for this particular certificate to ascertain for what amount it was indicated on the Register?

A. Yes, sir.

Q. For what amount does the register show it to have been issued?

A. $50.00.

Q. Is that shown on the book here, that is now in court, and shown to the court?

A. Yes, sir.

Mr. THOMAS: We offer this book for the inspection of the court showing the entry just testified to by the witness, and showing the record of the certificate as having been issued for $50.00.

607

Q. Is that contained in the book identified by the reporter as Exhibit X-33?

A. Yes, sir.

Q. Now did you examine the other books of the bank, that is the books other than the Certificate of deposit register, to ascertain for what amount that certificate entered the bank's liabilities; in other words, how it was entered in the ledger of the bank, and for what amount?

A. Yes sir.

Q. Now you may state for what amount the other books of the bank, the journal and deposit ledger, show this to have been entered on the books.

A. It went into the ledger account as $50.00.

Q. And was paid in what amount when it was paid?

Mr. ROSE: What ledger shows that?

A. That would be the Individual Deposit ledger of August 17th, 1891.

Q. Does it give the number of the certificate?

A. No sir.

Q. And for what amount was that certificate paid on January 6th, 1893?

A. $50.00 in the ledger account.

Q. Now have you made a similar investigation as to certificate No. 21379, Exhibit X-146?

A. Yes, sir.

Q. What does the Certificate of Deposit Register show the amount for which this particular certificate was issued?

A. I think that is on the certificate register for $100, and it was on the Ledger as $5.00.

608

Q. And is that shown on Exhibit X-33, just now in court?

A. Yes, sir.

Mr. ROSE: What does the stub show?

A. The stub shows $50,000.

Q. The ledger shows that that entered the books of the bank for $5.00?

A. Yes sir.

Mr. ROSE: But you find no item by that number?

A. The only way is to take the certificates issued on a certain day and then compare the amounts and then see if they show paid. When they are paid they don't come in the order they are issued; you can check the amounts very easily when they are issued. The certificates as paid are certificates that have been issued at perhaps a dozen different dates, and they are perhaps paid on the same day, and this of course it is difficult to trace. But the issuance of the certificates you can trace.

Q. Mr. Whitmore, did you make an examination of the other certificate accounts that were carried on the books of the bank?

A. Yes, sir.

Q. What other ones, did you examine Certificate account No. 1?

A. And also No. 3.

Q. Now what did you find as to the condition of the Certificate of deposit account No. 1?

A. On the 17th of January, 1893 there was an overdraft of $108.11; on that day there were paid four certificates of $100, each, which made an overdraft of $508.11, and that remained there, I think, until the bank closed.

Q. And di- you examine Certificate of deposit account No. 3?

A. Yes, sir.

Q. Tell us what condition you found that in.

A. On January 16th, 1893, this account showed unpaid certificates in the amount of $4,978.19; there were paid four certificates, one of $9,000, and one of $100, and one of $100, and another one of $50.00, making $9,250, that were paid.

609

Q. That made $4,271.81 paid more than the account showed outstanding?

A. That made an overdraft in the evening of $4,271.81. Now after January 16th there were no certificates entered as issued in account No. 3. On the 17th they paid certificates to the amount of $1,750.55; on the 18th $370; on the 19th $795; on the 20th $990; on the 21st $2,350, and when the bank closed the account was overdrawn $10,527.46.

Q. Now have you examined the certificate of deposit accounts at an earlier date to ascertain if those accounts were overdrawn at other times?

A. Yes sir, in a general way. Overdrafts appear in different ones of these accounts from time to time from, I think, 1888 on down until they closed the bank, in different amounts and at different times, and different accounts. I wouldn't attempt to state particularly when nor the amounts, because I didn't attempt to charge my memory with it, or make any record of it.

Q. In speaking of the different accounts, you mean the different subdivisions of the certificate of deposit account?

A. Accounts Numbers 1, 3 and 4.

Q. And you say from sometime in 1888 some of those accounts were overdrawn nearly all the time?

A. I think from sometime in 1888, down to the close of the bank

there was an overdraft shown in the certificate of deposit account all the time.

Q. Have you examined the books and made sort of a schedule of some of the overdrafts that you found?

A. No, I haven't.

610 Q. Mr. Whitmore, have you made an examination of the books of the bank to ascertain what amounts were paid out in dividends from the time of its organization until it failed—that is including both the Capital National and the Marsh National?

A. Yes sir.

Q. And from what books did you get that information?

A. From the journals and ledgers of the Capital National Bank.

Q. Those are contained in the books to which you have referred before, and the books are here in court?

A. Yes, sir.

Q. Now have you prepared a list or schedule giving the amount of the dividends that were paid out, and the dates when paid as shown by the books?

A. Yes, sir. Not exactly the date when paid, but the date when it was charged up really, because sometimes the stockholders might not get the dividends on the day that they were declared or marked as charged up.

Q. The dates you have are the dates when it was charged?

A. When the aggregate sum is charged on the ledger as having been set apart as a dividend.

Q. You may give the dates and the amounts.

A.

January 12th, 1885	$15,000.
July 3, 1885	13,000.
December 31, 1885	16,000.
July 13, 1886	14,000.
December 31, 1886	18,000.
July 1, 1887	18,000.
January 3, 1888	18,000.
July 11, 1888	18,000.
January 6, 1889	18,000.
July 9, 1889	18,000.
January 14th, 1890	15,000.
July 9th, 1890	15,000.
January 15th, 1891	15,000.
July 17th, 1891	13,750.
January 12, 1892	15,000.
July 12th, 1892	12,000.
Total	$251,750.00

611 Q. I will ask you if you have examined the books of the bank to ascertain its condition, that is, its assets and liabilities as shown by the books at the date of its failure?

A. Yes, sir.

Q. Are you able to state what the assets and liabilities of that bank

were, as shown by these books, on January 21, 1893 or January 23rd, 1893?

A. I have a schedule of the assets and liabilities of the bank, eliminating the expense account, just getting down to what the actual assets of value were, the accounts of value in the bank, and the liabilities, including the capital stock.

Q. And taken from the books that are here in court now?

A. Yes, sir.

Q. You may state the result of that examination.

Mr. ROSE: When you speak of assets of value are you judging which notes are good and which are bad?

A. No sir. In making up a statement of the assets of the bank, the bank makes a statement for publication and it eliminates the expense account.

Q. I just wanted to know what the scope of your inquiry was.

A. Yes sir.

Q. So you took the assets shown by the book?

A. Yes sir.

Q. Didn't put your own judgment in anywhere.

A. No sir.

Mr. ROSE: Defendants severally renew the objection.

Objection overruled.

Each of the defendants excepts.

612 A. Of course I have no way of telling what these accounts consist of. For instance, Stocks & Bonds, $325.00 is the book value.

Furniture and fixtures	5,770.	
Bills Receivable	851,880.07	
Excess bonds	5,000.00	
Cash and Cash items,—That would be simply the cash balance, as shown on the Journal	28,731.79	
Bills of Exchange	4,997.97	
Overdrafts, Individual Balance Ledger No. 1	5,225.21	
Overdrafts, Individual Balance Ledger No. 2	17,069.95	
Certificate of Deposit a/c No. 1	508.	
Certificate of Deposit a/c No. 3	10,527.46	
Country Bank overdrafts	177.41	
General overdrafts	33,508.14	
Real Estate	112,533.16	
Banks on General Ledger	15,219.75	
Making a total of		1,057,965.18

The Liabilities:

Capital stock	300,000.00	
Due to Banks, Commercial Nat'l	37,196.99	
American Exc. Nat'l	2,288.23	(2,228.23)
Merchants Nat'l	250.11	
Clearing House	965.95	
Total	40,641.28	
Individual Deposits, Ledger 1	168,971.84	
Ledger 2	231,468.72	
Country Banks, due to	143,210.31	
Certificates of Deposit, Balances	97,301.27	in No. 4.
Making total deposits	640,952.14	
Bills Receivable sold,—I would call them rediscounts,—not sold absolutely	68,694.72	
Making a total liability of		1,050,288.14

613 Q. That one item of liability you said Certificates of Deposit $97,301.27, that was what was supposed to be outstanding?

A. That was account No. 4 showed that amount outstanding.

Q. The other accounts were overdrawn?

A. Yes, sir.

(Adjournment taken until tomorrow morning, Feb. 3, 1911, at 9 a. m.)

(Feb. 3, 1911, 9 a. m. Direct Examination of witness Whitmore continued.)

Q. Mr. Whitmore, have you made an examination of the books with reference to a credit to the Nebraska Relief Fund, which ir referred to in the deposition of Mr. Ludden?

A. I examined the account on the books of the Capital National Bank.

Q. And do the books of the Capital National Bank show a credit to the Relief fund?

A. They show a credit, or a deposit, to the Relief fund.

Q. Under what date?

A. Under date of April 25, 1891.

Q. In what amount?

A. $100,250.00.

Q. Did you follow out that account to see whether it had been checked out and withdrawn from the bank?

A. Yes, sir.

Q. How was that, an open account or certificate?

A. It was what they call an open or individual deposit account.

Q. How was it withdrawn in large or small amounts?

614 A. In various amounts, from time to time,—almost daily in fact; there was an overdraft when this deposit was made,—the account apparently had been opened as an overdraft, and checks were charged to it from time to time for some days, and then this deposit was made, and then there were checks apparently in the ordinary course of business until the account was practically wiped out at the time of the failure of the bank.

Q. On that same day, that is April 25, 1891 do the books show a certificate of deposit issued?

A. Yes, sir.

Q. What books did you examine in that regard?

A. The certificate register, and the ledger account of the certificates.

Q. What does it show as to the certificate issued?

A. Well it shows several certificates issued.

Q. Does it show a certificate for the sum of $100,250.00?

A. Yes, sir.

Q. Does the certificate of deposit account show a certificate of $100,250.00 issued?

A. Yes sir, No. 24452.

Q. Is the certificate, Exhibit X-140, shown to you the one?

A. That bears the number and is the amount, and corresponds with the certificate register in all respects as the certificate shown on the register that day.

Q. Now did you examine the books further to ascertain what became of this certificate of deposit for $100,250.00, that is, what disposition was made of it?

A. Yes, sir.

Q. You may state what disposition was made, as shown by the books.

615 A. This certificate, No. 24452 is marked paid and enters into the ledger account of certificates on April 28th, 1891 for $100,250.00; paid that day.

Q. Trace the history of it clear through, as far as you can, and show what entries appear on the books contemporaneous with that, and what credits were given to other accounts.

A. On the day that this certificate was paid and certificate, No. 24473, in the name of C. W. Mosher for $75,000.00 was issued. The account of C. W. Mosher was credited with $10,000, and an individual deposit account called the Prison Contract was credited with $15,000, which made a total of $100,000. On April 30th, 1891, a certificate, No. 24473 for $75,000 was marked cancelled and paid, and certificate No. 24481 to C. W. Mosher for $62,500 was issued. An account on the books in the name of Mosher & Outcalt, deposit account, was credited with $2,500 and the account of R. C. Outcalt, Treasurer, was credited with $10,000, making a total of $75,000. On May 2, 1891, Certificate No. 24481 for $62,500 was marked cancelled and paid and a new certificate, No. 24496 to C. W. Mosher for $52,500 was issued. An account on the General Ledger and on the General Balance book known as Walsh & Putnam, Journal E, page

dollars cash. Now the teller counts his cash and he might only have $25,00- cash.

* * * * * * *

624 Q. Have you examined the books with reference to the credit to the open account of J. E. Hill, State Treasurer?

A. I have examined the account of J. E. Hill, treasurer and also the State Treasurer account.

Q. For what period?

A. Well I examined the account at different times from '89 down to the close of the bank.

Q. And at what time in 1889 did it begin?

625 A. December 23rd, 1889.

Q. What do you find,—what entry do you find in the account on that day?

A. I find that on December 23rd, 1889, the account on the books in the name of J. E. Hill, treasurer was closed, that was in Individual Deposit Ledger No. 1, and a new account was opened in the name of State Treasurer, called State Treasurer account—Individual Deposit Ledger No. 2, and the balance in the J. E. Hill, Treasurer account appears as a deposit in the State Treasurer account.

Q. In what amount?

A. $23,328.75, closing one account and opening the other account with the same amount. And on the 24th of December, there appears to have been a deposit of $100,000 made to the account of State Treasurer.

Q. Did that $100,000 enter into that account?

A. Yes, sir, it was entered into the footing on computation of the balance that was carried forward that day.

Q. Did you follow that account on out from that time, December 24th, 1889, up to the close of the bank to see whether or not it had been checked upon from day to day?

A. Yes, sir, the account is checked upon from day to day apparently in the usual course of business for sometime; I don't know whether it run until the close of the bank or not.

Q. Well it was ultimately checked out, I suppose, in the settlement with the succeeding treasurer?

A. I presume it was.

Q. The point I want to bring out is was the account after this deposit was made checked out from day to day in the usual course of business?

A. I have already stated it was apparently checked upon, and deposits made from time to time.

626 Q. Now you may state when this $100,000 deposit was made in the State Treasurer account would that amount appear as a liability on the General Balance book of the bank, and was it shown as a liability of the General Balance book?

A. It was shown as a liability upon the Individual Deposit Ledger, No. 2.

Q. That is opposite the name State Treasurer?

A. Yes, sir, opposite the name State Treasurer.

Q. How did it appear on the other books of the bank?

A. Well it would not appear. Of course in the General Balance book or the ledger it would not appear as a separate item; there would be no way of identifying it.

Q. They simply carried the balances.

A. They simply carried the total; they had three Individual Deposit ledgers No. 1 and No. 2 of individual depositors,—check depositors and the certificate account, and another one in which they carried the deposits of banks that kept deposits there.

Q. This account of the State Treasurer, that appeared in what you call Individual Deposit book No. 2.

A. Yes, sir.

Q. And did you foot up the amounts of deposits in this book number 2 to ascertain whether the footings were correctly transferred to the other books of the bank, the General Balance book of the bank, which contains its resources and liabilities?

A. Yes, sir.

Q. You may state the result of that examination.

627 A. I will state that the total footings as shown on these three books are carried into the General Balance book as the total of deposit liabilities of the bank each day, and of course in order to get at the total liabilities they had to take the aggregate footings of the three books. During the week beginning April 28, 1902, I footed the balance of the Individual balance books of the Capital National Bank, for the 23rd, 24th and 26th days of December, 1889, and then I took the totals as shown by my footings and compared them with the totals shown by the General Balance book. I found the totals of the several pages of these three books, less the total amount of overdrafts shown on the three books to agree within forty cents of the amount shown on the General Balance book for the 23rd day of December, 1889. But the totals as shown on the 24th and 26th days of December, 1889, was in round numbers $100,000 less,—or more than the General Balance book showed.

Q. Which do you mean, the total of the Individual Balance book was?

A. The aggregate totals of all the balances shown on the three Individual balance books, less the overdrafts lacked forty cents of being $100,000 more than the General Balance book showed. There was an error in footing that they had made of forty cents, which they probably didn't discover in their footings, and it threw it off just that much. And then I discovered that in carrying forward the footings on Individual deposit ledger No. 2, they had carried them forward $100,000 less than the correct footing.

Q. Now what was the effect of that upon the General Balance book; did it show on the Balance book that the liabilities of the bank in that particular instance, were $100,000 less than they actually were?

628 A. It made the liabilities of the bank, as shown by their General Balance book just $100,000 less than the Individual Balance books actually showed.

Q. Now how long did this continue to be on the books in this way?

A. It continued until—this continued until the 28th day of December, 1892.

Q. Three years you mean?

A. December 15th, 1892, the grand total is correctly entered on the Balance books, but the General Balance book still shows the discrepancy of $100,000. It is then $100,000 less than the General Balance book shows.

The COURT: Now how would it be possible for that to get by the eyes of a good examiner for three years?

A. That's pretty hard to answer. I have a statement showing just the way in which this was done.

Q. I will ask you first, Mr. Whitmore, do you mean then that this Balance Book No. 2, that there was an error in its footing somewhere, of $100,000 for each day from December 24th, 1889, until December 15th, 1892, so that the totals understated the actual deposits there by $100,000?

A. Yes, sir.

By Mr. ROSE: In Individual Balance Book No. 2? I understood you to say that the Balance book was footed correctly, but wasn't carried forward correctly.

A. It was footed incorrectly until December 15th, 1892, then the correct footings were put down, but the correct amount was not put upon the balance book until the 28th of December, 1892.

Q. You may state how the books were finally made to balance,—by what entries?

A. I will give the figures on these balance books from December 23rd, 1889: Balance book No. 1 showed a total deposit of $148,727.34; No. 2 a total deposit of $298,435.76. All banks
629 showed, $129,905.31; making a total deposit of $576,568. The overdrafts on the three books amount to $35,361.22, which made $540,207.19 as the net amount of their deposits on the three books for this day. The net deposits as shown on General Balance Book "B" were $540,207.59, just within forty cents of the aggregate of the three balance books correctly footed.

Now on the close of business December 24th, 1889, the deposits in the bank were Balance Book No. 1, $130,916.03; Balance Book No. 2, $425,548.91; Banks, $135,027.04, Gross deposits, $691,591.48; less overdrafts, $44,977.88; Net deposits by the balance books correctly footed, $646,614.10. The net deposits by the General Balance Book "B" on that day were $546,614.50. The correct balance was $646,614.10 and the General Balance book showed $546,614.50.

At the close of business on December 25th, correctly footed Balance Book No. 1, showed $125,851.47; No. 2, $422,091.15; Banks, $144,742.90; Gross deposits, $692,685.52 Less overdrafts, $42,639.07; Net deposits on balance books, $650,046.45. Net deposits as shown on General Balance book "B" $550,046.85. Now the footing at the bottom of a page in each of these books is carried forward to the head of the column of that particular day on the next page, and then that total footing is carried to the next page. Now sometimes the footing at the bottom of the page would be $100,000 less than the correct footing; sometimes it would be correctly entered at

the bottom of the page, but when you look at the total carried forward to the next page at the top of the column, it would be just $100,000 less than it was at the bottom of the preceding page. Now those changes don't appear in the same place every day during the three years, for instance January 2nd, 1890, the footing on
630 the last "S" page was carried to the "T" page $100,000 off, and the same practice was observed on every day during this month and the month of February, except on January 29". And so it doesn't appear in the same place each time, nor in the same manner, the footing may be incorrect by $100,000, or if correct then carried forward $100,000 to the succeeding page less.

Q. Now Mr. Whitmore, how were those books finally brought into balance, if you have examined to ascertain that, give us your opinion of that.

A. Well on the 24th of December, 1892, Journal G, page 91, shows that Bills Receivable of C. W. Mosher, No. 50638 for $17,500 and R. C. Outcalt, No. 50639 for $12,500 were discounted by the bank, Discount Register, page 288. On the same day the account of Mosher & Outcalt, that is an account kept in the name of Mosher & Outcalt was credited with an amount equal to the amount of these two notes $30,000. On December 28 notes were put in the bank as follows:

50642	C. W. Mosher	$20,000.
50643	C. W. Mosher	20,833.34
50640	R. C. Outcalt	15,000.
50641	R. C. Outcalt	14,166.66
	Total	$70,000.

The account of Mosher & Outcalt on this day was charged with $30,000, which made a total of $100,000, and on that day the total balance of the Individual Deposit Ledgers agree with the net deposits carried on the General Balance Book. That is the only explanation that I have been able to find as to how they made those two books agree.

* * * * * * *

631 By the COURT:

Q. To carry out that transaction, Mosher and Outcalt would necessarily,—their clerk, who made those entries would know that they were false, would he not?

A. Well the clerk who made the footings on the Individual deposit ledger knew, of course that he was making a false entry, a false footing.

Q. That is all the time during those three years when that fictitious balance was shifted from one account to another whatever clerk had that in charge necessarily knew that he was making a false entry every day?

A. Yes, sir.

Q. And every bank officer who had access to the books, that is if he would examine the books would know of the falsity of that entry?

A. If he examined the Individual Deposit Ledger.

Q. That is I mean the officers who were actively in control of the bank would necessarily know of this false balance, if they had examined the books?

632–638 A. Yes, if they made a thorough examination.

By Mr. Rose:

Q. How many books would they have to foot to catch it?

A. They wouldn't have to foot any, Mr. Rose.

By Mr. Bishop:

Q. You said if they made a thorough examination.

A. If they examined the individual deposit ledger.

By Mr. Rose: How would they catch it without footing it themselves.

A. It was on the 24th this was done,—from the 24th down to the 15th of December, 1892.

Q. How many days was that?

A. That was three years. Any examination made of that book without footing a single page, if they had gone over and followed the footings would have revealed the discrepancy.

Q. How many books would they have to have examined?

A. The Individual deposits for that time.

Q. How many of them were there?

A. Well during that time; they had six a year and three years would be—about 36 books.

By Mr. Thomas:

Q. Would anyone of those Individual Deposit books have disclosed it?

A. Every day from the 24th of December, 1889, to the 15th of December, 1892, there was a falsification of the total footing of one of the columns, either at the bottom of the page or at the top of the page in every Individual Deposit Ledger No. 2.

* * * * * * *

639 & 640 By Mr. Thomas:

Q. I would like to have the record show that one of the books was produced and inspected by the court.

The Court: The book was so inspected by the court.

Q. Mr. Whitmore, have you examined the books of the Capital National Bank to ascertain what notes of the Western Manufacturing Company, executed by E. Huribut, Jr., as manager entered into and became a part of the assets of the Capital National Bank?

A. Yes, sir, I have.

Q. Over what period did that examination extend?

A. I have gone over all of the books of the bank, and it covers the period from when I first discovered notes in 1888—July 25th 1888.

Q. And up until what time?

A. Until the close of the bank.

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CHARTS

TOO
LARGE
FOR
FILMING



641 A. I have made up a statement here showing the transactions concerning those notes down to January 6, 1893, and of course there were a good many notes taken,—three large pages—I might put this schedule in evidence.

(Schedule identified as Exhibit "cc.")
Mr. THOMAS: We will offer the schedule in evidence.
Schedule, Exhibit "cc" received in evidence.
(Copy of Exhibit "CC" at page 6092 hereof.)

—the first column shows the notes when taken from day to day, and the second column shows the notes when paid from day to day, and the last column shows the amount of notes left in the hands of the bank at the close of that day's business.

Q. As shown by the books themselves?

A. Yes, sir, and I have made a very careful search of the discount register, and I have checked this back, and I think it is an absolutely correct statement.

—. And that was compiled from an examination of all of the books that you have access to, Mr. Whitmore?

A. Yes, sir.

Q. Now in making this examination, did you endeavor to ascertain what interest if any was shown by the books to have been received on account of these notes, either when taken into the bank, or when they were indicated as paid, or at any other time?

642 (Here follows sheets Nos. 1, 2, and 3, of Exhibit *"cc,"* Western Mfg. Co., appearing at page 642.)

643 A. Yes, sir.
Q. You may state the result of that investigation.

Mr. BISHOP: Each of the defendants objects as incompetent and immaterial.
Objection overruled.
Each of the defendants excepts.

A. Of course there were some notes that were turned in to the Receiver afterwards, but those are not on the books; I didn't put those in.
Q. In compiling this schedule as you have, which has been identified as Exhibit *"cc"* you have not included some notes that appeared at the close of the bank, and were allowed by the Receiver as having been rediscounted?
A. The Receiver receipts showed notes that I have not been able to find.
Q. Those were notes apparently issued by the same company and were outstanding and had been rediscounted by the Capital National Bank?
A. Yes, sir.
Q. And were allowed by the receiver as a charge against the bank?

Mr. ROSE: Each of the defendants objects as leading and suggestive.

A. I don't know whether they were rediscounted. The receiver's books that I examined showed that certain notes of the Western Manufacturing Company,——

Mr. ROSE: Each of the defendants objects to the recital of what the receiver's books shows as not binding upon these defendants; as a self serving declaration, that is not made by authority of any of the officers of this bank, and subsequent to the date of the transactions charged.
Objection sustained.
Each of the plaintiffs excepts.

Q. You may state what you know concerning any other notes of the Western Manufacturing Company that are not included in your schedule, and that appear to have been allowed by the receiver as a charge against the bank.

644 Mr. ROSE: Each of the defendants objects because the sources of information are not disclosed, and not shown to be subject to the inspection of the defendants; the question is too general, and calls for general knowledge and not knowledge derived from an expert examination of the books and records of the Capital National Bank.
Objection overruled.
Each of the defendants excepts.

A. All I know is that the Receiver's books showed that there were certain notes of the Western Manufacturing Company that were

allowed as claims against the Capital National Bank which did not appear upon the books of the Capital National Bank among their discounts.

Mr. Rose: Each of the defendants moves to strike out all reference to the contents of the Receiver's books as no foundation having been laid for it.

Motion overruled.

Each of the defendants excepts.

Q. Have you made an examination to ascertain whether any interest is shown to have been received on any of the notes which are contained in your schedule, Exhibit "*cc*"?

A. Yes sir, I have.

Q. You may state the result of that examination.

Mr. Bishop: Each of the defendants objects as incompetent and immaterial; no foundation laid, and the records, the course of the information asked for, have not been sufficiently authenticated to entitle them to be received in evidence, or secondary evidence to be given therefrom.

Objection overruled.

Each of the defendants excepts.

A. October 2, 1890, $208.85 entered on interest book on account of Western Manufacturing Company, and charged to Western Manufacturing Company account; on August 28, 1891, I find $122 on the Interest Received book; November 30th, 1892 I find $280 on the Interest Received book; on December 30th 1892 I find $1,250 on the Interest Received book.

Q. Charged to what account?

A. Well entered as having been received from the Western
645 Manufacturing Company; they're marked Western Manufacturing Company.

Q. Is there any charge to the account of the Western Manufacturing Company on that day?

A. I don't know whether I looked it up to see whether it was charged to their deposit or not.

Q. Will you examine it and see?

A. I would have to get that book; perhaps the account is there.

(Witness looks up entry.)

A. December 30th, 1892, Western Manufacturing Company, C. W. Mosher, per H, is an account,—that shows no check for that amount on December 30th. The account is overdrawn $1,341.54 so I don't know whether this interest was paid, any more than it was marked as having been received on that day.

Q. That is, the account of the Western Manufacturing Company is shown overdrawn $1,341.54?

A. On that day, yes sir.

Q. It doesn't appear that there is any item of $1,250., charged against that account?

A. No sir. It don't appear to have been included in the renewal of the notes on that day either.

The COURT: Now are the items of interest to which you have testified, the only items of interest that have been paid, as shown by the books?

A. All that I have been able to find on the books of the bank as paid on account of the Western Manufacturing Company notes from 1888 down to 1892.

Q. And in your examination, did you go through what is known as the Interest Received book?

A. Yes, sir.

Q. That was the book of original entry upon which entries of that kind were made?

A. Yes, sir.

646 Q. In your schedule, Mr. Whitmore, of this Western Manufacturing Company paper, does that include the Western Manufacturing company notes attached to the deposition read a few days ago, and identified by the reporter as Exhibits x-68, x-69, x-70, x-71, x-72, x-73, x-74, x-75, x-76, x-77, x-78, x-79, x-80, x-81, x-82, x-83, x-84, x-85, x-86, x-87, x-88, x-89, *c*-90, x-91, x-92 and x-93 inclusive. I will read the numbers of the notes.

Q. No. 132105?

A. I don't seem to have that.

Q. No. 141017?

A. I don't have that one.

Q. No. 135003?

A. I don't have that one.

Q. No. 133000?

A. It is not on my list.

Q. No. 135042?

A. That is not on my list.

Q. No. 133781?

A. That is not on my list.

Q. No. 131011?

A. I have that one.

Q. No. 133003?

A. I have that one.

Q. No. 118004?

A. I have that.

Q. No. 133004?

A. I have that.

Q. No. 133014?

A. I have that.

Q. No. 135005?

A. I have that.

647 Q. No. 131010?

A. I have that.

Q. No. 134003?

A. I have that.

Q. No. 134013?

A. I have that.

Q. No. 134005?

A. I have that.

Q. No. 133002?
A. I have that.
Q. No. 134004?
A. I have that.
Q. No. 133681?
A. I don't seem to have that one.
Q. No. L36081?
A. That is not on my list.
Q. No. 131819?
A. It is not on my list.
Q. No. 119007?
A. I have that.
Q. One dated August 6th, 1892 without any number?
A. It is not on my list.
Q. No. 133005?
A. I have that.
Q. No. 133041?
A. I don't seem to have that one.
Q. Have you made an examination of the books of the bank to ascertain the amounts of notes that were carried as assets of the bank at different times?
A. I have some of the notes.
Q. Did you make an investigation as to the amount of the notes of Marsh Brothers that were in the bank at different periods of the bank's existence?

648 Mr. ROSE: Each of the defendants objects as a mere repetition.
(No ruling shown.)

A. I have made up a ledger account, similar to the account of the Western Manufacturing company notes from the time of the organization of the Capital National Bank, down to its close.
Q. Well did you make an examination of the paper of Marsh Brothers, and of Mosher and Outcalt, of Donnell, Lawson & Simpson, and the Western Manufacturing Company at different periods?
A. I have made up a ledger account of each of those.
Q. Have you made a ledger account of the paper that I have just referred to that was in the bank on January 1st, 1890?
A. Yes, sir.
Q. Of that particular paper?
A. Yes, sir.
Q. You may state the result of that investigation.

Mr. ROSE: Each of the defendants objects as no foundation laid, and the books to which the witness had access are not sufficiently proved to entitle them to be received in evidence.
Objection overruled.
Each of the defendants excepts.

A. I have made up a ledger account of the Marsh paper, C. W. Mosher, R. C. Outcalt, Donnell, Lawson & Simpson, Western Manufacturing Company, E. Hurlbut, manager, and Mosher & Outcalt,—that is notes that were shown as signed by both; they're in the regis-

ter under the name of Mosher & Outcalt, and I have taken the balances that were due from each of these persons or firms on January 1st, 1890, July 1st, 1890, January 1st, 1891, July 1st, 1891, January 1st, 1892, July 1st, 1892, and January 1st, 1893, showing the amounts due from these several parties on those dates.

Exhibit "dd" identified.

649 Q. Is Exhibit "dd" the schedule to which you refer?

A. Yes, sir.

Q. Explain to the Court what that means.

A. I have taken the balances, for instance as shown by the ledger account, of the Marsh paper in the bank on January 1st, 1890,—that is one of the dates, and entered that balance in a column opposite the words "Marsh notes". It shows the amount that was due on the Marsh notes at that time in the bank, according to the books, and then in the same column the next line is C. W. Mosher's notes, the balances, and following that R. C. Outcalt's notes, Donnell, Lawson & Simpson, Western Manufacturing Company, E. Hurlbut, Manager, notes, and Outcalt & Mosher notes. And then on the second line below that I have shown the total of these several balances.

Q. Then the column under the date of January 1st, 1890 is the list of paper referred to in the bank at that time?

A. Yes sir.

Q. As shown by the books?

A. I took every six months from January 1st, 1890 down to January 1st, 1893.

Q. That pertains simply to the particular paper that is referred to in the s-hedule?

A. Yes, sir, in the first column.

Q. Now with reference to Exhibit "ee" you may explain what that shows.

A. "ee" is a statement of the liabilities of the bank, which were in existence—some of the liabilities which were in existence at the dates named, and which were not apparent from the books.

Q. You don't pretend to give all of them?

A. No, some that I found that I know of that were in actual existence at those dates, for instance a certificate No. 21739

650 of J. E. Hill, which was on the books at a smaller amount, $50,000., and a false footing on Deposit Ledger No. 2, $100,000 and then certain other certificates coming in later, one of D. B. Welch, No. 2471, $10,000, and one, No. 25097 J. E. Hill, $50,000; and No. 268181 Poultney National Bank, $5,000, No. 27401 George Alcott, Cashier, $5,000, and two certificates, numbers 27978 and 28009, La Salle National Bank, for $5,000 each.

Q. That is Exhibit "ee"?

A. These were liabilities that actually existed at the dates named, but were not shown by the books.

Mr. THOMAS: We offer in evidence Exhibits "dd" and "ee".

Exhibits "dd" and "ee" received and read in evidence.

(Copy may be found at next succeeding page.)

(Exhibit "dd" appearing at page 651.)

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652 & 653 Q. Mr. Whitmore, in your former testimony you referred to Bills Receivable, or notes, of Donnell, Lawson & Simpson that appeared among the assets of the Capital National Bank from time to time. I will ask you if you made a schedule showing the amount of this paper, when it entered the bank, and when it appears to have been taken out of the balances in the bank from time to time?

A. Yes sir, I made up a ledger account.

(Exhibit "ff" Identified.)

Q. Is Exhibit "ff" the account to which you refer?

A. Yes, sir.

* * * * * * *

(Here follows sheet 1. "ff." appearing at page 654.)

655–657 Q. Have you prepared from the books of the bank, the Marsh National Bank and the Capital National Bank a schedule or statement showing the different items of this Marsh paper that entered the assets of the bank as Bills Receivable, also showing when it appears to have been paid, and the amounts of notes on hand in the bank at the various dates?

A. Yes, sir.

Q. Will you hand that exhibit to the reporter and have it identified as Exhibit "gg."

(Paper so identified.)

Q. From what books was that prepared?

A. Made up from the books of the Capital National Bank and the Marsh National Bank, also.

Q. Explain to the court what that schedule means, how you prepared it, so it will be understood?

A. It shows the notes that were taken into the bank, the numbers and amounts, and the names are Sycamore Marsh Harvester Company, C. W. and W. W. Marsh, Marsh, Marsh Harvester Company, Marsh Binder Manufacturing Company, C. E. Tuerk and Blakely Marsh and Company.

Q. That shows the paper as it came into the bank?

A. And also some notes that were entered in one place as notes of other individuals, but are marked on the books of the bank at different places as Marsh paper, or Sycamore Harvester Company, or something to indicate that apparently they were Marsh notes; those are all indicated in the schedule here.

Mr. ROSE: These are the instances that you detailed the other day from the Journal?

A. Yes sir.

Q. All except one of those notations were pencil notations?

A. Yes sir. I think on the Discount Register the notes were entered as "Marsh" sometimes.

* * * * * * *

658 Q. Do you remember of making search for that Tuerk note in the first entries of the bank?

A. I think the first note appears in—No. 5664, May 28, 1884.

Q. And what amount?

A. It is $3,225.67.

Q. And does that and its renewals remain in the bank right along?

A. That note apparently goes through the account; the next time it appears it is paid, $3,225.67, and it is renewed for $3,254.77, and then $3,254.77 is paid and $3,490.04 is taken, adding interest apparently and the note keeps on increasing in that way.

Q. And it finally turns up at the failure of the bank at what amount?

A. I think the last note is $7,289.10.

Q. That is the original note of some three thousand dollars renewed with the interest accumulations added to it apparently?

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A. Well the note keeps on increasing from 1884 on down; there were accretions, I presume it was interest, we found interest on the Interest Received boom sometimes, and sometimes we would not.

659 Q. But when one is marked paid the other appears in the bank as a renewal apparently?

A. I think in every case when one was renewed there was another note taken in the same name for a larger amount, although in some instances the notes would disappear for a while and then reappear.

Mr. THOMAS: We offer in evidence the schedule, Exhibit "gg."

A. Then I have a balance showing what was due each day, or each time there was any posting. Of course the balances showing here will continue unchanged until there was another posting to the ledger account.

Q. Have you the total of Bills Receivable taken into the bank, as shown there?

A. Yes, sir.

Q. Give us that.

A. $510,628.71.

Mr. ROSE: There is no particular significance in that total is there?

A. Simply to get at the balance.

Q. That wouldn't indicate what was in the bank at any time?

A. Oh, no, the balances would show that. I think the evidence shows how many of these Marsh notes were taken into the bank. Of course that will vary some from this, because the Receiver didn't find these three notes that I speak of.

Exhibit "gg" received in evidence. (To be found at page 626½ hereof.)

660–662 (Here follow sheets Nos. 1, 2, and 3, Exhibit "gg," appearing at page 660.)

* * * * * * *

663 (Here follow sheets Nos. 1 and 2, Exhibit "hh," appearing at folio 663.)

664 & 665 Mr. ROSE: I would like to cross examine the witness on the competency of this document.

The COURT: Proceed.

By Mr. ROSE:

Q. Did you find any irregularities in the transactions of Mr. Holmes with that bank?

A. No sir.

Q. Did you find every note that he ever gave paid?

A. That is what I say.

Q. The account balanced. You examined it clear through the journal?

A. Certainly.

Q. So far as you discovered, it represented a straight business transaction.

A. So far as I know.

* * * * * * *

(Here follow sheets Nos. 1, 2, and 3, Exhibit "II," appearing at page 666.)

667 & 668

* * * * * * *

669 Q. Are there and notations there that require explanation?

A. No sir.

Mr. THOMAS: We offer Exhibit "kk" in evidence.

Mr. ROSE: I would like to cross examine the witness on that subject.

The COURT: Proceed.

Mr. ROSE: Did the transactions between the bank and R. O. Phillips seem to balance in every respect?

(Here follow sheets 1, 2, 3, and 4, Exhibit "JJ," appearing at page 670.)

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671 A. Yes sir.

Q. And indicate that Mr. Phillips paid all his indebtedness to the bank?

A. No, I think he had a thousand dollar note in the bank when the account closed.

Q. He paid that to the receiver, didn't he?

A. I don't know whether he did or not.

Q. Don't you have the receiver's record here? You mentioned having gotten some items from the receiver's record.

A. That was eight years ago.

Q. Is the receiver's record here?

A. No sir.

Q. Not in court?

A. Not to my knowledge.

Q. Do they indicate that they were the ordinary loans and discounts in Mr. Phillips' case?

A. Yes, sir.

Q. Is there anything to cast any suspicion as to the regularity of his transactions with the bank?

Mr. THOMAS: Plaintiffs object to that as not proper cross examination and immaterial.

Objection overruled.

Plaintiffs except.

A. No sir.

* * * * * * *

672 (Here follow sheets Nos. 1 and 2, Exhibits "kk," appearing at folio 672.)

* * * * * * *

673 Q. Now, Mr. Whitmore, you never found a period from the organization of the bank until it closed when Mr. Yates had promissory notes in there aggregating at one time as much as $5,000, did you?

Mr. THOMAS: That is objected to as not proper cross examination to show the competency of the exhibit.

Objection overruled.

Plaintiffs except.

A. No he hadn't at any one time to exceed, or as much as $5,000.

Q. And he hadn't at any time any obligations in there that were not paid off in short intervals?

A. They were paid off; his account shows that it was frequently balanced.

674–676 Q. What was the last day that he had any loan at all in there?

A. October 7th, 1885.

Q. So that in a period of eight years before the suspension of the bank, Mr. Yates hadn't borrowed a dollar from the bank, according to the books?

A. I think that is a mistake, Mr. Rose. 1889, June 3rd,—this is only one sheet,—the other sheet they started to make a copy on, it wasn't completed. You will find it goes down to 1889.

Q. Is there anything in there to indicate that the bank suffered any loss, or that any transaction of Mr. Yates with the bank wasn't legitimate?

A. Nothing that I know of.

Q. What would be your conclusion from an examination of the account as to whether his transactions with the bank, so far as his personal borrowing was concerned, were legitimate?

Mr. THOMAS: That is objected to as not proper cross examination and immaterial, and it does not effect the competency of the exhibit.

Objection overruled.

Plaintiffs except.

A. Everything that I can see in connection with Mr. Yates' borrowing there is regular and legitimate.

* * * * * * *

674 (Here follows sheet No. 1, Exhibit "LL," appearing as folios 674-75.)

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CHARTS

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677–681 Q. And it does show, for the most part they were in there for but a few days. Now what was the highest amount of indebtedness that the books of the bank show that Mr. Thompson had at any one time?

A. $10,000.

Q. And for how long a period of time did he have as high an indebtedness as that to the bank?

A. From the 27th of August, 1887 to Sept. 13th, 1887.

Q. At all other times when he had any indebtedness, it was for a smaller amount than ten thousand dollars.

A. Yes sir.

Q. Do the books show that all of his notes were paid?

A. Yes sir.

Q. Do they show that any of them were suffered to remain there past due?

A. As to that I didn't look.

Q. Did you check up the interest items to see whether the Interest Received account shows that he paid interest every time?

A. No, I didn't.

Q. Now I want to ask you what is your conclusion from an inspection of those notes as to whether they appear to represent regular and legitimate transactions with the bank?

A. I think they do.

Q. Is there any exception, when you could deduce any other conclusion from any entry in the book concerning them?

A. No sir.

Mr. Rose: We will let that go in without objection.

Exhibit "mm" received without objection.

(Copy at page 638½ hereof.)

(Here follows sheet No. 1, Exhibit "MM," appearing as page 678.)

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680 (Here follows sheet No. 1. Exhibit "NN," appearing as page 680.)

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682 Mr. THOMAS: We offer in evidence Exhibit X-1039 which is a portion of the General Balance book, identified by the reported as Exhibit X-19 and purports to be the condition of the bank, that is the account showing its assets and liabilities und-r date of Wednesday, December 29th, 1886.

Mr. ROSE: Defendants severall- object as no foundation laid, and the book has not been sufficiently proved to entitle it to be received in evidence.

Objection overruled. Each of the defendants excepts.

Exhibit No. X-1039 received and read in evidence, as follows:

	WEDNESDAY, Dec. 29/86.	
Capital Stock	.....	300,000.00
Surplus	.....	12,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	7,188.43	
Circulation a/c	.....	45,000.00
Redemption Fund	1,900.00	
Stock & Bond a/c	22,739.34	
Furniture a/c	5,650.00	
B/R.	725,826.12	
Cash	55,378.44	
Bills of Exchange	25,458.45	
Commercial Nat'l Bank, Chic.	27,747.31	
U. S. National Bank, Omaha	14,011.93	
Omaha Nat'l Bank "	4,628.78	
Merchants Nat'l Bank "	1,911.83	
Commercial Nat'l Bank, Omaha	.....	603.20
Chemical Nat'l B'k	46,321.32	
Drovers Nat'l Bank	158.73	
Blackstone Nat'l Bank	4,865.70	
American Exchange, in Europe	66.46	
First Nat'l Bank, Beatrice	.....	5,307.67
Merchants Nat'l Bank, Nebr. City	.....	268.40
Bank of Cass County	47.15	
Schuster, Hax & Co.	1,500.73	
First Nat'l Bank, Kans. City	5,179.87	
Walsh & Putnam	11,600.00	
Hurlbut E. Jr.	667.83	
Undivided Profits	.....	9.36
Rediscount	.....	52,090.60
Real Estate	1,450.00	
Tax	77.33	
C. W. Marsh	521.65	
Discount, Interest & Ex.	.....	36,644.92
Interest Paid	8,214.90	
Wages	5,149.98	
Expense	3,735.67	
Deposit a/c	.....	580,073.80
	1,031,997.95	1,031,997.95

Overdrafts, $11,665.87.

Exhibit X-1039.

683 Q. Mr. Whitmore, I will ask you if you have compared the statement of the condition of the bank as shown by Exhibit X-1039, with the statement of its condition as shown by Exhibit X-977, being the condition of the bank at the close of business, December 28th, 1886?

A. I have.

Q. Why do you take the column of the General Balance Book under the head of Wednesday, December 29th, 1886?

A. Because the way the books of this bank were kept the balances shown under a certain date refer to the close of business of the preceding day.

Q. Then the statement contained under the head of Wednesday, December 29th, 1886 would reflect the condition of the bank at the close of business December 28th, 1886.

A. Yes sir, the opening of business, on the morning of the 29th would.

Q. You say you have made a comparison of those two statements?

A. Yes, sir.

Q. And you may state what discrepancies you find, if any in those two exhibits.

A. I find the overdrafts stated in the published report are $7,691.54 less than those shown on the Individual Deposit ledgers. The overdrafts themselves do not appear upon the General Balance book of the bank. The loans in the published statement are $11,400.00 more than the loans shown on the books of the bank. The totals of the amounts due from all banks is $35,339.47 more than the totals due from all banks as shown on the books of
684 the bank. I think that was stated as $11,600 eight years ago, but in checking it over from what I have access to now, the copies of the published statements in the record.—I don't know whether there is a mistake of $200 in copying them or not, but it makes a difference there I notice of $200. The item of Bills of Exchange shown on the books of the bank, is not shown as a separate item in the published statement,—$25,458.45.

Q. That does not appear in the published statement?

A. It does not appear as a separate item in the published statement. In the matter of real estate, the published statement shows $7,177.33, and the real estate shown on the book is $1,450, and the furniture account is shown,—the real estate is shown as Real Estate, Furniture and Fixtures—$7,177.33, and the real estate alone is $1,450. The book value of the furniture and fixtures is $5,650, making $7,100.

Mr. Rose: What is the amount of the discrepancy?

A. $77.33.

Mr. Thomas: We now offer in evidence Exhibit No. X-1040, contained in book identified by the reporter as Exhibit X-19, purporting to be the condition of the Capital National Bank as shown by the General Balance Book under date of Tuesday, August 2nd, 1887.

Mr. Rose: Each of the defendants object to the offer as incompetent, immaterial and no issue tendered; there is no specification

in the petition that any false statement was made or published, or attested by any of the defendants under any such a date, set forth in the petitions if the several plaintiffs; also object to it because the book itself is not proved or established in such form as to entitle it to be received in evidence.

Objection overruled.

Each of the defendants excepts.

Exhibit No. X-1040 received and read in evidence.

(Copy of next succeeding page.)

Exhibit X-1040.

685 EXHIBIT No. X-1040.

	TUESDAY Aug. 2/87.	
Capital Stock	.....	300,000.00
Surplus a/c	.....	16,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	6,200.00	
Circulation a/c	.....	45,000.00
Redemption fund	2,250.00	
Stock & Bond a/c	15,281.00	
Furniture a/c	5,650.00	
B/R.	832,941.44	
Cash	87,631.50	
Bills of Exchange	42,096.44	
Commercial Nat'l Bank, Chic.	11,998.98	
American Exch. Nat'l Bank	3,048.07	
U. S. Nat'l Bank, Omaha	12,079.52	
Omaha Nat'l Bank "	6,130.13	
Merchants Nat'l Bank, "	.....	948.75
Commercial Nat'l Bank, "	.....	2,335.16
Chemical Nat'l Bank	28,570.52	
Drovers Nat'l Bank	131.53	
Blackstone Nat'l Bank	240.97	
American Exchange, in Europe	722.54	
First Nat'l Bank, Beatrice	639.48	
Merchants Nat'l Bank, Neb'r City	300.11	
Bank of Cass County	467.39	
Schuster, Hax & Co.	3,119.24	
First Nat'l Bank, Kan's City	1,058.18	
South Omaha Nat'l Bank	1,042.48	
Walsh & Putnam	10,400.00	
Hurlbut, E. Jr.	442.83	
Undivided Profits	.....	30.18
Real Estate,	17,874.32	
C. W. & W. W. Marsh	3,008.35	
Discount, Int. & Exch.	.....	6,799.24
Wages a/c	1,083.33	
Interest Paid a/c	2,835.72	
Expense a/c	1,360.05	
Deposit a/c	.....	777,490.79
	1,148,604.12	1,148,604.12

POOR

Country Bank overdrafts	3,435.07
Overdrafts	53,828.74
	57,263.81

686 Q. Now I will ask you, Mr. Whitmore, if you have examined the exhibit referred to, X-1040,—if you have compared Exhibit X-1040 with Exhibit X-978?

A. Yes, sir.

Q. You may state what discrepancies, if any, you find in those two exhibits.

A. The overdrafts as published are $51,032.12 less than the overdrafts shown on the books. The loans are $75,681.97 more than shown on the books; the amount due from banks is $53,313.71 more than shown by the books; the Real Estate, Furniture and Fixtures is $17,874.32 less than shown by the books. The cash is $10,462.98 more than shown by the books. The item Bills of Exchange is not shown in the published report, of $42,096.44.

Mr. THOMAS: We now offer in evidence Exhibit X-1041 contained in Exhibit X-19, and purporting to state the condition of the Capital National Bank as shown by its General Balance Book, under date of Thursday, October 6th, 1887.

Mr. ROSE: Each of the defendants objects as incompetent, immaterial, there being no issue, there being no charge contained in the petition of any of the several plaintiffs that the defendants made or participated in the making of a statement of the condition of the bank upon that day, and no charge of deceit based upon any such report, and further because the book itself is not sufficiently proved to entitle it to be received in evidence.

Objection overruled.

Each of the defendants excepts.

Exhibit No. X-1041 received in evidence as follows:

687 EXHIBIT No. X-1041.

		THURSDAY, Oct. 6/87.
Capital Stock	.....	300,000.00
Surplus	.....	16,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	5,500.00	
Circulation	.....	45,000.00
Redemption Fund	2,250.00	
Stock & Bond a/c	16,129.56	
Furniture a/c	5,650.00	
B/R	{ 867.30 / 186,663.80 }	787,531.50
Cash	104,617.55	
Bills of Exchange	42,458.65	
Chemical Nat'l Bank	7,496.58	
American Exch. Nat'l Bank	21,742.29	

COPY

Commercial Nat'l Bank, Omaha.....	114.90	
U. S. Nat'l Bank, "	21,724.78	
Omaha Nat'l Bank, "	4,078.88	
Merchants Nat'l Bank, "	453.19	
First Nat'l Bank, Kans. City.....	922.94	
Schuster, Hax & Co.....	816.45	
Drovers Nat'l Bank.....	.....	1,071.07
Blackstone Nat'l Bank.....	3,590.67	
American Exchange in Europe.....	1,268.86	
South Omaha Nat'l Bank.....	1,478.28	
Merchants Natl Bank, Nebr. City....	468.53	
First National Bank, Beatrice.....	.....	1,997.55
Bank of Cass County.....	.....	323.29
Commercial Nat'l Bank, Chic.....	491.17	
Clearing House a/c.....	.....	4,159.04
Walsh & Putnam.....	10,000.00	
Hurlbut, E. Jr.....	442.83	
Undivided Profits	.....	30.18
Rediscount a/c	.....	10,000.00
Real Estate a/c.....	15,888.82	
C. W. & W. W. Marsh.....	2,974.19	
Discount, Int. & Exch.....	.....	19,306.82
Wages a/c	3,249.99	
Interest Paid a/c.....	9,474.22	
Expense a/c	2,503.48	
Deposit a/c	.....	725,430.36
	1,223,318.31	1,223,318.31

688 Q. I will ask you Mr. Whitman if you have made a comparison of the condition of the bank, as disclosed by Exhibit X-1041 and Exhibit X-979?

A. Yes, sir.

Q. You may state what discrepancies, if any, you find.

A. The overdrafts as published are $20,780.12 less than the books show. The loans are $44,658.83 more than the books show; due from all banks $60,435.78 more than the books show; real estate $14,438 less than the books show; the item of Bills of Exchange $42,458.65 not shown as such.

Mr. THOMAS: We now offer in evidence Exhibit X-1043, contained in Exhibit X-20, being the statement of the condition of the Capital National Bank as shown by its General Balance Book under date of Tuesday October 1st, 1889.

Mr. ROSE: That is objected to on the part of D. E. Thompson, because it is irrelevant and immaterial; there being no proof that Mr. Thompson either made or participated in making any report of the condition of the bank at or about that time, or in the publication of any statement thereof; there being no allegations contained in either of the petitions against him that he so did. And for the further reason that the book itself is not sufficiently proved or authenticated to entitle it to be received in evidence under the statute.

Objection overruled.

Defendant Thompson excepts.

POOR

Mr. Bishop: The defendant Hamer makes the same objection as made by defendant Thompson, and the defendant Yates makes the same objection and that the report is not one alleged in any of the petitions, nor are any representations stated in it stated in any of the petitions as a ground of recovery.

Objection overruled.
Defendants Yates and Hamer except.

689 Exhibit X-1043 received in evidence as follows:

		Tuesday, Oct. 1/'89.
Capital Stock		300,000
Surplus a/c		24,000.
U. S. Bond a/c	50,000.00	
Premium a/c	3,750.00	
Circulation a/c		45,000.00
Redemption Fund	1,500.	
Stock & Bond a/c	21,954.94	
Furniture a/c	5,770.00	
B/R	761,156.53	
Cash	65,054.70	
Bills of Exchange	36,665.78	
Chemical Nat. Bank	1,550.94	
Am. Exch. Nat. Bank	14,996.55	
Com'l Nat. Bank, Omaha	540.89	
U. S. Nat. Bank, "	13,690.85	
South Omaha Nat. Bank	442.19	
First Nat. Bank, Kan. City	731.31	
Schuster Hax Nat'l Bank	413.38	
Drover's Nat. Bank	59.04	
Blackstone Nat'l Bank	1,487.80	
Am. Exch. in Europe	725.40	
Merchants Nat. Bank, Neb. City	338.51	
First Na. Bank, Beatrice		2,900.20
Bank of Cass County	153.36	
Com'l Nat. Bank, Chicago	746.22	
Knauth, Nachod & Kuhne	26.09	
Clearing House a/c	12,597.50	
Walsh & Putnam	8,500.	
Undivided Profits		598.38
Rediscount a/c		15,682.92
Real Estate a/c	37,976.70	
C. W. & W. W. Marsh, Colls	4,969.65	
Discount, Int. & Exchange		16,508.99
Wages a/c	4,453.32	
Suspense	9.20	
Interest Paid a/c	2,895.64	
Expense a/c	3,473.06	
Deposit		626,744.06
	1,044,032.05	1,044,032.05

COPY

690–692 Q. Have you made a comparison of the statement purporting to show the condition of the Capital National Bank, as contained in Exhibit No. X-1043, with the statement of its condition as shown by Exhibit X-983?

A. Yes, sir.

Q. Purporting to be for September 30th, 1889?

A. Yes, sir.

Q. You may state what discrepancies, if any, there are in those two statements.

A. I find the overdrafts to be $30,924.05 less in the published statement than shown by the deposit books; I find the loans $39,003.35 more than shown by the books; I find the item Due from All Banks $88,056.13 more than as shown by the books. Now the item of notes or bills rediscounted would be $46,000 more than shown by the books. The item of Bills of Exchange is not shown as such in the published statement.

Mr. ROSE: What was the item of Bills of Exchange not shown?

A. $36,665.78.

Mr. THOMAS: We now offer in evidence Exhibit X-1044, contained in Exhibit X-20, in the General Balance book of the Capital National Bank and purporting to show its condition—the condition of its assets and liabilities under the head of Thursday, December 12, '89.

Mr. ROSE: That is objected to by each of the defendants because it is irrelevant and immaterial; there is no proof that any of

692½ these defendants either made or participated in the making or publishing of any report of the condition of this bank upon the date of this entry in the balance book, because there is no allegation in the petition that any of the defendants made or participated in or permitted the making or publishing of any report of the condition of the Capital National Bank at or about the date of said entry, and also because no foundation has been laid for the admission of the entry as a book of account, and the book itself has not been sufficiently proven to entitle it to be received in evidence under the statute.

Objection overruled.

Each of the defendants excepts.

Exhibit No. X-1044 received and read in evidence, as shown on next succeeding page.

693–699 EXHIBIT X-1044.

	THURSDAY, Dec. 12/89.	
Capital Stock	.....	300,000.00
Surplus a/c	.....	24,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	3,750.00	
Circulation a/c	.....	45,000.00
Redemption Fund	1,709.41	
Stock & Bond a/c	11,954.94	
Furniture	5,770.	
B./R.	742,485.61	
Cash	38,643.31	
Bills of Exchange	32,036.78	
Chemical Nat. Bank	22,379.67	
Am. Exch. Nat. Bank	10,047.26	
Com'l Nat. Bank, Omaha	.....	1,721.92
U. S. Nat'l Bank "	2,656.98	
South Omaha Nat. Bank	402.58	
First Nat. Bank, Kas. City	1,211.18	
Schuster Hax Nat. Bank	252.17	
Blackstone Nat. Bank	461.45	
American Exchange in Europe	725.40	
Merchants Nat. Bank, Neb. City	246.45	
First Nat. Bank, Beatrice	.....	3,517.07
Bank of Cass County	13.40	
Com'l Nat. Bank, Chic	288.39	
Knauth, Nachod & Kuhne	.....	24.08
Clearing House a/c	.....	
Walsh & Putnam	8,500.00	
Undivided Profits	.....	598.38
Rediscount a/c	.....	138,103.49
Real Estate a/c	41,565.47	
C. W. & W. W. Marsh, Colls	4,969.65	
Discount, Int. & Exchange	.....	32,807.20
Wages a/c	6,699.98	
Suspense a/c	.....	17.38
Interest Paid	9,559.91	
Expense a/c	4,259.91	
Deposit a/c	.....	453,995.22
	1,000,187.32	1,000,187.32

* * * * * * *

700 Q. Now I will ask you if you have made the comparison called for in my last question.

701 A. I have compared the published report which purported to give the condition of the bank at the close of business on December 11th, 1889, with the books of the bank which showed its condition at the close of business on December 11, 1889.

Q. You may state what discrepancies, if any, you find in those two statements.

Mr. Rose: Each of the defendants object- to that for the same reasons assigned to the introduction of the exhibit, and for the further reason that it appears on the face of this report fairly, that the date with which comparison is sought to be made is not the date of the bank's business that formed the basis of that report.

The Court: It is the previous day's business, is it not, Mr. Whitmore?

A. Yes sir, as I said in all cases.

The Court: Proceed.

Each of the defendants excepts.

A. I find that the overdrafts as published are $44,543.70 less than as shown on the individual deposit ledgers at the close of business on December 11th: I find that the loans as published are $66,295.65 more than as shown on the books for that day; I find that the amount due from banks is $44,809.47 more than is shown by the books of the bank at the close of business on December 11th, 1889; I find that the cash in the published report is $18,735.55 more than is shown by the books; I find that notes and bills rediscounted $12,081.25 more than is shown by the books. The item of Bills of Exchange $32,036.78 is not shown as such.

Mr. Thomas: We now offer in evidence Exhibit No. X-1046, contained in book Exhibit X-20 being the statement of the condition of the bank under the heading column, Saturday December 20th, 1890.

Mr. Rose: Each of the defendants object- to that exhibit for the reason that it is irrelevant and immaterial; there is no allegation in any of the petitions of plaintiffs that any one of the defend-
702 ants either made or participated in, or permitted the making or publishing of the report of the condition of the Capital National Bank at the date of these entries, and no proof that either of the defendants did so make or participate or permit the publication of any such report; for the further reason that the book itself is not sufficiently proved to entitle it to be received in evidence.

Objection overruled.

Each of the defendants excepts.

Exhibit No. X-1046 received and read in evidence.

Copy on next succeeding pages.

703 EXHIBIT No. X-1046.

	SATURDAY, Dec. 20/90.	
Capital Stock	.....	300,000.00
Surplus a/c	.....	28,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	2,400.00	
Circulation a/c	.....	45,000.00
Redemption Fund	2,250.00	
Stock & Bond a/c	6,909.88	
Furniture a/c	5,770.00	
B/R.	823,829.70	
Cash	63,326.82	
Bills of Exchange	39,424.90	
Chemical Nat. Bank	20,866.95	
Am. Exch. Nat. Bank	16,448.84	
Com'l Nat. Bank, Omaha	5,503.53	
U. S. Nat. Bank "	15,020.70	
South Omaha Nat. Bank	849.93	
First Nat. Bank, Kans. City	570.21	
Schuster, Hax. Nat. Bank	4,108.32	
Blackstone Nat. Bank	231.58	
Am. Exch. in Europe	725.40	
Merchants Nat. Bank, Neb. City	1,035.49	
First Nat. Bank, Beatrice	.....	313.64
Bank of Cass County	.....	98.23
Com'l Nat. Bank, Chicago	675.08	
Knauth, Nachod & Kuhne	153.82	
Clearing House a/c	.....	6,887.02
Walsh & Putnam	5,600.00	
Undivided Profits	.....	500.19
Rediscount a/c	.....	43,676.25
Real Estate a/c	55,099.59	
Discount, Int. & Exch.	33,085.61	
Wages a/c	6,750.23	
Suspense a/c	9.26	
Taxes Paid a/c	2,000.00	
Interest a/c	14,769.98	
Expense a/c	2,775.51	
Deposit	.....	689,544.78
	1,147,105.72	1,147,105.72

704 Q. I will ask you, Mr. Whitmore, if you have made an examination of Exhibit X-1046, showing the condition of the Capital National Bank as reflected by its general balance book and compared it with Exhibit X-985 purporting to be the condition of the Capital National Bank at the close of business December 19th, 1890?

Mr. ROSE: Each of the defendants object to that for the reason it is irrelevant and immaterial; there is no allegation in any of the petitions of plaintiffs that any one of the defendants either made or participated in, or permitted the making or publishing of the report of the condition of the Capital National Bank at the date of these entries, and no proof that either of the defendants did so make or participate or permit the publication of any such report; for the further reason that the book itself is not sufficiently proved to entitle it to be received in evidence.

Objection overruled.

Each of the defendants excepts.

A. I have compared the published statement of the Capital National Bank, which purported to give its condition as shown by its books at the close of business on December 19, 1890 with its books for the same date, and found that the overdrafts as published was $24,621.64 less than the overdrafts shown by the individual deposit ledgers; that the loans and discounts as published were $23,612.70 more than as shown by the books; that the amount due from all banks was $79,007.16 more than as shown by the books; that the amount of cash as published was $20,000 more than as shown by the books; that the notes and bills rediscounted were $52,973.22 more than shown by the books; that the item of Bills of Exchange, $39,424.90 was not shown as such.

Mr. THOMAS: We now offer in evidence Exhibit No. X-1047, being contained in book marked Exhibit X-20, and being a portion of the general balance book of the Capital National Bank, purporting to give the condition of the Capital National Bank under the column heading Friday, July 10th, 1891.

705 Mr. ROSE: That is objected to by each of the defendants severally as irrelevant and immaterial; there being no allegations in the petitions of any of the plaintiffs that the defendants, or any of the defendants either made or participated in, or wilfully permitted either the making or publication of a report of the condition of the Capital National Bank at the date shown in the column heading of the entries offered; nor is there any proof that any of the defendants in fact either made or participated in making, or publishing of any such report, and because the book itself is not sufficiently proved or established to entitle it to be received in evidence as a book of account under the statute of Nebraska.

Objection overruled.

Each of the defendants excepts.

Exhibit No. X-1047 received and read in evidence.

(Copy on next page.)

706 EXHIBIT No. X-1047.

FRIDAY, July 10/91.

Capital Stock	.....	300,000.00
Surplus a/c	.....	30,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	1,437.50	
Circulation a/c	.....	45,000.00
Redemption Fund	600.00	
Stock & Bond a/c	52,913.49	
Furniture a/c	5,770.00	
B/R	801,780.97	
Cash	67,398.46	
Bills of Exchange	9,332.75	
Chemical Nat. Bank	.....	27,672.60
Am. Exch. Nat. Bank	.....	4,109.81
Com'l Nat. Bank, Omaha	.....	13,123.61
U. S. Nat. Bank "	1,984.76	
Saud Omaha Nat. Bank	1,963.93	
First Nat. Bank, Kans. City	52.13	
Schuster Hax Nat. Bank	619.72	
Blackstone Nat. Bank	177.74	
Am. Exch. in Europe	725.40	
Merchants' Nat. Bank	1,024.96	
First Nat. Bank, Beatrice	.....	3,999.39
Bank of Cass County	.....	36.32
Knauth, Nachod & Kuhne	80.04	
Clearing House a/c	.....	3,229.16
Walsh & Putnam	2,800.00	
Undivided Profits	.....	16,003.79
Rediscount a/c	.....	117,391.10
Real Estate a/c	56,230.60	
Taxes Paid a/c	1,500.00	
Discount, Int. & Exch	.....	1,301.08
Wages a/c	1,068.33	
Suspense	105.06	
Interest Paid	733.77	
Expense a/c	408.14	
Deposit a/c	.....	496,840.91
	1,058,707.77	1,058,707.77

707 Q. Have you examined the condition of the Capital National Bank as disclosed by its General Balance Book, and particularly identified as Exhibit X-1047, and compared it with the condition as shown in Exhibit No. X-986 purporting to be the condition at the close of business July 9th, 1891 as published?

A. Yes, sir.

Q. You may state what discrepancies, if any, you find in those two statements?

Mr. Rose: That is objected to as immaterial and irrelevant; there being no allegation in the petitions of any of the plaintiffs that the defendants, or any of the defendants, either made or participated in, or wilfully permitted either the making or publication of a report of the condition of the Capital National Bank at the date shown in the column heading of the entries with which the comparison is to be made; nor is there any proof that any of the defendants in fact either made or participated in the making of any such report, and because the book itself is not sufficiently proved or established to entitle it to be received in evidence as a book of account under the statute of Nebraska.

Objection overuled.

Each of the defendants except.

A. I have compared the published statement of the Capital National Bank purporting to show its condition at the close of business on July 9th, 1891, with the books of the bank showing its condition at the close of business on July 9th, 1891; I find that the overdrafts as published are $50,050.26 less than the overdrafts shown on the individual deposit ledger; I find that the loans and discounts as published are $96,230.60 more than shown by the books; I find the amount due from all banks as published $72,183.01 more than shown by the books; I find that the item of Bills of Exchange, $9,332.75 is not shown as such. I find in the published report an item of Banking House, Furniture and Fixtures $5,770. Real Estate of $56,230.60 is not shown in the published statement as such.

708 Mr. Thomas: We now offer in evidence Exhibit No. X-1048 contained in Exhibit X-20 being General Balance Book, of the Capital National Bank, purporting to show the condition of the bank under the heading of Saturday, September 26th, 1891.

Mr. Rose: That is objected to by the defendants Thompson and Yates for the reason that it is immaterial; it not appearing that either of said defendants either made, or participated, or permitted the making or publishing of any report of the corresponding date; because it is not alleged in the petitions in any of the cases that the defendants made or participated in the making of any report of the condition of the bank on the corresponding date; and, because the book itself is not sufficiently proved to entitle it to be received as a book of account under the statute of this state.

Objection overruled.

Defendants Thompson and Yates severally except.

Mr. Bishop: The defendant Hamer objects as immaterial; it not appearing that he ever made, participated in or permitted the making or publishing of any report of the corresponding date, and because it is not alleged in the petitions in any of the cases that the defendants made or participated in the making of any report of the condition of the bank on the corresponding date, and because the book

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itself is not sufficiently proved to entitle it to be received as a book of account under the statute of this state.

Objection overruled.

Defendant Hamer excepts.

Exhibit No. X-1048 received in evidence. (See copy on the next succeeding page.)

* * * * * * *

709 EXHIBIT No. X-1048.

	SATURDAY, Sept. 26/91.	
Capital Stock	.....	300,000.00
Surplus a/c	.....	32,000.00
U. S. Bond a/c	50,000.00	
Premium a/c	868.82	
Circulation a/c	.....	45,000.00
Redemption Fund	2,250.00	
Stock & Bond a/c	53,063.49	
Furniture a/c	5,770.00	
B/R	765,133.40	
Cash	59,451.46	
Bills of Exchange	10,794.09	
Chemical Nat. Bank	18,442.41	
Amer. Exch. Nat. Bank	8,263.27	
Com'l Nat. Bank, Omaha	.....	286.61
U. S. National Bank, "	14,908.97	
So. Omaha Nat. Bank	.43	
First Nat. Bank, Kas. City	380.06	
Schuster Hax Nat. Bank	288.88	
Blackstone Nat. Bank	620.48	
Amer. Exch. in Europe	725.40	
Merchants Nat. Bank, Nebr. City	.....	416.
First Nat. Bank, Beatrice	2,458.92	
Bank of Cass Co.	.....	66.32
Knauth, Nachod & Kuhne	169.01	
Clearing House a/c	.....	3,914.82
Walsh & Putnam	2,800.	
Undivided Profits	.....	253.79
Rediscount a/c	.....	198,571.52
Real Estate a/c	56,478.20	
Taxes Paid	1,500.	
Dis. Int. and Exch.	.....	14,531.78
Wages a/c	3,239.	
Suspense a/c	127.83	
Int. Paid a/c	3,495.40	
Expense a/c	2,423.92	
Deposit a/c	.....	473,112.60
Continental Nat. Bank	4,500.00	
	$1,068,153.44	$1,068,153.44

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710 Q. I will ask you, Mr. Whitmore, if you made an examination of the condition of the Capital National Bank as disclosed by Exhibit No. X-1048 and compared it with its condition as shown by Exhibit X-987, purporting to be the condition of the bank at the close of business on September 25th, 1891?

A. I have.

Q. You may state what, if any, discrepancies you find in those two statements.

Mr. ROSE: That is objected to by the defendants Thompson and Yates for the reason that it is immaterial; it not appearing that either of said defendants either made, or participated in or permitted the making or publication of any report of the corresponding date; because it is not alleged in the petitions in any of the cases that the defendants made or participated in the making of any report of the condition of the bank on a corresponding date, and because the book itself is not sufficiently proved to entitle it to be received as a book of account under the statutes of this state.

Objection overruled.

Each of the defendants excepts.

Mr. BISHOP: The defendant Hamer objects as immaterial; it not appearing that he either made, participated in or permitted the making or publication of any report of the corresponding date, because it is not alleged in the petitions in any of the cases that the defendants made or participated in the making of any report of the condition of the bank on a corresponding date, and because the book itself is not sufficiently proved to entitle it to be received as a book of account under the statutes of this state.

Objection overruled.

Defendant excepts.

A. I have compared the published statement of the Capital National Bank purporting to be a statement of its condition at the close of business on September 25th, 1891, with the books of the bank showing its condition at the close of business on September 25th, 1891; I find the amount of overdrafts as published $22,049.52 less than the amount of overdrafts shown by the deposit book; I find the amount of loans and discounts as published to be $69,006.06

711 more than as shown by the books; I find the amount due from all banks to be $27,223.67 more than as shown by the books; I find the amount of rediscounts as published to be $100,000.00 less than as shown by the books; I find the Banking House, Furniture and Fixtures as published to be $5770.00; the item of Real Estate of $56,478.20 is not given in the published statement as such. I find the item of Bills of Exchange $10,794.09 is not given in the published statement as such.

Mr. THOMAS: We now offer in evidence Exhibit No. X-1049, contained in the General Balance book of the Capital National Bank, Identified as Exhibit X-21, purporting to give the condition of the Capital National Bank under the heading of Thursday, December 3, 1891.

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Mr. ROSE: That is objected to on behalf of Thompson and the Hamer estate because there is no proof that either one of these defendants ever made or participated in the making of any report of the condition of the bank at or about the date of the column heading; because the petitions do not charge the defendants, or any of the defendants with having made or published any statement of the condition of the bank at a corresponding date; the book itself is not sufficiently proved or established to entitle it to be received in evidence as a book of account under the statutes of Nebraska.

Objection overruled.

Each of the defendants excepts.

Mr. BISHOP: The defendant Yates objects because there is no proof that he ever made or participated in the making of any report of the condition of the bank at or about the date of the column heading; because the petitions do not charge the defendant, or any of the defendants, with having made or published a statement of the condition of the bank on the corresponding date; the book itself is not sufficiently proved or established to entitle it to be received in evidence as a book of account under the statutes of Nebraska.

Objection overruled.

Defendant excepts.

Exhibit, No. X-1049 received and read in evidence.

(Copy on next succeeding page.)

712 EXHIBIT No. X-1049.

		THURSDAY, Dec. 3/91.
Capital Stock		$300,000.00
Surplus a/c		32,000.00
U. S. Bond a/c	$50,000.00	
Premium a/c	868.82	
Circulation a/c		45,000.00
Redemption Fund	2,250.00	
Stock & Bond a/c	53,513.49	
Furniture	5,770.00	
B/R	735,474.93	
Cash	44,314.02	
Bills of Exchange	10,583.88	
Chemical Nat. Bank	402.45	
Am. Exch. Nat. Bank	16,673.83	
U. S. Nat. Bank	7,605.55	
South Omaha Nat. Bank	1,510.24	
First Nat. Bank, Kans. City	224.55	
Schuster Hax Nat. Bank	1,588.07	
Blackstone Nat. Bank	1,034.78	
Am. Exch. in Europe	725.40	
Merchants Nat. Bank, N. C		604.46
First Nat. Bank, Beatrice	224.28	
Bank of Cass County		3.17

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Knauth, Nachod & Kuhne.....	193.08	
Continental Nat. Bank, Boston.....	5,155.	
Clearing House a/c	.....	
Walsh & Putnam	2,800.	
Undivided Profits	.....	253.79
Rediscounts a/c	.....	125,196.14
Real Estate a/c	56,572.70	
Taxes Paid a/c	2,512.50	
Discount, Interest & Exchange.....	.....	23,023.10
Wages a/c	6,530.83	
Suspense a/c	46.43	
Interest Paid a/c	14,792.48	
Expense a/c	3,792.17	
Deposit a/c	.....	499,078.82
	$1,025,159.48	$1,025,159.48

713 Q. You may state, Mr. Whitmore, if you have made an examination of Exhibit No. X-1049 purporting to be the condition of the Capital National Bank as disclosed by its general balance book and compared it with Exhibit X-988 purporting to give the condition of the same bank at the close of business on December 2, 1891?

A. I have.

Q. You may state, what, if any, discrepancies you find in those two reports or statements.

Mr. ROSE: Each of the defendants objects because there is no proof that either one of these defendants ever made or participated in the making of any report of the condition of the bank at or about the date named, or the date of the column heading; because the petitions do not charge the defendants or any of the defendants with having made or published any statement of the condition of the bank at the corresponding date, and because the book itself is not sufficiently proved or established to entitle it to be received in evidence as a book of account under the statutes of Nebraska.

Objection overruled.

Each of the defendants excepts.

A. I have examined the published statement of the Capital National Bank purporting to be a statement of its condition at the close of business on December 2nd, 1891, with its books showing its condition at the close of business on December 2nd, 1891. I find the item of overdrafts as published is $45,623.20 less than the overdrafts shown on the deposit ledger; I find the loans and discounts as published to be $134,750.79 more than the loans as shown by the books; I find the amount due from all banks as published is $36,460.29 more than as shown by the books; I find the amount of cash as published is $30,000 more than as shown by the books; I find the Banking House, Furniture and Fixture and Fixtures as published is $5,770.00 but the item of Real estate of $56,572.70 is not published as such; I find the item of Bills of Exchange $10,583.88 is not shown or published as such.

714 Mr. THOMAS: We now offer in evidence Exhibit No. X-1050, contained in the Balance book of the Capital National Bank, identified as Exhibit No. X-21, purporting to be the condition of the bank under the heading column, Saturday, December 10, 1892.

Mr. ROSE: Now I object to that on behalf of Mr. Thompson and Mr. Hamer for the reason that there is no proof that either of these defendants ever made or participated in the making of a report of the condition of the bank at the date corresponding with the column heading, also because the date over it is obviously and manifestly not the account which forms the basis of any published report that purports to have been made by any of the officers of the bank; because the petitions do not charge any misrepresentation in any published report for this date, and because the book is not sufficiently authenticated or proved to entitle it to be received in evidence as such under the statutes of this state.

Objection overruled.

Each of the defendants excepts.

Mr. BISHOP: The defendant Yates objects for the reason that there is no proof that he ever made or participated in the making of a report of the condition of the bank at the date corresponding with the column heading, also because the date over it is obviously and manifestly not the account which forms the basis of any published report that purports to have been made by any of the officers of the bank; because the petitions do not charge any misrepresentation in any published report for this date, and because the book is not sufficiently authen*it*cated or proved to entitle it to be received in evidence as such under the statutes of this state.

Objection overruled.

Defendant excepts.

Exhibit No. X-1050 received and read in evidence.

(Copy on next succeeding page.)

715 EXHIBIT No. X-1050.

		SATURDAY, Dec. 10/92.
Capital Stock	.....	300,000.00
Surplus a/c	.....	6,000.00
U. S. Bond a/c	50,000.00	
Circulation a/c	.....	45,000.00
Redemption Fund	1,350.00	
Stock & Bond a/c	325.00	
Furniture a/c	5,770.00	
B/R	687,696.01	
Cash	44,848.45	
Bills of Exchange	2,591.31	
Chemical Nat'l Bank	41,924.17	

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Am. Exch. Nat'l Bank.....	4,513.70	
U. S. Nat'l Bank, Omaha.....	29,880.78	
South Omaha Nat'l Bank.....	858.03	
Packers Nat'l Bank.....	194.27	
First Nat'l Bank, Kansas City....	719.15	
Schuster Hax Nat'l Bank.....	808.—	
Blackstone Nat'l Bank.....	389.57	
Merchants National Bank	1,038.74	
First Nat'l Bank, Beatrice.....	1,264.27	
Bank of Cass County	.....	1.74
Knauth, Nachod & Kuhne.....	237.62	
Clearing House a/c.....	.....	
Walsh & Putnam	2,800.—	
Undivided Profits	.....	26.81
Rediscount a/c	.....	34,054.38
Real Estate	110,352.04	
Discount, Interest and Exchange..	.....	19,905.68
Wages a/c	7,159.98	
Suspense a/c	.....	1,432.—
Interest Paid a/c.....	1,356.25	
Expense a/c	5,872.93	
Deposit a/c	.....	605,529.66
	1,011,950.27	1,011,950.27

716 Q. I will ask you if you have made an examination of Exhibit No. X-1050, being the Balance book of the Capital National Bank showing its business under the head of December 10th, 1892, and being actually at the close of business December 9th, 1892, and compared it with the published report purporting to give the condition of the business at the close of business December 9th, 1892?

A. I have.

Q. You may state what, if any, discrepancies you find in those two statements.

Mr. Rose: Now I object to that on behalf of Mr. Thompson and Mr. Hamer for the reason that there is no proof that either of these defendants ever made or participated in the making of a report of the condition of the bank at the date corresponding with the column heading referred to; also because the date over the column is obviously and manifestly not the account which forms the basis of any published report that purports to have been made by any of the officers of the bank, and because the petition does not charge any misrepresentation in any published report for this date, and because the book itself is not sufficiently authenticated or proved to entitle it to be received in evidence as such under the statutes of this state.

Objection overruled.

Each of the defendants excepts.

Mr. Bishop: The defendant Yates objects for the reason that

there is no proof that either of these defendants ever made or participated in the making of a report of the condition of the bank at the date corresponding with the column heading referred to; also because the date over the column is obviously and manifestly not the account which forms the basis of any published report that purports to have been made by any of the officers of the bank, and because the petition does not charge any misrepresentation in any published report for this date, and because the book itself is not sufficiently authenticated or proved to entitle it to be received in evidence as such under the statutes of this state.

Objection overruled.

Each of the defendants excepts.

717–724 A. I have examined the published statement of the Capital National Bank purporting to give a statement of the condition of the bank at the close of business on December 9th, 1892 with the books of the bank showing its condition at the close of business on December 9th, 1892, and find that the overdrafts as published are $13,175.31 less than the amounts shown by the deposit ledgers; I find the amount of loans and discounts as published is $80,905.43 more than as shown by the books; I find the amount due from banks as published is $46,356.76 more than as shown by the books; I find the amount of cash as published is $14,565.48 more than as shown by the books; I find the amount of Bills of Exchange $2,591.31 is not shown in the published statement as such; I find the amount of rediscounts as published to be $25,000.00 more than as shown by the books; I find the Banking House, Furniture and Fixtures given as $5,770, which is correct, but the item of other real estate and mortgages owned $38,617.92 as published, is $71,734.12 less than the amount of real estate as shown by the books.

I desire to state to the court that since Mr. Rose has called my attention to the pencil memoranda which I find does occur at or near the bottom of a column,—sometimes it is the column of the particular day for which the report purports to have been issued, but these pencil figures, if they refer to anything, refer to a computation of the amount of deposits in the bank; they have nothing whatever to do with the making up of a statement of the condition, other than arriving at the amount of deposits, by adding the amount of overdrafts to the deposits as shown.

* * * * * * *

725 Mr. NORVAL: It is understood that all of the exhibits attached to the depositions which were read in evidence with your objections, were introduced in evidence. I didn't take the time to read them to the court.

Mr. ROSE: That was my understanding.

The COURT: Yes, sir.

Mr. THOMAS: We offer in evidence Exhibits commencing with No. 147 to and including 923½, being the certificates of deposit of the Capital National Bank, which were outstanding and unpaid at the time of the failure, and in addition to that we ask leave of

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court to substitute for these original certificates a schedule giving the date of their issuance, the numbers, to whom issued and the amount, and such other notations as the certificates contain. I will state that there is a schedule of that kind attached to the Bill of Exceptions in the former trial at page 865,—the schedule referred to containing eight sheets, written on both sides.

Mr. ROSE: Each of the defendants objects to each of the exhibits as incompetent, irrelevant and immaterial, and not binding upon any of these defendants, each of them purports to be outstanding and were not in the bank and wouldn't import any knowl-
726 edge or notice to anyone other than those issuing them as to their amounts.

The COURT: The objections will be overruled, and leave will be granted to substitute a schedule instead of the original certificates and the schedule instead of the original documents will be read in evidence.

Each of the defendants excepts.

Schedule offered is received and read in evidence. (See next page for copy.)

(Here follow sheets 1 to 14, schedule offered in evidence, appearing at page 727.)

CHARTS

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728 H. T. JONES recalled:

Direct examination.

By Mr. THOMAS:

Q. Mr. Jones, what has been your occupation for the past twenty, twenty five or thirty years?
A. Banking business, principally.
Q. When did you begin the banking business?
A. In November, 1883.
Q. With what institution did you begin?
A. The Jones National Bank.
Q. Of Seward?
A. Seward, Nebraska?
Q. In 1883?
A. Yes, sir.
Q. How long were you connected with that bank as cashier?
A. I was cashier up until '96, and then President after that time.
Q. Until,—that is you were president from '96 until when?
A. Until 1908, in November.
Q. That is, from 1883 to 1908 you were either cashier or president of the Jones National Bank?
A. I was.
Q. In 1908 did you sever your connection with the bank?
A. I did.
Q. Both as officer and stockholder?
A. I did.
Q. What has been your experience in bookkeeping?
A. I have had considerable experience.
Q. And are you conversant with the manner of keeping books of account for banks and similar institutions?
A. I think so.
729 Q. Referring now particularly to the books that have been in court during the progress of this trial, referred to as the books of Marsh Brothers, Mosher & Company, the Marsh National Bank and the Capital National Bank,—have you made an examination of those books from time to time?
A. I have.
Q. And when did you begin to make examinations of them?
A. January 23rd, 1893; I want to say that I didn't make an examination of the books that day, but looked over several of them.
Q. You may explain how you happened to be looking at the books that day.
A. We received a telegram early Monday morning, on January 23rd, 1893, that the Capital National Bank was closed and in the hands of the examiner, and it happened that it come just in time that I could catch the 9 o'clock train, and I jumped on the train and went to Lincoln; the doors were closed and it was in the possession of Mr. Griffith, the National bank examiner, and I went to the side door and rapped and he let me in.
Q. You say Griffith was then in possession of the bank and of the books on January 23rd?

A. Yes, sir.
Q. When was he succeeded by a Receiver?
A. I think sometime in February, 1893, by Mr. Macfarland.
Q. Do*n* you know about how long Mr. Macfarland had charge of the bank?
A. Two or three months, and he was succeeded by Kent K. Hayden.
Q. How long was Mr. Hayden receiver of that bank?
A. In the summer of 1896—1898 it was,——
Q. That is, that Mr. Hayden died, you think?
A. Yes, sir.
Q. He was succeeded by whom?
730 A. Mr. McDonald.
Q. J. W. McDonald?
A. Yes, sir.
Q. And he remained as receiver until the affairs were wound up?
A. He did.
Q. At the time you saw the books when Mr. Griffith had charge, was your attention called to any entries on the books?
A. Yes, sir.
Q. Do you remember what entries they were?
A. There was the overdrawn collection account; the loss of Donnell, Lawson & Simpson, and the State Treasurer account were the principal ones.
Q. Did he show you a credit of $100,000 to the account of the state treasurer?
A. That was part of it.
Q. When did you examine the books after that?
A. At various times; I couldn't give the dates.
Q. Did you examine them while Mr. Hayden was receiver?
A. I did, several times.
Q. About how many days do you think you spent on the books while Mr. Hayden was in possession of them?
A. Probably thirty.
Q. And did you spend any time examining the books while Mr. McDonald was receiver?
A. I did.
Q. How much time did you spend on them during his Receivership?
A. Oh, eight or ten days; something like that.
731 Q. And I think you said when you were on the stand before that you were present when the deposition of Mr. McDonald was taken?
A. I was.
Q. The depositions that have been read in evidence?
A. Yes, sir.
Q. And also the depositions of Mr. Outcalt and Hale and others?
A. I was present when they were all taken.
Q. And you were there when they identified these books that have been referred to in this trial?
A. I was.

Q. Who was the notary before whom the depositions were taken?
A. Mr. Ricketts.
Q. And you were there when Mr. Ricketts identified and put his mark of identification on each of the books and documents that have been referred to in the trial of this case?
A. I was.
Q. And did you take these books from the bank—were you there when the books were taken out of the possession of the receiver and brought to Seward?
A. I was.
Q. And have you examined the books during the progress of this trial so you can state whether they are the same books identified in the depositions taken before Mr. Ricketts when the identification marks were placed thereon by Mr. Ricketts and saw him put it on them and know whether they are the same books?
A. I have examined the books and records, and they are the same books and records.
Q. That is you mean the books in court now are the same books identified by Mr. Outcalt and Hale and other witnesses, whose
732 depositions were taken before Mr. Ricketts?
A. Yes, sir.
Q. Who was with you when you examined the various books, accounts and documents and records?
A. Where do you mean?
Q. Who was with you at some of the times when you examined the books during the receivership of Mr. Hayden?
A. No one, with the exception of you, that I remember.
Q. And was anyone with you when you examined them during the receivership of Mr. McDonald?
A. Yes; Mr. Whitmore, Mr. Barkley, J. J. Thomas, R. S. Norval and L. C. Burr.
Q. I hand you, Mr. Jones, Exhibit No. X-1056, which purports to be a photographic copy of a certificate of deposit No. 17969 for $40,000 issued to Mr. Willard, Treasurer, and I will ask you to state if you ever saw the original of which this is a photographic copy?
A. I did.
Q. And where was it when you saw the original?
A. First in the hands of Receiver Hayden, and afterwards saw in the possession of receiver McDonald.
Q. And who had it photographed?
A. I did.
Q. And is this Exhibit X-1056 a correct photographic reproduction of the certificate of deposit as you saw it in the hands of the receiver?
A. It is.
Q. What effort did you make, if any, to get the original for use on the trial of this case?
A. I tried to have receiver McDonald produce it, and he failed to do so.

733 Q. Did you make a search for it among the documents and papers of the Capital National Bank that were in the possession of the receiver?

A. I did.

Q. Did you make a diligent search?

A. I tried pretty hard to find it.

Q. And failed to find it?

A. Yes, sir, it couldn't be found.

Q. Could Mr. McDonald find it?

(No answer.)

Q. After you had it photographed what did you do with the original?

A. Returned it to Mr. McDonald, together with a number of others.

Q. That is, you had a number of others photographed at the same time?

A. Yes, sir.

Q. And this one, Exhibit X-1056, the original of that was returned with the other certificates you had photographed?

A. It was.

Mr. THOMAS: We offer in evidence Exhibit No. X-1056.

Exhibit No. X-1056 received in evidence. (See following page.)

734 EXHIBIT X-1056.

$40,000.00.

Capital National Bank,

Lincoln, Neb.

Apr. 28, 1888.

C. H. Willard, Treas., has deposited in this Bank Forty Thousand Dollars payable to the order of self on return of the Certificate properly endorsed.

No. 17969. Not subject to check.

C. W. MOSHER, *Pt.*

Interest at —— if left ——months.

Paid Jan. 1, 1889, Capital National Bank, Lincoln, Nebraska.

Paid Dec. 31, 1888, Capital National Bank, Lincoln, Nebraska.

[Endorsed:] X-1056. O. P. H.

Exhibit No. X-1056.

735 Q. Did you observe, Mr. Jones, in the original, of which Exhibit No. X-1056 is a copy, any endorsement on the back of it?

A. It was not endorsed.

Q. Did you observe?

A. Yes, sir, or I wouldn't have said so.

Q. Now, Mr. Jones, have you examined the books that you found that related to the affairs of Marsh Brothers, Mosher & Company?

A. I have.

Q. And did you examine the ledger of that concern?

A. I did.

Q. You may state, if you are able to, what was the amount of the purported capital stock of Marsh Brothers, Mosher & Company as disclosed by their books?

A. $100,000.

Q. At what time did the Marsh Brothers, Mosher & Company commence to do business and cease as shown by the books of that institution?

A. January 1882 as shown by ledger 1.

Q. And when did they close business, or cease doing business.

A. On June 29, 1883 it merged into the Marsh National Bank as shown by record book, pages 18 and 30, and ledger One of the Marsh National Bank.

Q. And at the time you say it merged into the Marsh National Bank, what was the purported capital stock of the Marsh National Bank?

A. The same, $100,000.

Q. Did you compare the books of the Marsh National Bank with the books of Marsh Brothers, Mosher and Company to see in what manner the transfer or merger was made?

A. I did.

Q. And what did you find?

736 Mr. ROSE: Each of the defendants objects as no foundation laid: the witness not qualified, and incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

A. When the Marsh National Bank organized, they got a new set of books, and the accounts from Marsh Brothers, Mosher & Company were balanced and transferred into the new set of books of the Marsh National Bank.

Q. That is the accounts that were on the ledger of Marsh Brothers, Mosher & Company were simply transferred to the Marsh National Bank?

A. All accounts were transferred from the old set of books to the new ones; that would apply to the full line of books.

Q. And did you examine the Journal of the Marsh National Bank, commencing with the time that it commenced business as a national bank?

A. Yes, sir.

Q. And was there any entry on that Journal when the shift was made from Marsh Brothers, Mosher & Company to the Marsh National Bank?

A. No, sir, there wasn't.

Q. What does the entry of the first day of the opening of the Marsh National Bank show, so far as the Journal is concerned?

A. I don't know.

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Q. I mean does it show the current business of that day?
A. Certainly.
Q. But nothing with reference to a transfer of assets?
A. No. As I said there is nothing on the Journal to show a transfer of the assets; simply a transfer of the accounts from the old bank,—transferred to the books of the new bank.

737 Q. And when the change was made from the Marsh National Bank to the Capital National bank, what did they do then with reference to opening up new books?

Mr. Rose: Each of the defendants objects as the witness is not qualified: no foundation laid, and it is incompetent, irrelevant and immaterial.
Objection overruled.
Each of the defendants excepts.

A. When the name was changed from the Marsh National Bank to the Capital National Bank they again got a new set of books and the accounts of the Marsh National Bank were transferred to the books of the Capital National Bank.
Q. What day was that transfer made?

Mr. Rose: Each of the defendants objects as the witness is not qualified; no foundation laid, and it is incompetent, irrelevant and immaterial.
Objection overruled.
Each of the defendants excepts.

A. The old books show May 31, 1884.
Q. You mean the old books of the Marsh National Bank?
A. Yes, sir.
Q. And the new ones, when it took the name of the Capital National Bank, what date was that?
A. Under date of June 2nd, 1884; the difference in date is on account of Sunday.
Q. What was the purported capital stock of the Marsh National Bank during its existence?
A. $100,000.00.
Q. Was there any change in the capitalization when the name was changed to the Capital National Bank?

738 A. Yes, sir.
Q. What changes were made then?
A. Increased to $200,000.00.
Q. To take effect when?
A. June 1st, 1884.
Q. And was there afterwards any further increase in the capital stock of the Capital National Bank?
A. Yes, sir.
Q. When and for what amount?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, and the witness not qualified.
Objection overruled.
Each of the defendants except-.

A. June 2nd, 1886, the capital stock was increased to $300,000, as shown by record book, page 42, and ledger "A" page 1, Journal "A" page 592.

Q. And were there any further changes made in the purported capital stock of the bank up to its failure?

A. No, sir, there wasn't.

Q. Now in speaking of the transfer of assets of Marsh Brothers, Mosher & Company, which became the Marsh National Bank, were all the accounts correctly transferred?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid, and not the best evidence.

Objection overruled.

Each of the defendants excepts.

A. They were not.

Q. In what respects and regards were they incorrectly transferred?

739 A. Ledger "A", page 488, Marsh Brothers, Mosher & Company shows a collection account overdrawn $14,573.32, and this account was transferred to Ledger "1", page 617 of the Marsh National Bank as Collection Account of Marsh Brothers Mosher and Company as $14,573.32. It was transferred to the Balance book of Marsh National Bank as $4,573.32. This account was reduced from $14,573.32 to $4,573.32 by erasing the figure "1" in the tens of thousands column, and prefixing the figure "1" in the tens of thousands column to the account of the Omaha National Bank, thereby reducing Collection Account ten thousand dollars and increasing the account with the Omaha National Bank by ten thousand dollars.

Q. Now were those erasures to which you refer,—where do they appear,—are they apparent on the books that are in court?

A. They are.

Q. Under what date?

A. The erasures and change shows on Balance book, July 2, 3 and 5.

Q. Now were there any entries upon the Journal for that time that would justify any of these charges or changes?

Mr. Rose: Each of the defendants objects as no foundation laid; the witness not qualified, and as incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

A. There were no entries on the Journal to justify those changes.

Q. You examined to see?

A. I did.

Q. The fact that ther- are no journal entries justifying this change in the Collection acount, or in the bank account what would that indicate?

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740 Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. There could be no changes on those accounts unless it was shown by the journal, unless they were fraudulent changes.

Q. Now Mr. Jones, you may state, what is the nature of a collection account, and could a collection account, honestly kept, be overdrawn, and properly carried as an asset of the bank?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. A collection account is usually understood as where *that* you collect money, and when collected it is credited to an account until you make the remittance to the party from whom you got the collection. and a collection account therefore, if honestly kept, could not be overdrawn.

Q. As it is carried on the books of the bank, does it purport to be an asset?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. It does.

Q. Now with reference to these two accounts to which you have testified that were changed, I will ask you if the Balance book agreed with the ledger account?

741 Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; the witness not qualified, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. It did not.

Q. In what respect did it disagree?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; the witness not qualified, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. It was transferred to the General Balance book ten thousand dollars short, and the Balance book and the ledger account was—there was a difference of ten thousand dollars until the 5th of July when the General Balance book was made to agree with the ledger account.

Q. The fact that these accounts were kept in the manner you

have suggested, with this ten thousand dollar item of the Collection account eliminated as you say by the use of a knife what would you say,—what would be your opinion as to whether or not that was a valuable asset or otherwise?

Mr. Rose: Each of the defendants objects as the witness is not qualified as to the value of any asset.

Objection overruled.

Each of the defendants excepts.

A. I have two reasons. My first is because it was eliminated from the account by the use of a knife; secondly there is a charge to the Omaha National Bank on the same day of $10,000.00 which was a fictitious charge.

742 Q. And does the fact that it purports to be an overdrawn collection account affect your opinion in any way?

Mr. Rose: Each of the defendants objects as cross examination of the witness.

Objection overruled.

Each of the defendants *objects*.

A. Certainly.

Q. And were those changes on the book obvious to anyone, Mr. Jones?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, and not shown to have any connection with any of these defendants.

Objection overruled.

Each of the defendants excepts.

A. They are.

Q. Now were there any other accounts that were incorrectly transferred?

Mr. Rose: Each of the defendants objects as no foundation laid; the witness not qualified, and incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

A. The Stock & Bond account of $30,540.

Q. In what way was that incorrectly transferred?

Mr. Rose: Each of the defendants objects as no foundation laid; the witness not qualified and it is incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

743 A. Ledger No. "1", page 639 of Marsh Brothers, Mosher & Company shows on July 2, 1883 as $30,540.00. This was transferred to Ledger "1", page 7 of the Marsh National Bank as $540., and to the General Balance book as $540.00.

Q. Did you examine the books of the Marsh National Bank to

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ascertain if there had been any erasures *of* changes in that account?

A. Yes, sir, the erasure showed daily for some time and under date of July 9th they forgot to erase the cypher in front of the figure "5"; on July 24th the figure "3" is only partially erased.

Q. And do you know for how many days those erasures occur on that book?

A. No, I don't remember now, but for a number of days. I have carried it here from the 2nd to the 24th.

Q. What year was that?

A. 1883.

Q. In the month of July?

A. Yes, sir.

Q. And did the journal which corresponds to the dates to which you have referred show any entry that would justify the reduction of the Stock & Bond account to the extent of $30,000?

A. Nothing on the journal to authorize the change of $30,000.

Q. Now were there any other accounts that were incorrectly transferred?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid; not the best evidence, and the witness not qualified.

Objection overruled.

Each of the defendants excepts.

744 A. Yes sir, the Bills Receivable account. On June 30th, 1883 it shows $248,029.33. It was transferred to Ledger "1" page 15 of the Marsh National Bank as $278,029.33; Balance book is $278,029.33, an increase in this account of $30,000, and nothing on the Journal to show the increase of thirty thousand dollars.

Q. Does the fact, Mr. Jones, that this Stock & Bond account appears decreased to the extent of $30,000, in the manner you have stated, and the Bills Receivable account shows an increase of $30,000 in the manner you have stated, and the further fact that in neither case is this entry justified by any entry on the journal,—what would you say was the nature of the transaction, if there was any legitimate transaction justifying those changes?

A. In my opinion it was a fraudulent transaction, not only for the reason that it was changed this $30,000., but this account was made up of stocks in the various Marsh companies as shown by Ledger "1" of Marsh Brothers, Mosher & Company at page 639, which shows this account to be as follows: January 6th, 1882 $7500. April 21, 1882, $7500.00. July 24th, 1882 $7500.00 and December 29th, 1882 $7500., or a total of $30,000. And the following credits: April 21, 1882, Ledger "1" page 9 shows Marsh Binder Company credited $26250.00, and Ledger "1" page 8, C. W. & W. W. Marsh was charged with $18,750. This difference of $7500.00 is charged to the Stock & Bond account. On July 24th, 1882 Ledger "1", page 6 shows Marsh Harvester Company credited with $7500. De-

745 cember 29th, 1882, Ledger "1" page 6 shows Marsh Harvester Company again credited with $7500, and on December 27th 1886, Journal "B", page 188 shows a credit to this account of $9300.

and the books show on this date a note of Donnell, Lawson & Simpson taken for $9300.

Q. From your examination of the books, and your knowledge of banking what would you say that this $30,000 item that was carried in the Stock & Bond account before the transfer was a valuable asset or otherwise?

A. It was not.

Q. Now I will ask you if you examined the books of the Marsh National Bank to ascertain if during the existence of the bank under that name it carried an account with Donnell, Lawson & Simpson?

A. It did.

Q. And was that account closed out at any time?

A. It was.

Q. When was the account closed out, and what was the amount at which it was carried immediately prior to its close?

A. May 19th, 1884 the Chemical National Bank was charged with $10,000. May 19th, 1884 Donnell, Lawson & Simpson's account was credited $10,000. This is found in Journal "A" Marsh National Bank at pages 532-3, Ledger "1" of the Marsh National Bank, page 159. On May 26th, 1884 the Commercial National Bank of Chicago is charged with $10,000. May 26th, 1884 Donnell, Lawson & Simpson is credited with $10,000. This may be found in Journal 9, Marsh National Bank, pages 544 and 5 Ledger "1" Marsh National Bank, page 159. May 27th, 1884 note of
746 C. W. Mosher, No. 5629 was put in the bank for $8174.70 and May 27th, 1884 the account of Donnell, Lawson & Simpson is credited and marked "To balance account" $8174.70.

Q. Did you examine to see whether there were any erasures in the account of Donnell, Lawson & Simpson?

A. I did.

Q. State what they were.

A. May 9th, 1884 Balance book shows erasure in account of Donnell, Lawson & Simpson in the tens of thousands column each day from May 7th, 1884 to May 19th, 1884, and on May 19th this account was credited with $10,000 and made to balance with the ledger account.

Q. Did you examine the books of the Capital National Bank to ascertain if any notes, Bills receivable of Donnell, Lawson & Simpson, purport to have been taken into the bank and entered as a part of its assets?

A. I did.

Q. You may state what that examination disclosed.

A. October 14th, 1884, Journal "A" Capital National Bank shows as follows: Donnell, Lawson & Simpson note, No. 6841*a* taken for $5084.76. On the same day another note for $695.79 No.
747 6842*a*. May 7th, Journal shows notes of Donnell, Lawson & Simpson taken as follows: No. 8448*a* $9391.56. N. 8449*a* for $9391.57. On July 20th, Journal "A" shows note of Donnell, Lawson & Simpson taken, No. 9133*a* for $9391.57. July 24th, 1885, the Journal shows a note of Donnell, Lawson & Simpson taken, No.

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9157*a* for $9391.56. August 13th, 1885, Journal "A" shows a note of Donnell, Lawson & Simpson taken, No. 9356*a* for $10200.00 and on the same day another note, No. 9357*a* for $20,300.00.

Q. Now referring to this date, do you mean that the books show they entered and became a part of the purported assets of the bank?

A. Yes sir, each of those notes were charged to the account of Bills Receivable.

Q. Now do the books of the bank indicate that those notes were paid at divers times?

Q. If so you may state what they show in that behalf.

A. They do. August 13th, 1885, Journal "A" page 744 of the Capital National Bank shows the following notes marked paid:

No. 9157*a*, Donnell, Lawson & Simpson	$9391.56
No. 9133*a*, ...	9391.57
No. 6841*a*	5084.76
No. 6842*a*	5084.76

Total notes of Donnell, Lawson & Simpson marked paid that day $28,952.66. The Journal shows taken on the same day notes of Donnell, Lawson & Simpson as follows: No. 9356*a* for
748 $10,200.00 and No. 9357*a* for $20,300.00 Total notes taken by the bank that day $30,500. The difference in the two amounts was account of interest.

Q. Was there a credit to the account of interest?

A. Yes sir. December 28th, 1885, Journal B, page- 230 and 231 shows the following notes paid.—No. 9357*a*, Donnell, Lawson & Simpson $20,300. Bills Receivable credited with this amount and the Chemical National Bank of New York charged with the same amount, $20,300. July 13th, 1885 shows, No. 8448*a* for $9391.56 was paid. The same date shows a note, No. 8449*a* for $9391.57 paid. On March 3rd, 1886 it shows No. 9356*a* credited with $5200.

Q. Now you may state if on the books of the Capital National Bank was carried an account, as an apparent asset, which was known as Bills of Exchange account.

A. There was.

Q. Have you examined that account and traced it through from time to time to ascertain the nature of the account and what sort of transactions entered into it?

A. To a certain extent I have.

Q. Now were there any entries made in that account along in October, 1885?

A. Yes, sir.

Q. You may state what you found with reference to that account at that time.

A. October 23rd, 1885, Journal B, pages 102 and 3 shows Bills of Exchange account charged $16,614.47, and on the same day Marsh Brothers, Mosher & Company credited with $16,614.47.

749 Q. And do you find any entry to that account on November 4th, 1885?

A. I did.

Q. State what that entry is.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid, and the witness not qualified. Objection overruled. Each of the defendants excepts.

A. November 4th, 1885, Journal B, pages 128 and 9 shows the account of C. W. & W. W. Marsh charged $14,000, but this on the ledger account is charged to Marsh Brothers Mosher & Company's Collection account, on Ledger "A", page 622. On the same day the Bills of Exchange account is credited with the same amount, $14,000.

Q. Did you find any entries in that account under date of December 14th, 1885; if so state what they are.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial. Objection overruled. Each of the defendants excepts.

A. Journal B, pages 204 and 5, December 14th, 1885 shows the Bills of Exchange account charged $29,968, and on the same date the following notes marked paid:

No. 10418 Marsh	$4,868.	
No. 10461 Marsh	5,000.	($5,000.00)
No. 10475 Marsh	2,500.	
No. 10502 Marsh	2,500.	
No. 10511 Marsh	5,000.	
No. 10519 Marsh	3,600.	
No. 10525 Marsh	2,000.	
No. 10521 Marsh	2,000.	
No. 10529 Marsh	2,500.	
A total of	$29,968.	

Q. Now are there any further entries to that account that you have found and want to testify to?

750 A. Yes sir.

Q. What is the next one?

A. July 20th, 1886, Journal B, pages 636 and 7 shows notes taken and charged to Bills Receivable in the amount of $46,853.56. Of this amount the following forged notes were included:

No. 18775 F. S. Johnson & Co.....	$9,968.
No. 19947 First National Bank, Hastings.....	10,000.
No. 20613 First Nat'l Bank, Kearney.....	10,000.
Total	$29,968.00

And on July 29th, 1886 Bills of Exchange account credited $10,000.00 and the books show that the accounts of F. S. Johnson & Co., received no credit, neither does the First National Bank of Hastings, nor the First National Bank of Kearney on account of these notes.

Q. That is, when these notes appear to have been taken in the bank?

A. Yes, sir. The books of the bank further show that no interest was received on these notes.

Q. What is the nature of a Bills of Exchange account, and what was the nature of this account, so far as you can determine from the entries that have been made here?

A. A Bills of Exchange account is an account kept by a bank in which they enter cash items which could not properly be sent to their correspondents for their credit, and so forth. Then they are collected and sent direct to the bank,—we will say, on which they are drawn, and when that bank pays them and remits then they are credited back to this Bills of Exchange account; this account
751 has many legitimate charges of that kind.

Q. That is, Mr. Jones, it would consist largely of instances where checks and things of that character would be brought into the bank on banks with which they had no account,—usually in small items wouldn't it?

—. ——.

Q. You may state more fully the nature of that account, and what sort of items largely enter into it.

A. There would be items that a banker would call cash items, such as checks or orders. So you will get my idea more clearly, suppose that the Jones National Bank would send them a check on a bank at Beaver Crossing; the Capital National had no account with the bank at Beaver Crossing. Now they would send that direct to the bank at Beaver Crossing for collection and remittance; the bank at Beaver Crossing would charge that check to its customer's account, draw a draft and send that to the Capital National, who would then credit this Bills of Exchange account.

Q. What would be the size of the items that would ordinarily enter into such an account?

—. ——.

Q. Now you may state if from your examination of this account known as Bills of Exchange and carried on the books of the Capital National bank, if this account was such a one as you have
752 described or defined.

Q. I will ask you, Mr. Jones, to state what sort of items entered into this account, as shown by an examination of the books.

A. The books show that this account received credits which were not properly charged against the account as I have testified to.

Q. Well from an examination of the account, and tracing it through at various times what was that account used for in many instances, if you can tell, as shown by the books themselves?

A. In a number of instances it was used to cover up transactions.
753 A. Such as on October 23rd, 1885 there was a charge of $16,614.47, and this same amount was credited to Marsh Brothers Mosher & Company. Again on November 4th, 1885, there was a charge of $14,000 which did not belong to that account, and on December 14th, 1885 there was a charge of $29,968.00 and you will find numerous charges of that nature all through the account.

Q. Did you find instances where the account received credit on account of items that were not valuable assets?

A. Yes, sir.

Q. State some of them.

A. October 14th, 1885 it received credit of $14,000, and then there is the credit of $29,968 to that account for those forged notes, July 20th, 1886.

754 Q. Referring there to a credit of $29,968 on account of three fictitious notes aggregating that amount. Have you examined the books to ascertain the history of those notes as they appear on the books; I refer to the Johnson notes.

A. Yes, sir. I have examined as to when they were received and paid, and so forth.

Q. Now what do the books show as to the Johnson note?

A. The books show that the Johnson note was received on July 20th, 1886 by the Capital National Bank and entered into the Bills Receivable account for $9968. The books show that this note was marked paid on the books of the bank as follows: $2,000.00 on September 21st, 1886, Journal B, page 756, and $7,768 was paid in September 27th, 1886 as found in Journal B page 770. $200.00 paid September 28th, 1886, found in Journal B, page 772.

Q. Now with reference to the note of the First National Bank of Hastings, what do the books show?

A. The books show that this note was received by the Capital National Bank on July 20th, 1886 and entered into the Bills Receivable account and assets of the Capital National Bank as $10,000. And the books show on November 29th, 1886, Journal C page 126, that this note was marked as paid, $10,000.

755 Q. And with reference to the First National Bank of Kearney note?

A. The books show that the Capital National Bank received that note on July 20th, 1886 and it entered into the Bills Receivable account and assets of the Capital National Bank as $10,000. Journal C, page 202 shows that this note was marked paid December 23rd, 1886 to the amount of $2,500, and Journal C page 202, on January 3, 1887 shows that this note was credited with $7,500., but under the name of Marsh; not under the name of the First National Bank of Kearney.

Q. Now Mr. Jones, on the dates that payments appear to have been made, or are shown to have been made on these notes, the three to which you have just testified, do the books show any charge against any of the proper makers, that is, F. S. Johnson & Company, The First National Bank of Hastings, or the First National Bank of Kearney?

A. The books show that there were no charges to either of these accounts.

Mr. Rose: Did the books show that these three makers had accounts on the books of the Capital National Bank?

A. Yes, sir.

Q. Do the books of the bank disclose that any interest was received on any of these three notes at the time payments purport to have been made?

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A. The books show that no interest was received on these notes, either on the date they were made or on the date of payment.

Q. Now, Mr. Jones, have you made an examination of some of the items that entered into and were a part of the apparent or purported assets of the Bank,—the Marsh National Bank at the time they changed its name and it became the Capital National Bank?

756 A. I have made a schedule and a list of losses that the bank sustained up to the close of business May 31, 1884, when it changed its name from the Marsh National Bank to the Capital National Bank.

Exhibit "00" identified.

Q. Is exhibit "OO" which I hand you the schedule to which you refer?

A. It is.

Q. And was that compiled by you from the examination of the books, and what was shown to be the assets at divers times up to that date?

A. It was.

Mr. THOMAS: We offer Exhibit "OO" in evidence.

Exhibit "OO" received and read in evidence. (Copy on next page.)

757 EXHIBIT "OO."

The Start of Capital National Bank.

May 31, 1884. The Marsh National Bank ceased, by changing its name to the Capital National Bank, and the following is a partial list of its losses up to that date:

Donnell, Lawson & Simpson account	$28,174.70
Collection account—Marsh Bros. Mosher & Co	14,578.32
Stock & Bond Account	30,000.00
Sycamore Marsh Harvester Co. Note No. 4268*a*	1,500.00
C. W. & W. W. Marsh, Note 4369*a*	5,000.00
Marsh Binder Co. Note 4565*a*	5,000.00
Sycamore Marsh Harvester Co. Note 4883*a*	2,500.00
March,—Note No. 5018*a*	1,000.00
Marsh Binder Co. Note 5061*a*	2,500.00
C. W. Mosher, Note 5063*a*	5,233.33
Marsh Harvester Co.—Note 5082*a*	1,541.
Marsh Binder Co. Note 5419*a*	5,000.00
C. W. Mosher,—Note 5468*a*	200.00
Marsh Binder M'f'g. Co. Note 5543*a*	2,500.00
Marsh Note 5552*a*	2,000.00
C. W. Mosher—Note 5610*a*	1,412.50
C. W. Mosher,—Note 5629*a*	8,174.70
C. E. Tuerk,—Note 5664*a*	3,225.67
Total losses	$119,540.22
Capital at that date was	100,000.00
Losses exceeded capital by	$19,540.22

758 Q. In compiling that statement have you taken into consideration Bills Receivable which were carried as assets of the Marsh National Bank that consisted of paper, Bills Receivable, that had been floated by the Marsh Harvester Company, and the binder company,—that is notes that had been given to the Marsh companies for machinery, and so forth, and were held by the bank at this time as Bills Receivable?

A. No sir, that list doesn't contain any of the notes give- to the Marsh companies for machinery at all.

Q. What amount does the books show the bank carried as bills receivable on the day it became the Capital National Bank?

$386,853.59.

Q. Have you examined the books of the Marsh National Bank and the Capital National Bank to ascertain as to whether or not there were any credits entered to the account of Interest Paid?

A. I have.

Q. Have you prepared a schedule showing such credits?

A. I have prepared a schedule showing credits to this account other than at the time they were charged out at the dividend periods.

Q. You may explain to the court the nature of this account as it is shown by the books themselves.

A. The Interest Paid account of a bank is an expense account made up of amounts which the bank pays its customers on

759 certificates of deposit or on daily balances.

Q. How was that account treated; how is it expunged, or ever charged off?

A. At the dividend period it would be credited with the amounts paid out,—or in other words balanced out at the dividend period, then it would start in as a new account, and run along until the next dividend paying period, and then it would again be balanced out.

Q. Do you wish to be understood as saying that this Interest Paid account is charged up against the gross profits of the bank?

A. Well yes,—just whichever way you want to state it; you can say it is charged up against an undivided profit or you can say it is credited to that account.

Mr. Rose: The difference between the two makes the net profit?

A. Yes sir.

Q. It is carried on the books as a debit account?

A. It is an expense account.

Q. Does it represent any asset of value?

A. No. It is simply a record of the amount of money which has been paid out on that account.

Q. Now how can credits properly be made to that account?

A. At the dividend period.

Q. And if that account received a credit that is not charged against gross profits in any way, would that be a proper credit?

A. I should say not.

Q. Well why not?

760 A. Because as I stated, it is an account which shows the amount of money which has been paid out to the customers,

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and couldn't receive a credit only at dividend periods, providing it was a legitimate credit.

Q. And then the credit it did receive would have to be charged against the gross earnings of the bank?

A. Yes, sir.

Q. Have you examined this account to see if this account received credits that were not so charged and were not deducted from the gross earnings of the bank?

A. I did. I made a schedule of the various amounts I have found credited to this account which was not charged to the gross earnings of the bank. It dates from December 29th 1884 to May 4th, 1892, making a total of $90,916.44.

Q. You may have the reporter identify that schedule as Exhibit "pp."

(Exhibit so identified.)

Q. Double "p" is the exhibit to which you have just testified is it, Mr. Jones?

A. It is.

Mr. THOMAS: We offer in evidence Exhibit "pp".

Exhibit "pp" is received in evidence.

(See copy on next page.)

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EXHIBIT "pp."

False Credits to Interest Paid Account.

Dec. 29, 1884	$813.	(J. "A" p. 356—L. "A" p. 377 —Exchange A/C)
Apr. 14, 1888	2500.	(J. "D" p. 294—L. "C" p. 542 Int. Paid A/C)
Jun. 9, 1888	1500.	(J. "D" p. 388—L. "C" p. 542)
Nov. 16, 1888	2500.	(J. "D" p. 662—L. "C" p. 545)
Jun. 28, 1889	10000.	(No. J p. 300—L. "7" p. 490)
Sep. 30, 1889	7000.	(No. J p. 458—L. "7" p. 491)
Mar. 19, 1890	5000.	(No. J. p. 744—L. "7" p. 494)
May 16, 1890	1500.	(J. "E" p. 78—L. "7" p. 495)
May 19, 1890	2000.	(J. "E" p. 82—L. "7" p. 495)
May 21, 1890	1500.	(J. "E" p. 86—L. "7" p. 495)
June 9, 1890	2500.	(J. "E" p. 104—L. "7" p. 495)
Sep. 25, 1890	5000.	(J. "E" p. 300—L. "7" p. 497)
Dec. 27, 1890	10000.	(J. "E" p. 456—L. "7" p. 797)
Apr. 9, 1891	800.	(J. "E" p. 628—L. "8" p. 608)
May 2, 1891	8200.	(J. "E" p. 666—.. "8" p. 608)
Jun. 20, 1891	10000.	(J. "E" p. 750—L. "8" p. 609)
Sep. 25, 1891	14000.	(J. "F" p. 116—L. "8" p. 611)
		($69813.00 amount paid to July 1, 1891.)
Feb. 2, 1892	2103.44	(J. "F" p. 332—L. "9" p. 571)
May 4, 1892	5000.	(J. "F" p. 486—L. "9" p. 573)
Total	$90,916.44	

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762 Q. You may state, Mr. Jones, in what instances, if any, you have been able to trace the source of those false entries, so-called, to the Interest Paid account.

A. June 28, 1889 there was a credit to this account of $10,000.00 and on the same day Stocks & Bonds account was charged $10,000.00 as shown in Ledger 7, page 13. On September 30th, 1889, this account was credited with $7,000.00 and on the same day Real Estate account was charged with the same amount.

Q. In the charge to Real Estate, is there any description so you could tell what it was?

A. No, sir, just simply a charge, and no description given. That is found in Ledger 7, page 447. May 16th, 1890 there was a credit given of $1500.00. This was charged to the Chemical National Bank of New York, as shown by Ledger 7, page 92. May 19th, 1890 there was a credit of $2,000.00; the same date the same amount was charged to the Chemical National Bank of New York. June 3rd, 1890 $2500.00 was credited to this account, and on the same date the same amount was charged to real estate, Ledger 7, page 447. September 25th, 1890 $5,000 was credited to this account and on the same date the same amount was charged to the American Exchange National Bank of Chicago, Ledger 7, page 123. December 27th, 1890 there was a credit of $10,000.00 to this account, and on the same date the same amount was charged to Stocks & Bonds account, Ledger 7, page 13. May 2nd, 1891 this account was credited with $7200.00 and on the same date Certificate of Deposit No. 24481 for $62,500 was paid, and this $7200 may be a part of that payment. September 25th, 1891 there was a credit

763 of $14,000 to this account, and on the same day the same amount was charged to the Continental National Bank of Boston, ledger 8, page 644. May 4th, 1892, this account was credited $5,000 and on the same day the Chemical National Bank of New York was charged the same amount, ledger 9, page 67.

Q. Have you examined the books of the bank, Mr. Jones, to ascertain the amount that was paid out in dividends from the time it became the Capital National Bank?

A. I have examined the books of the bank from January 12th, 1885 up to July 12th, 1892 and prepared a schedule of the amounts that have been paid out in dividends, which amounts to $251,750. The schedule shows the date and amount, the book and page, and so forth, where the various entries are found.

Q. Will you have that identified?

(Schedule identified as Exhibit "qq".)

Q. Is Exhibit "qq" the one to which you refer?

A. Yes, sir.

Q. And has been compiled from the books of the Capital National Bank?

A. Yes, sir.

Mr. THOMAS: We offer in evidence Exhibit "qq".

Exhibit "qq" received in evidence, as follows:

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EXHIBIT "qq."

"Paid out in dividends since organization Capital National Bank, June 1st, 1884—July 12th, 1892, as shown by bank books.

Date paid as shown by journal and ledger.	Dividend paid.		
Jan. 12, 1885	6½%	$15,000.	J. "A" p. 379, L. "A" p. 798 1/20 Journal "A" p. 392
July 3, 1885 (1)	6½%	13,000.	Journal "A" p. 536-7
Dec. 31, 1885 (#)	6½%	16,000.	Journal "B" p. 236-7
Jul. 13, 1886	7%	14,000.	Journal "B" p. 592-3
Dec. 31, 1886 (2)	6%	18,000.	Journal "C" p. 200-1
July 1, 1887 (3)	6%	18,000.	Journal "C" p. 564-5
Jan. 3, 1888 (4)	6%	18,000.	Journal "D" p. 112-3
Jul. 11, 1888 (5)	6%	18,000.	Journal "D" p. 440-1
Jan. 8, 1889	6%	18,000.	Ledger "7" p. 435
July 9, 1889	6%	18,000.	Ledger "7" p. 435
Jan. 14, 1890	5%	15,000.	Ledger "7" p. 435
July 9, 1890	5%	15,000.	Journal "E" p. 167
Jan. 15, 1891	5%	15,000.	Journal "E" p. 487
Jul. 17, 1891 (")	5%	13,750.	Journal "E" p. 795
Jan. 12, 1892	5%	15,000.	Journal "F" p. 298-9
July. 12, 1892	4%	12,000.	Journal "F" p. 604-5
Total loss		$251,750.	—as bank was never in condition to legally pay dividends.

(1) Record Book, "2nd Tuesday in July, 1885).

(#) Book entries made Dec. 31, 1885, dividend declared Jan. 12, 1886.

(2) Record book "Jan. 11, 1887".

(3) Record Book, "July 12, 1887".

(4) Record Book "Jan'y 10th, 1888".

(5) Record Book, "July 10th, 1888".

(") Record Book says Dividend of $15,000.00. Books show only $13750.00 charged under profits, besides $2000.00 credited to Surplus account.

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765 Q. Have you examined the books and documents of the Capital National Bank with reference to the purported Certificate of Deposit of $100,250.00 issued to J. E. Hill, treasurer?

A. I have.

Q. And also with reference to a credit of a like amount which appears to have been given to the Nebraska Relief Fund on the books of the Capital National Bank?

A. I have.

Q. You may state the result of that examination.

A. April 25th, 1891, Journal "A" page 655, and Balance Ledger "2" shows that the Chemical National Bank was charged with $101,516.70. Certificate of Deposit account, No. 2, was charged with $100,000 and on the same date the Nebraska Relief Fund was credited with $100,250.00 certificate of deposit No. 24453 was issued to Mr. Imhof for $1,166.70. On the same day certificate of deposit No. 24454 was issued to — for $100.00; on the same day certificate of deposit No. 24452 was issued in the name of J. E. Hill, Treasurer for $100,250.00. I consider this a loss to the bank of $100,000, as the charge of $100,000 to certificate of deposit account No. 2 was a fraud, as the bank books show that there was no such certificate of deposit outstanding at that date.

766 Q. In other words, do you mean that the certificate issued in the name of J. E. Hill, was a duplication of the credit to the Relief Fund?

A. No, that is not the way I would put it. The fraud here consists of an even hundred thousand dollars, that is the charge of $100,000 certificate being paid that day, because the books of the bank show that there was no such certificate of deposit outstanding and by debiting that account with $100,000 made a way for issuing this $100,250 certificate. All that anyone had to do to make the accounts balance on that day was to put in $250., in cash, or its equivalent, and then both sides of the book would balance.

Q. Then what do you say as to whether the Capital National Bank received the equivalent of the certificate of deposit of $100,250.00?

A. The books show simply that $250.00 was put in *the* balance the account.

Q. Then did the bank receive anything for the remainder of that $100,250 certicfiate?

A. The books show nothing for that only the fraudulent charge against the account.

767 Q. And is Exhibit X-140 the certificate of deposit which appears by the books to have been issued at that time for $100,250.00?

A. It is.

Q. Now have you followed and traced through the history of this certificate for $100,250 to ascertain what became of it, and what was apparently done with the proceeds of it?

A. I have.

Q. You may give us in narrative form the history of that certifi-

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cate of deposit as disclosed by an examination of the books and documents of the bank.

A. The books of the bank show that on April 28th, 1891 certificate of deposit No. 24452, issued in the name of J. E. Hill, Treasurer was cancelled and paid and charged to certificate account to the amount of $100,250. On the same day a new certificate was issued to C. W. Mosher, Treasurer, No. 24473, for $75,000, and on the same day the account of C. W. Mosher was credited with $10,000; on the same day the account of Prison Contract was credited with $15,000.

April 30th, 1891, the books show as follows: Certificate of deposit No. 24473 issued in the name of C. W. Mosher, Treasurer, was cancelled and paid as $75,000 and charged to certificate of deposit account. On the same day a new certificate of deposit was issued to C. W. Mosher, No. 24481, for *for* $62,500. On the same
768 date the account of Mosher and Outcalt was credited with $2500; on the same date the account of R. C. Outcalt, Treasurer was credited with $10,000. These credits just off-set the $75,000 the amount of the certificate.

On May 2nd, 1891 the books show a certificate of deposit No. 24481 issued in the name of C. W. Mosher was cancelled and paid for $62,500 and charged to the account of Certificate of Deposit. On the same date new certificates of deposit issued, No. 24496 to C. W. Mosher for $52,500, and on the same date a credit to the account of Walsh & Putnam of $2800, and on the same date a credit to the account of Interest Paid of $7200.

May 5th, 1891, the books show certificate of deposit, No. 24496, C. W. Mosher, was cancelled and paid as $52,500 and charged to the certificate of deposit account, and on the same day new certificate, No. 24522, was issued to C. W. Mosher, Treasurer for $32,500; on the same date two notes of C. W. Mosher's was paid, one note for $10,000—No. 50539—and the other note, No. 50540 for $10,000. These just balanced.

May 8th, 1891 the books show certificate of deposit No. 24522, C. W. Mosher, Treasurer; cancelled and paid for $32,500 and charged to certificate of deposit account; on the same day a new certificate, No. 24537 was issued for $12,500; on the same day two notes of C. W. Mosher was paid, No. 50545 for $10,000, and No. 50550 for $10,000. These amounts just balanced.

May 14th, 1891 the books show as follows: Certificate of deposit No. 24537 to C. W. Mosher, Treasurer cancelled and paid as $12,500 and charged to the account of Certificates of Deposit; on the same date note paid of Western Manufacturing Company, No. 101012 for $5,000; on the same day issued a new certificate of deposit, No. 24570 to C. W. Mosher, Treasurer for $7500.

769 May 16th, 1891 the books show certificate of deposit No. 24570 to C. W. Mosher was cancelled and paid for $7500., and charged to certificate of deposit account. The books show no corresponding entry for the $7500; therefore cash must have been taken out.

Q. Have you examined the books of the Capital National Bank

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with reference to the open account of the State Treasurer from sometime in December, 1889, until its close, or until the close of that account?

A. I have.

Q. You may state the result of that examination as disclosed by the books.

A. The books of the Capital National Bank show that on December 24th, 1889, in the Individual Balance book, No. 2 for November and December, 1889, that the state treasurer's account was credited with $100,000. There is nothing on the Journal to authorize this credit, and the $100,000 false credit threw the books out of balance $100,000, and the books were out of balance every business day from December 24th, 1889 to December 28th, 1892, $100,000.

Q. You used the word "false". You don't mean to say that that credit to Mr. Hill indicated that no such deposit was made do you?

770 A. There was no such credit as that made at that time.

Q. What do you mean by that. You said there was such a credit made on the books.

A. Yes sir; I called it a false credit because there was nothing went into the bank at that time, and the credit of this $100,000 to this account threw the books out of balance just a hundred thousand dollars.

Q. That is, so far as the bank is concerned, it didn't get the $100,000.

A. Certainly, if they had got it, it wouldn't have been a false credit.

Q. Well did you follow out this account to see whether it was checked out from time to time?

A. It was in the usual course of business.

Q. And that would indicate that Mr. Hill was entitled to a credit, but that the bank hadn't received it.

Q. What does that indicate to you as to what that transaction was?

A. The books show that on December 24th, 1889 when state treasurer Hill's account was credited with $100,000 that the bank received nothing, and the placing of the $100,000 of a credit to the state treasurer's account on that day,—nothing going into

771 the bank—threw the books out of balance $100,000.

Q. And you say the balance that was made by this credit of $100,000, was gradually checked out from time to time?

A. Why his account would run along in the usual course; it never was checked out up until the time the state treasurer's account changed, and then it shows closed.

Q. What was the effect of that transaction upon the assets of the bank?

A. Understated them to the extent of $100,000.

Q. And the checking out of this account, what effect, if any, did that have, in abstracting or taking out assets of the bank when the various checks that were made on that account were presented and paid, as the books show that they were?

A. The loss to the bank would have to be the amount of the credit, which was $100,000.

Q. Now you say the books were out of balance,—explain that, in what way you mean that.

A. An account is out of balance when the two sides do not agree,—your debit and your credit. There was a credit given here to this account of $100,000,—nothing received,—therefore when you would balance up your accounts there would be $100,000 difference in the two sides.

772 Q. And you say that continued for a period of three years?

A. Practically so, until December 28th, 1892.

Q. And were any entries made at that time, or about that time which brought the books back into balance?

A. Yes, sir.

Q. What were those entries and purported transactions as shown by the books?

A. On December 28th, 1892 the books show,—Journal G, page 95—Bills Receivable taken that day amounting to $77,570.00 among which are the following notes: C. W. Mosher, No. 50642 for $20,000. C. W. Mosher, No. 50643 for $20,833.34 R. C. Outcalt note, No. 50640 for $15,000. R. C. Outcalt note, No. 50649 for $14,166.66. Mosher and Outcalt on this day gave their personal check on the Capital National Bank for Thirty thousand dollars. The amount of these notes which I have just stated, and the check of $30,000 amounts to $100,000. The books show that no accounts were credited, so the bank books were again made to balance. On December 24, 1891—Journal G, page 91—shows notes taken by the bank $38,375.00 among which are notes. C. W. Mosher, No. 50638 for $17,500.00 R. C. Outcalt, No. 50639 for $12,500.00—a total of $30,000. On the same day the account of Masher and Outcalt is credited with Thirty thousand dollars. The credit is found on Individual Balance Ledger 2 for November and December, 1892.

Q. Now was that discrepancy, or the fact that the books were out of balance obvious and patent?

A. Yes sir, very easily seen and detected.

Q. Have you examined the books, certificates and other documents of the bank to ascertain any irregularities in the certificate of deposit account, that is, any difference in the amount

773 shown outstanding at any particular time, and the actual amount outstanding at that time?

A. Yes, sir.

Q. And have you made a schedule of any certificates of deposit of that character?

A. I have made a schedule showing the certificates of deposit outstanding and unpaid on July 1st, 1891 as shown by the certificate of deposit ledger, giving the date of the certificate, the number of the certificate and the amount of the certificate.

Q. State the result of your examination.

A. The total amount of certificates of deposit outstanding and unpaid as shown by the certificate register July 1st, 1891 is $153,854.01; while the amount shown to be outstanding by the ledger of

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$100,938.59, or a difference of $52,915.42 more certificates of deposit outstanding as shown by the certificate of deposit register, than is shown by the ledger.

Q. Now have you examined the books and documents of the bank with reference to certificates of deposit that were issued apparently for one amount and shown by the books to have been issued for another amount, and so carried onto the other books of the bank?

A. I have.

Q. You may state the result of that examination.

774 A. The bank books show that certificate of deposit No. 17969 was issued Apri- 28th, 1888, to C. H. Willard, Treasurer, for $40,000. This certificate is stamped paid January 7th, 1889 as $40,000 and charged to certificate of deposit account as $40,000. The certificate of deposit stub book shows nothing only 40,000 written down in figures and then a line drawn through it. Certificate register, the date of issue shows nothing, neither does the certificate register date of payment show anything.

Q. Have you made a similar examination with reference to certificate of deposit No. 21379 for $50,000?

A. I have.

Q. You may state the result of that examination.

A. The books show that certificate of deposit No. 21379 was issued December 23, 1889 to J. E. Hill, treas., for $50,000. The certificate was stamped paid January 6th, 1893 as $50,000. The amount shown on the certificate of deposit register on date of issue is

775 $100. The amount charged on ledger on account of this certificate is $5.00. April 24th the certificate is marked paid on the certificate of deposit register as $100.

Q. If you have made a similar examination of the books with reference to certificate of deposit No. 24491, you may state the result of that examination.

A. The books show that certificate of deposit No. 24471 issued April 28th, 1891 to D. B. Welch for $10,000. Certificate of Deposit stub book April 28th, 1891 shows this certificate issued in the name of "Costs" for $1.50. Ledger of this date shows nothing received by the bank account of this certificate.

Q. What does the certificate register show?

A. The certificate is stamped paid November 28, 1891 as $10,000. Certificate of Deposit register shows this certificate paid May 13th, 1891, as $1.50. Certificate of deposit register April 28th, 1891 shows the certificate issued "Costs $1.50".

Q. Have you made a similar examination of the books and documents of the bank with reference to No. 25097?

A. I have.

Q. You may state the result of that investigation.

776 —. The bank book shows certificate of deposit No. 25097 as issued August 17th, 1891 to J. E. Hill, Treasurer for $50,000; Certificate stub book, August 17th, 1891 shows issued to J. E. Hill, Treasurer for $50.00; Certificate of Deposit Register, August 17th, 1891 shows issued in the name of "Collection" for $50.00. August 17th, 1891 the ledger shows the bank received account of this certifi-

cate $50. Certificate was stamped paid January 6th, 1893 and charged to certificate of deposit account as $50,000. Certificate of deposit register shows certificate outstanding and unpaid.

Q. Have you made similar investigation with reference to certificate of deposit No. 25933?

A. I have.

Q. You may state the result of that investigation.

A. The bank book shows certificate of deposit No. 25933 as issued January 2d, 1892 to Mayer Brothers for $11,000. Certificate of Deposit stub book, January 2, 1892 shows certificate issued to Mayer Brothers for $1,000. January 2, 1892 ledger shows bank received, account of this certificate, $1,000. The certificate of deposit was stamped paid January 3, 1893 as $11,000. Register shows certificate not paid, as $1,000.

777 Q. Have you made similar investigation with reference to certificate No. 26818?

A. I have.

Q. You may state the result of that investigation.

A. The bank book shows certificate of deposit No. 26818 issued May 16th, 1892 to the First National Bank of Poultney for $5,000; Certificate stub book shows, May 16th, 1892, issued to Loup City costs for $3.00. The register was gone. May 16th, 1892 ledger shows the bank received, account of this certificate $3.00. Certificate is cancelled, and receiver's certificate is issued for it.

Q. In what amount?

A. $5,000.00.

Q. Have you made similar investigation with reference to Certificate of Deposit No. 27401?

A. I have.

Q. You may give the result of that investigation.

778 A. Bank books show Certificate of Deposit No. 27401 as issued August 18th, 1891 to George Olcott Cashier, for $5,000. Certificate stub book, August 18th, 1891 shows issued in the name of "Costs", for $1.77. The register is gone. Ledger, August 18th, 1891 shows the bank received, account of this certificate, $1.77. Certificate was cancelled and Receiver's receipt issued therefor.

Q. Is that certificate among those that are now,—and have been offered here in evidence, as one of the certificates unpaid and outstanding at the time of the bank's failure?

A. Yes sir, and I will say that all certificates that I will testify to in this regard, you will find in that package of certificates, and that will show them allowed, and the Receiver's number, and so forth.

Q. Is that one of the number of exhibits, commencing with No. 147 and extending to 923½,—it is in this package of certificates.

A. Yes sir, in that bunch; I think that is the proper number of the exhibits.

779 Q. Have you made a similar examination of the books and records of the bank with reference to certificate of deposit No. 27978?

A. I have.

Q. You may state the result of that examination.

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A. The books of the bank show that that certificate of deposit, No. 27978 was issued November 3rd, 1892 to the LaSalle National Bank for $5,000. Certificate stub book, November 3, 1892 shows certificate issued to "Interest account" for $3.00. The certificate of deposit register is gone. November 3rd, 1892 the ledger shows that the bank received, account of this certificate, $3.00. Certificate was cancelled and receiver's receipt issued therefor for $5,000.

Q. That is one of the certificates that was outstanding at the time of the failure of the bank?

A. Yes sir.

Q. That has been offered in evidence?

A. Yes, sir.

Q. Now have you made similar investigation with reference to Certificate of Deposit No. 28009?

A. I have.

Q. You may state the result of that investigation.

780 A. The bank books show certificate of deposit No. 28009 issued November 7th, 1892 to LaSalle National Bank for $5,000. Certificate stub book shows issued in the name of "Costs" for $3.00. Certificate register is gone. Ledger shows that the bank received on account of this certificate $3.00. Certificate was cancelled and receiver's receipt issued therefor as $5,000.

Q. That certificate was outstanding and unpaid at the time of the failure of the bank?

A. It was.

Q. Now have you made similar investigation with regard to certificate No. 24806?

A. I have.

Q. You may state the result of that investigation.

A. The bank books show that certificate No. 24806 was issued June 27th, 1891 to Cassius S. Weese for $2100. Stub book, June 27th, 1891 shows it was issued to Cassius M. Weese as $2100.;

781 Register of June 27th, 1891 shows Cassius Weese for $100.00; Ledger of June 27th, 1891 shows $2100; certificate stamped paid July 27th, 1892 as $2100.00. The Certificate of Deposit Register shows it not paid and outstanding *at* $100.00.

Q. Have you made a similar investigation of the books and record of the bank with reference to certificate of deposit No. 24709?

A. I have.

Q. State the result of that investigation.

A. The bank books show that certificate of deposit No. 24709 was issued June 10th, 1891 to John A. T. Hibbs for $3,000. Certificate stub book, June 10th, 1891 shows issued to John A. T. Hibbs for $3,000; Register of June 10th, 1891 shows issued to John A. T. Hibbs for $300.00; certificate stamped paid July 8th, 1892 as $3,000. Certificate register shows paid June 11th, 1891 as $300.00.

Q. Have you made a similar examination of the books and records of the bank with reference to certificate of deposit No. 24653?

A. I have.

Q. You may state the result of that examination.

782 A. The bank's books show that certificate of deposit No. 24653 was issued June 1st, 1891 to C. Hammond for $5,000.

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Certificate stub book, June 1st, 1891, shows issued to C. Hammond for $5,000. Certificate register, June 1st, 1891, shows issued to C. Hammond for $100.00. Certificate is stamped paid June 20th, 1892 as $5,000; register shows it outstanding and unpaid as $100.

Q. Have you made a similar investigation with reference to certificate No. 23593?

A. I have.

Q. You may state the result of that investigation.

A. The bank books show certificate of deposit No. 23593 issued — J. E. Hill, State Treasurer, December 9th, 1890 for $40,000. Certificate stub book shows J. E. Hill for $40,000. The certifi-
783 cate register shows "do." $100.00. Certificate stamped paid November 3, 1892 as $40,000. Register shows same was paid April 24th, 1891 as $100.00.

Q. Have you made a similar investigation as to certificate of deposit No. 24574?

A. I have.

Q. You may state the result of that examination.

A. The bank books show that certificate of deposit No. 24574 was issued May 15th, 1891 to P. L. T. Ashton for $1500. Certificate stub book shows issued to P. L. T. Ashton for $1500.00; Certificate register May 15th, 1891, shows issued to P. L. T. Ashton for $500. Ledger, May 15th, 1891 shows $1500. Certificate is stamped paid June 30th, 1892 as $1500. Certificate of deposit register shows it was paid on May 25th 1891 as $500.

Q. Have you made a similar examination of the books and documents of the bank with reference to certificate of deposit No. 24866?

A. I have.

Q. You may state the result of that examination.

784 A. The books of the bank show that certificate of deposit No. 24866 issued July 8th, 1891 to A. Humphreys for $4500. Certificate stub book, July 8th, 1891 shows issued to A. Humphreys for $4500. Certificate of deposit register, July 8th, 1891 shows A. Humphreys $500.00. Ledger of July 8th, 1891 shows it *at* $4500. Certificate stamped paid October 13th, 1891 as $4500. Register shows paid October 13th, 1891 as $500.

Q. And have you made a similar investigation of the books and documents of the bank with reference to certificate of deposit No. 24937?

A. I have.

Q. You may state the result of that investigation.

A. The bank books show that certificate of deposit number 24937 was issued July 18, 1891 to J. E. Hill, treasurer for $14,650. Certificate stub book, July 18th, 1891 shows J. E. Hill, treasurer for $14,650. Certificate of deposit register July 18th, 1891 shows issued in the name of "Collection" for $4650, and the certificate is stamped paid August 6th, 1891 as $14,650. Certificate of deposit register marked paid August 6th, 1891 as $4650.00.

(Adjournment until Tuesday, February 7th, 1911, at 9 o'clock a. m.)

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785 TUESDAY MORNING, February 7th, 1911.

Direct examination of H. T. JONES continued:

Q. Now have you made a similar investigation of the books and documents of the Capital National Bank with reference to certificate of deposit No. 24491?

A. I have.

Q. You may state the result of that investigation.

A. The books of the Capital National Bank show that Certificate No. 24941 was issued July 20th, 1891 to J. E. Hill state treasurer for $10,000. The certificate stub book of July 20th, 1891 shows J. E. Hill state treasurer for $10,000; the certificate register, July 20th, 1891, shows J. E. Hill, $5.00. July 20th, 1891 the ledger account shows $10,000; the certificate is stamped paid August 8th, 1891 as $10,000; the certificate register shows paid August 6th, 1891 as $5,000.

Q. Have you made a similar investigation with reference to certificate of deposit No. 24981?

A. I have.

Q. You may state the result of that investigation.

786 A. The books of the Capital National Bank show that Certificate of Deposit, No. 24981 was issued July 27th, 1891 to A. P. S. Stuart for $2,000. The certificate stub book, July 27th, 1891 shows issued to A. P. S. Stuart for $20.00; certificate register of July 27th, 1891 shows issued to A. P. S. Stuart as $20.00; the ledger account of July 27th, 1891, shows $2,000. The certificate is stamped paid January 27th, 1892 for $2,000. The certificate register shows paid January 27th, 1892 as $20.00.

Q. Have you made similar investigation with reference to certificate of deposit No. 24986?

A. I have.

Q. You may state the result of that investigation.

A. The books of the Capital National Bank show that Certificate of deposit No. 24986 was issued July 27th, 1891 to H. R. King for $7,000. The stub book for July 27th, 1891 shows issued to H. R. King for $1,000. The certificate register of July 27th, 1891 shows H. R. King for $1000. The ledger account July 27th, 1891 shows as $7,000. Certificate was stamped paid, but the stamp date is blurred so that I can't state just what the cancellation date is, as $7,000. The certificate register shows it paid August 7th, 1891 as $1,000.

Q. Have you made a similar investigation with reference to Certificate of Deposit No. 25047?

A. I have.

787 Q. You may state the result of your investigation.

A. The bank books show that certificate issued August 6th 1891 to J. E. Hill, treasurer, for $37,975. The certificate stub book shows August 6th, 1891, J. E. Hill, treasurer as $975.00; the certificate register of August 6th, 1891 shows issued to "Collections" for $975. August 6th, 1891 the ledger shows $37,975.

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Certificate stamped paid August 13th, 1892 as $37,975. Certificate register marked paid August 8th, 1891, as $975.00.

Q. Have you made a similar investigation with reference to Certificate of Deposit No. 25056?

A. I have.

Q. You may state the result of that investigation.

A. The bank books show Certificate of Deposit No. 25056 issued August 8th, 1891 to "Harper notes" for $7,000; the certificate stub book August 8th, 1891 shows "Harper notes," as $1,-
788 000. Certificate register, August 8th, 1891, shows issued to "Collections" for $1,000. August 8th, 1891 ledger account shows $7,000. Certificate is stamped paid October 2, 1891 as $7,000. Register marked paid August 14th, 1891 as $1,000.

Q. Have you made a similar investigation with reference to certificate of deposit No. 25636?

A. I have.

Q. You may state the result of that investigation.

A. The bank books show that certificate of deposit No. 25636,——

Q. Do you mean the bank books show, or the certificate itself?

A. I take it from the books and the certificates both. The bank books and records show that certificate of deposit No. 25636 was issued November 18, 1891 to J. E. Hill treasurer, for $50,000. Stub book of November 18th, 1891 shows issued to J. E. Hill, treasurer for $50,000. Certificate register of November 18th, 1891 shows issued to "Colls." as $100. The ledger of November 18th, 1891 shows $50,000, and the certificate is stamped paid May 21, 1892 as $50,000. The certificate register shows not paid, but outstanding as $100.

Q. Have you made a similar investigation with reference to certificate of deposit No. 25691?

A. I have.

789 Q. You may state the result of that investigation.

A. Certificate of deposit No. 25691 was issued November 28th, 1891 to D. B. Welch for $10,000. The certificate stub book of November 28th, 1891 shows issued to D. B. Welch for $10,000; the certificate register of November 28th, 1891 shows issued to D. B. Welch for $100. Ledger of November 8th, 1891 shows $10,000. The certificate is stamped paid June 28th, 1892 as $10,000; register shows not paid and outstanding as $100.

Q. Have you made a similar examination with reference to Certificate of deposit No. 24937?

A. I have.

Q. You may state the result of that investigation.

A. Certificate No. 24937 was issued July 18th, 1891 to J. E. Hill, treasurer, for $14,650. Certificate stub book, July 18th, 1891 shows issued to J. E. Hill, treasurer for $14,650. The certificate register of July 18th, 1891 shows issued to "Collections for
790 $4,650.00; Certificate is stamped paid August 6th, 1891 as $4,650.

Q. Have you made a similar investigation with reference to Certificate of Deposit No. 25862?

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A. I have.

Q. You may state the result of that investigation.

A. Certificate No. 25862 is issued December 22, 1891 to J. E Hill, treasurer for $37,114.75; certificate stub book of Decembe 22, 1891 shows issued to J. E. Hill treasurer for $37,114.75; Cer tificate of deposit register, December 22, 1891 shows issued to "do. for $114.75. Certificate is stamped paid December 13th 1892 fo $37,114.75. Register shows not paid and outstanding as $114.7

Q. And have you totaled up the amount of the certificates to whic you have testified as to discrepancies between the certificates an the ledger account?

A. I have.

Q. And what is the total?

A. The certificates which I have just testified to shows a loss t the bank of $179,934.23.

Q. Have you made a similar investigation with reference to cer tificate of deposit No. 21386?

A. I have.

Q. You may state the result of that investigation.

791–801 A. Certificate of deposit No. 21386,—the certificate it self is missing, and was missing at the time I made my original notes. The certificate stub book shows December 24th 1889 issued to J. E. Hill, for $5.00; the certificate register shows issued to G. M. Bartlett, Tr., for $5.00. The ledger account is shown as $50,000; the certificate of deposit register is marked paid December 24th, 1889 as $5.00.

Q. Is this certificate to which you have just testified included in the total to which you have previously testified:

A. No sir, I didn't put it in for this reason; the certificate when I first went there was there, but when I went to make up my final minutes it had been abstracted, and for that reason I did not include it, because the certificate itself could not be produced in court.

Q. When was it you say you saw the certificate, Mr. Jones?

A. While I was making an examination of the records; they were in the hands of Hayden, receiver.

Q. Were there any other documents that you found missing that you had seen at that prior time, and when you went to take the deposition of Mr. McDonald they were found to be missing?

A. Yes sir, quite a number of them.

* * * * * * *

802 Q. Did you see the original report of that character of which this Exhibit X-977 is a copy?

A. I did.

Q. And did that bear the signatures of anyone?

A. It did.

Q. And whose signatures did the original bear?

A. C. W. Mosher, president, C. W. Mosher, C. E. Yates and D. E. Thompson, directors.

Q. Now, Mr. Jones, are you acquainted with the handwriting

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of these parties so that you can testify whether or not these
803 original instruments bore their genuine signatures?

A. Yes, sir.

Q. You may state whether the original of which this Exhibit X-977 is a copy, bore the genuine signature of C. W. Mosher, president?

A. It did.

Q. Did it bear the genuine signature of C. W. Mosher director?

A. It did.

Q. And did it bear the genuine signatures of C. E. Yates and D. E. Thompson, the defendants in this case?

804–821 A. It did.

* * * * * * *

822 Q. Now, Mr. Jones, you may state if you made an examination of the books of the Capital National Bank to ascertain the amount that the books themselves showed outstanding as a liability on account of certificates of deposit outstanding and unpaid at the date of the failure of the bank?

A. I have.

Q. Can you state what amount the books themselves showed were outstanding as a liability of the bank at the time the bank closed its doors, January 21, 1893?

A. I can.

Q. And the books which reflect that condition and show the amount outstanding are here in court, are they?

A. They are.

Q. And are the books that have been identified during the progress of this trial?

A. They are.

Q. You may state then what amount is shown by the books of the Capital National Bank to have been outstanding and a liability on account of certificates of deposit outstanding at the date referred to, January 21, 1893.

823 A. The books show $86,665.70 of certificates of deposit outstanding and unpaid.

Q. Mr. Jones, have you made an examination, and a list of the certificates of deposit which were actually outstanding and which have been offered in evidence here, and were unpaid and a liability of the bank at the time of its failure, referring of course to liability on account of the certificates of deposit?

A. I have.

Q. Have you footed up the amount of the certificates outstanding and unpaid at the time of the suspension of the bank?

A. I have.

Q. And what is the total amount of the certificates that are here in evidence as outstanding?

A. The total amount of certificates outstanding I make $517,999.49. The amount outstanding as shown by the books of the bank $86,265.70. They show a discrepancy of $431,733.79.

Q. And did you find that any of the certificate accounts that were carried on the books of the bank at various times were overdrawn?

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A. Yes sir; I have prepared a list of where the certificates of deposit account showed overdrafts at various dates.

Q. How can you as a bookkeeper and an expert accountant account for a certificate of deposit account being overdrawn if properly kept?

824 A. A certificate of deposit account properly kept could not be overdrawn.

Q. Explain why.

A. A certificate of deposit account shows the amount of money that customers of a bank will bring to a bank and deposit and receive a certificate therefor, and of course a bank would not issue a certificate of deposit unless it had received the money, if it was an honest transaction, and it being an account of that kind you can readily see that it would be impossible to have it overdrawn, if properly kept.

Mr. ROSE: You couldn't overdraw an account that imported a liability as its foundation?

A. Not a certificate of deposit account, because the certificates of deposit outstanding, if properly kept, will equal the amount shown in the certificate of deposit account. It is not like a personal account. A man with a personal account in a bank could draw a check for a greater amount than was on deposit, and if the bank would pay it, it would show an overdraft, but a certificate of deposit account is different.

Q. There couldn't be a certificate that had not been issued?

A. No sir, oh, no.

Q. And did you say you made an examination of that account at various dates during the existence of the bank with reference to overdrafts in the certificate of deposit account?

A. I have.

Q. You may state, Mr. Jones, at what various times during the existence of the bank this certificate of deposit account is shown by the books to have been overdrawn.

825 A. Certificate of Deposit Account, No. 1, November 3, 1888 shows to be overdrawn $1556.52, and this account is overdrawn every day during the month of November.

Q. Of what year?

A. 1888. This account is overdrawn every day during the month of December, 1888, as shown by Individual Ledger No. 2, for November and December, 1888. Account No. 1 is overdrawn every day during the months of November and December, 1889, as shown by Ledger No. 2 for November and December, 1889. The same account is overdrawn every day for the months of January and February, 1890, as shown by Ledger No. 2, January and February, 1890. This account is overdrawn during the months of May and June, 1891, as shown by Ledger account No. 2, for May and June, 1891. This account is overdrawn every day during the months of November and December, 1891, as shown by Individual Ledger No. 2, for November and December, 1891. This account is overdrawn every day during the months of May and June, 1892, as shown

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by Ledger No. 2 for May and June, 1892. This account is overdrawn every day for the months of November and December, 1892, as shown by Ledger No. 2 for November and December, 1892. Certificate of Deposit account No. 2 overdrawn November 1st 1892 $3,819.23. This account shows overdrawn every day during the month of November, 1892. This account shows overdrawn every day during the month of December, 1892 at various amounts as shown by Individual Ledger No. 2 for November and December, 1892. Account No. 1 is overdrawn every day in January up to the close of the bank, as shown by ledger No. 2.

Q. January 1893?

A. Yes sir. Account No. 3 is overdrawn January 16th, 1893 $4271.81 and this account continued to be overdrawn up to the close of the bank, and the day the bank closed it showed an overdraft of $10,527.46. On January 6th, 1893 Certificate of De-
826 posit Account, No. 4, showed that they paid $91,533.42 more certificates during that day's business than the books showed was outstanding, and what accounted for this discrepancy was Certificate of Deposit No. 21379 that was issued for $50,000 and carried onto the ledger of the bank as only $5.00; also Certificate of Deposit No. 25097 was issued for $50,000 and charged as only $3.00.

Q. Those two were indicated paid that day?

A. I said they were paid that day.

Q. For $50,000 each?

A. Yes sir.

Q. Mr. Jones, are those overdrafts that appear in these various accounts apparent and obvious?

A. Yes, sir.

Q. Would it require a person of more than ordinary ability or one that had any knowledge of bookkeeping to detect and ascertain that?

A. I think not.

827 Q. Now explain why not, Mr. Jones—just how that could be detected.

A. An account as I understand it can only be two ways; a debit balance or a credit balance; you can have an amount coming to you or it can be an overdrawn account. Now then I couldn't conceive of how a person wouldn't know that if an account wasn't overdrawn, why they wouldn't know it was the reverse.

Q. What I mean is, how would these overdrafts show on the books,—how did it appear,—what was there on the books to indicate that it was overdrawn?

A. In this bank the overdrafts are shown in red ink; the credit balances are shown in black ink; all overdrafts in those books were shown by red ink.

Q. And were those overdrafts to which you have testified all indicated in red ink?

A. Yes, sir.

Q. And was it necessary to make any footings, or add up any columns of figures, to see the amount of the overdrafts at any time?

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828 A. Oh no. The amounts were placed in red ink,—so many dollars and so many cents for each day's business.

Q. Have you examined the records and books of the bank to ascertain what notes of the various directors passed through the bank and at different times were entered into its Bills Receivable?

A. I have.

Q. Did you prepare schedule of them?

A. I have a schedule showing the total amount of loans, according to the statement made as shown by the books.

Q. Did you go over the books to ascertain the amount of notes of W. W. Holmes that were shown by the ledger to have gone through the bank and entered into its assets?

A. I did.

Q. What is the amount of notes of his in the aggregate that went through the bank at different times?

A. $238,800.

Q. Of course you don't mean that those were in at one time but those were the aggregate amount—those that passed through at various times.

829 A. That is the total amount of loans that director Holmes made with the Capital National Bank, as shown by the books.

Q. What amount of loans were taken in the same manner, if any, of R. C. Outcalt, and entered into the assets of the bank?

A $273,130.61.

Q. What amount, if any, of C. W. Mosher went through the bank in the same manner?

A. $711,648.98.

Q. What amount of notes of R. O. Phillips went through the bank in the same manner?

A. $139,470.04.

Q. What amount of notes of C. E. Yates went through the bank in the same manner?

A. $43,140.

830 Q. And the amount of notes of D. E. Thompson that went through the bank in the same manner?

A. Paper classified as Director's paper, $73,677.50.

Q. Were there any other notes that were otherwise classified?

A. Yes, sir.

Q. What ones?

A. Bills Receivable No. 50532 was a note signed by Thompson and Mosher for $1640.

Q. Was it the defendant D. E. Thompson, you mean?

A. Yes, sir.

Q. And C. W. Mosher?

A. Yes, sir.

Q. What amount?

A. $1600.

Q. When was that shown taken into the bank?

A. The date of the note was June 2, 1889.

Q. Find any other paper?

POOR

A. Yes, sir.
Q. You may state what it was.
A. No. 34724 for $2350.00.
Q. What was that?
A. It was a note.
Q. Whose?
A. Of J. E. Baum and D. E. Thompson.
Q. What other?
A. No. 73139 for $350. It was a note of J. S. Alexander and D. E. Thompson.

831 Q. I will ask you, Mr. Jones, if you have examined the books of the bank to ascertain what notes of E. W. Mosher were taken into the bank and made a part of its assets, as Bills Receivable?

A. I have prepared a list showing, the date, book and page where found, the number of the note and the amount. The various notes amount *to* $199,626.70.

Exhibit "RR" identified.

Q. Is Exhibit "rr" the schedule showing the notes of E. W. Mosher, to which you have just referred?
A. It is.
Q. And that was compiled from the books of the bank?
A. It was.
Q. And is it correct?
A. I think it is.

Mr. THOMAS: Then we offer in evidence Exhibit "rr."

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; having no significance whatever to the pending issue, because the cources of the inquiry of the witness have not been sufficiently proven to entitle them to be admitted in evidence; however, I make no specific objection to the fact that the schedule is used instead of an oral recital.

Objection overruled.

Each of the defendants excepts.

Exhibit "rr" received in evidence.

832 EXHIBIT "RR."

E. W. Mosher.—List of Loans Made by Him.

Date.	Book and page.		No.	Amount.
1885				
May 26	Journ. A	611	8,576*a*	1,025.00
Jun. 5		629	8,689*a*	4,612.50
Jul. 15		695	9,064*a*	2,000.00
Dec. 26	Journ. B	229	11,141*a*	3,587.50
1886				
May 18	B/R-B	80	18,968	58.00
Sep. 21		115	20,720	2,802.63

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1887				
Dec. 15	B/R-2	63	34,116	1,000.00
1888				
Jan. 9		77	34,833	2,850.73
Apr. 13		122	37,061	2,850.73
Oct. 11		135	37,703	125.60
3		200	40,975	1,000.00
Dec. 31		248	43,385	1,000.00
1889				
Feb. 23		292	45,584	1,000.00
Oct. 24	B/R-3	120	74,046	1,821.15
1891				
Jan. 12		270	97,007	414.23
July 8	B/R-4	26	100,184	10,600.00
		31	101,065	12,730.01
		...	101,036	5,000.00
		...	101,067	98.00
		...	101,068	8,631.20
		51	111,069	430.80
28		60	112,008	5,000.00
Sep. 3				
1892				
Feb. 18		120	118,007	12,730.01
		...	118,008	10,600.00
		...	118,009	8,631.20
		...	118,010	5,000.00
		...	118,011	98.00
		130	119,006	5,000.00
Mch. 4		...	119,012	5,000.00
14		...	119,013	5,000.00
		...	119,014	5,000.00
		...	119,015	5,000.00
		170	131,000	5,000.00
Feb. 6		...	131,001	5,000.00
		...	131,002	5,000.00
		...	131,003	5,000.00
		180	132,007	98.00
Oct. 6		190	133,008	430.80
		200	134,007	12,730.01
19		...	134,008	10,600.00
		...	134,009	8,611.20
		...	134,010	5,000.00
		...	134,011	5,000.00
Dec. 27		220	136,005	2,500.00
Total loans				$199,626.70

833 Q. Now, Mr. Jones, have you made an examination of the documents and records and books of the bank, of the notes executed by Stark & Mosher, that entered into and became a part of the assets of the Capital National Bank?

A. I have made a list showing the date, the book and page where

POOR

found, the number of the note and the amount of the several notes, which aggregate $337,718.02.

Exhibit "SS" identified.

Q. Is Exhibit "SS" the schedule to which you refer?
A. It is.
Q. Was that compiled from the books and records of the Capital National Bank which have been referred to and are in court at this time?
A. It was.
Q. And is it a correct compilation of what the books show in that behalf?
A. I know they show at least this amount; they might show more; I tried to make a correct list.

Mr. THOMAS: We offer in evidence Exhibit "SS".
Exhibit "SS" received in evidence. (Copy on next page.)

834 EXHIBIT "SS."

Stark & Mosher—List of Loans Made by Them.

Date.	Book and page.		No.	Amount.
1886				
Oct. 30	B/R-B	10	15,474	2,536.87
Nov. 20		10	15,481	3,175.47
1887				
Jan. 3		...	15,491	1,163.51
Feb. 2		...	15,499	6,415.85
Mch. 2		11	15,506	3,685.77
Apr. 6		...	15,515	7,573.64
May 4		...	15,517	5,872.85
Jun. 1		...	15,533	5,040.63
1886				
Nov. 1		17	15,809	4,146.98
Dec. 1		17	15,813	5,480.15
Jul. 2		55	17,723	5,000.00
7		...	17,733	112.50
2		70	18,498	5,000.00
2		84	19,177	5,000.00
24		86	19,294	3,536.87
2		99	19,935	5,000.00
Jun. 14		111	20,509	5,282.32
Jul. 2		113	20,605	5,000.00
Oct. 2		117	20,831	4,746.90
Jul. 2		227	21,328	5,907.71
Sep. 2		228	21,378	5,082.00
Nov. 3		233	21,619	5,000.00
Dec. 2		244	22,169	5,480.15
Aug. 3		256	22,750	2,119.65
Dec. 20		301	25,017	5,493.60

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1887				
Jan. 3		...	25,726	11,810.97
835				
May 16		...	27,321	500.00
Jul. 26		...	29,576	5,493.60
1887				
Aug. 1	B/R-"2"	20	31,987	1,425.20
Sep. 1		...	31,988	4,307.28
Oct. 1		...	31,993	5,623.70
Nov. 1		...	31,996	2,576.10
Dec. 1		...	31,999	5,505.68
7		21	32,006	4,000.00
1888				
Jan. 1		...	32,012	3,349.92
1887				
Aug. 1		...	32,018	3,968.25
Sep. 1		...	32,019	4,307.28
Oct. 1		...	32,020	5,623.70
1888				
Feb. 1		...	32,021	2,428.23
21		...	32,022	1,152.17
Mac. 1		...	32,024	2,554.36
31		...	32,027	3,172.45
May 1		...	32,033	2,260.35
Jun. 1		...	32,034	3,336.85
30		...	32,040	1,900.50
Aug. 1		...	32,042	764.03
Sep. 1		...	32,044	2,347.30
Oct. 1		...	32,046	980.84
		...	32,048	5,992.67
		...	32,049	6,509.30
		...	32,050	7,242.94
11		...		
Oct. 11	B/R-"2"	22	32,051	5,926.02
		...	32,052	2,188.50
		...	32,053	5,505.68
836				
	B/R-"2"	...	32,054	5,623.70
		...	32,055	4,307.28
		...	32,056	3,968.25
Nov. 1		...	32,059	904.25
Dec. 1		...	32,061	601.80
31		...	32,071	452.35
1889				
Feb. 1		...	32,076	1,460.50
Mch. 1		...	32,078	2,679.20
Apr. 1		...	32,080	1,072.79
May 2		...	32,082	2,033.47
Jun. 1		...	32,083	429.00
Jul. 1		...	32,086	514.43

POOR C

8		...	32,087	6,000.00
Aug. 3		...	32,092	508.75
1887				
Jul. 17		29	32,430	10,600.00
Dec. 28		105	36,240	5,493.00
1888				
Mch. 30		109	36,416	7,012.80
May 28		112	36,578	1,500.00
Jun. 28		127	37,301	500.00
Jun. 11		152	38,597	8,380.13
Nov. 19		275	44,719	7,517.83
1889				
June 6	B/R-"3"	51	59,094	11,422.69
Oct. 12		120	74,009	10,600.00
Nov. 25		130	75,051	8,299.24
1890				
Jun. 4		171	79,082	5,000.00
Oct. 24		240	94,019	10,600.00
Total loans				$337,718.02

837–841 Q. Have you made a similar investigation as to the notes of the Western Manufacturing Company, executed by E. Hurlbut, Jr., Manager, that entered into the Bills Receivable account of the Capital National Bank, and became a part of its assets as shown by its own books and records?

Mr. Rose: Each of the defendants objects as immaterial.
Objection overruled.
Each of the defendants excepts.

A. I have made a list giving the number of the note, the date, the amount, and so forth, which notes aggregate a total amount of $755,000.

Exhibit "TT" identified.

Q. Is Exhibit "TT", which I hand you, the schedule to which you refer?
A. It is.
Q. And was that taken and compiled from the books and records of the Capital National Bank which are in court at this time?
A. Yes, sir.
Q. And is that exhibit a correct compilation of the notes that you find passed through the bank and entered into its assets?
A. It is a correct list.

* * * * * * *

842 A. (continued). There is another part of this schedule that I did not state and that is in regard to interest.
Q. What do the records show in regard to interest having been paid on the Western Manufacturing Company notes?
A. There was interest paid on five of these notes, amounting to $2,031.19, or in other words there were 152 loans made and interest

was paid on six of them, and on 146 of them no interest was ever paid.

Q. And when does it appear that interest was paid?

A. At what dates?

Q. Yes, sir, and the amounts.

A. October 2nd, 1890, No. 93,030 there was credited to interest account $208.32 and the same amount was charged to the Western Manufacturing Company's account. August 28th, 1891 there was interest to the amount of $122.00 paid. May 16th, 1892 interest paid to the amount of $280.00, December 30th, 1892 interest paid $1,250. Total interest paid $2,031.19.

Q. Do the books show from what source the last payment of $1,250 came,—was it charged to some other account?

A. No, it shows nothing only the credit to the interest paid account, and a note of that amount accepted by the bank as *Bills* Receivable.

Q. I mean the interest payment of $1,250.

A. No, it wasn't charged to any account; there was just a $5,000 note taken in that day.

Q. And the interest credited with $1,250?

A. Yes, sir.

843 Q. And as to the other items that appear there could you find any account to which those items were charged,—the item of $170.84 and $280?

A. That was charged to the Western Manufacturing Company.

Q. Mr. Jones have you examined the books, records and documents of the Capital National Bank to ascertain what notes of the Marshes and their various concerns entered into and became a part of the assets and Bills Receivable of the Capital National Bank?

A. I have.

Q. Did you prepare a schedule from the books showing the various notes, and giving their description, as you have testified in your former testimony?

A. No, the Marsh schedule was prepared in a different way; it was prepared in a ledger form; one which was prepared by Mr. Whitmore and myself, and he used it in his examination, but I can give you the total amount of the loans.

Q. You may state what the total amount is of the paper that went through the bank of the Marshes.

A. The amount of the Marsh paper that passed through the Capital National Bank according to the ledger account is $510,628.71.

Q. Now, Mr. Jones, with reference to the apparent Bills Receivable that were carried by the bank, I will ask you if these notes were entered up and shown on any register or book of the bank, that is a book kept exclusively to list notes and bills receivable?

844 A. All bills receivable I have found or testified to have been kept in their bills receivable book, or discount register as it is sometimes called in this bank.

Q. And is Exhibit X-25 a book of that character?

POOR

A. That is one of the books.

Q. And does that book show listed in it, the notes, among which are the notes which you have testified to?

A. Well on page 312, under the head of Demand Paper, you will notice Edwin W. Mosher. This is the name, number, and the date *of* the notes are given, and when due, and the rate of interest and the date received by the bank, and this is the amount of the several notes.

Q. Now what amounts appear there, in consecutive order?

A. 1-2-3-4-5-6-7-8-, ranging in amount from $763.50 up to $6,881.

Q. Give the amount of each one in that table or column.

A. Commencing at the top of the page, the first note is $763.44. These are all notes of E. W. Mosher. The next one is $5,903.77, $5,505.68, $5,623.70, $4,307.28, $3,968.25, $6,000.00, $1,438.82, $6,881.18.

Q. Now turn to some other page.

A. Now here is another note of D. E. Thompson that I overlooked this morning, of $1,000.00.

845 Mr. Rose: Who appears to be the maker there?

A. The maker appears in this column, and in this column it appears to show how secured, if at all, either by collateral or by endorsement, and so forth.

Q. Then that indicates merely that Mr.——

A. It shows here it is by D. E. Thompson, Pt.—president.

Q. Is that a personal obligation, purporting to be of Mr. Thompson's?

A. I wouldn't think so; I would think it was signed as president of this company.

Q. Is the note paid?

A. The book shows the note paid 9/18/81.

Q. Now do these notes in a similar way appear in this book from day to day and from page to page?

A. Yes sir. I will call your attention to a page there. Now there is a page that is exclusively for the officer's paper of the bank.

Mr. Rose: That page shows everything except the paper of Mosher and Outcalt, doesn't it? Shows it paid.

A. I was going to say, under the line "Paid" here you have to use this distinction; when it shows paid here that doesn't necessarily mean that the note was paid with cash; it can be paid by renewal, and that would show under this column as paid.

Q. There are no notes shown unpaid and still existing on that page?

A. No, only where you see the vacant line.

Q. And those are the Mosher & Outcalt notes?

A. Let me see; That is correct.

Q. Quite a large number of the Mosher and Outcalt notes on this page are shown paid, to, are they not?

A. Yes sir. You will find that same thing true in the various bills receivable book of the bank; they were kept practically in the same form, only for different dates.

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846 Q. And were registered similar to those on this book?
A. Yes sir, the same practice.

Q. Mr. Jones, have you examined the books and documents of the bank to ascertain the assets it had, that is—or rather what its books show to be assets which were in fact valueless in July 1st, 1891?

A. I have prepared such a schedule, showing the date note was taken, the number of the note, the name of the makers and the amounts of the several notes.

Q. I will ask you if you have prepared a schedule showing worthless notes or bills receivable that had enter- into the bank or was held by the bank as part of its apparent assets on July 1st, 1891?

A. I have prepared such a schedule.

Exhibit "UU" Identified.

Q. Is Exhibit "UU" the schedule you have prepared that shows this paper?

A. It is.

Q. And from what was that schedule compiled?

A. From the books of the Capital National Bank.

Q. By yourself?

A. Yes, sir.

847 Q. Is it a correct compilation?

A. I think it is. That was my intention of making a correct schedule.

Mr. THOMAS: We offer that schedule in evidence.

Mr. ROSE: Mr. Jones do you mean to imply that the books showed the paper to be worthless?

A. No sir.

Mr. ROSE: Each of the defendants objects to the schedule as no foundation laid; incompetent, irrelevant and immaterial.

The COURT: How do you arrive, Mr. Jones, at the question of whether or not the paper was worthless as mentioned in that schedule?

A. From inquiry in to the financial standing of those parties at the times that the notes were given; the character of the companies, in some instances, that gave the notes,—for instance, the Western Manufacturing Company, I have satisfied myself that there never was such a company; that it was a myth, and along the line of general inquiry like you would on any other subject that you were investigating.

Q. Have you investigated the parties who purport to be the makers of those various notes, and made such investigation as you would make if you were making loans to them to ascertain what their financial condition was at the times these loans are shown to be held by the bank?

A. Yes sir, largely. I might say that some of these notes was given by such companies as the Marsh Harvester Company,—Marsh companies of various kind that were well known, you might say, that they were a bankrupt institution years before. And the

POOR

same way with Donnell, Lawson & Simpson, I knew that they were bankrupt because I was in the banking business at that time, and it came out in our reports and newspapers and I saw and read about it.

Q. And that bankruptcy and the standing of those various makers have been proved by other evidence in this case.

848 EXHIBIT "UU" Received in Evidence.

(Copy follows.)

"List of Worthless Notes & Assets Held by the Capital National Bank, July, 1, 1891.

Taken by bank.	No.	Maker.	Amount.
8/20-90	49358	Stark & Mosher.....	$12,472.25
3/10/91	49499	Stark & Mosher.....	5,000.00
8/31/89	50003	Stark & Mosher.....	7,242.94
8/31/89	50004	Stark & Mosher.....	5,926.02
8/31 '89	50006	Stark & Mosher.....	5,505.68
8/31 '89	50007	Stark & Mosher.....	5,623.70
8/31 '89	50008	Stark & Mosher.....	4,307.38
8/31/89	50009	Stark & Mosher.....	3,968.25
2/1/90	50048	Stark & Mosher.....	1,438.82
3/31/89	50022	Stark & Mosher.....	6,000.00
8/28/89	50056	Stark & Mosher.....	6,881.18
8/28/89	50057	Stark & Mosher.....	5,963.86
11/25/89	75021	Stark & Mosher.....	8,631.20
10/24/90	94019	Stark & Mosher.....	10,600.00
4/13/91	98030	Western M'f'g Co....	5,000.00
6/2/91	98161	Western M'f'g Co....	5,000.00
6/3/91	99022	Western M'f'g Co....	5,000.00
6/5/91	99068	Western M'f'g Co....	5,000.00
1/13/90	49174	Marsh & Hinds.....	1,000.00
1/7/91	96029	Marsh Binder Co....	9,000.00
849			
6/25/91	102040	C. W. & W. W. Marsh.	3,600.00
6/25/91	102041	Sycamore Marsh H. Co.	4,500.00
1/7/91	96030	C. T. Turek.....	6,606.51
1/27/91	96039	W. A. Sharrer.....	1,166.62
1/28/91	96040	W. A. Sharrer.....	5,291.30
12/1/90	96016	Mosher & Outcalt....	3,138.72
12/31/90	97006	Mosher & Outcalt....	1,040.00
8/31/89	50000	W. T. Scott.....	7,466.16
10/22/90	50544	C. W. Mosher.....	5,000.10
12/23/90	96-25	R. C. Outcalt.....	4,160.00
5/7/91	98065	R. C. Outcalt.....	5,100.00
5/7/91	101011	R. C. Outcalt.....	6,240.00
1/5/90	95023	R. C. Outcalt.....	5,200.00
1/28/91	97104	W. W. Marsh.....	5,254.17
Total			**$183,183.17**

850 Q. That schedule "UU" doesn't contain any notes of Donnell, Lawson & Simpson?

A. No.

Q. Now, Mr. Jones, have you made an examination of the books and records to ascertain what paper or notes were carried by the bank and held as part of its assets on the 1st of January 1892, which were in fact of no value, as you have determined by your investigations, and as shown by the testimony in this case?

A. I have prepared such a schedule.

Q. You may have the reporter identify it as Exhibit "VV".

Exhibit "VV" Identified.

Q. Is Exhibit "VV" the schedule to which you refer?

A. It is.

Q. Was that schedule prepared by you from an examination of the books and documents of the bank?

A. Yes, sir.

Q. And is it correct?

A. I think it is; it was my intention to have it correct.

Mr. THOMAS: We offer in evidence Exhibit "VV".

Mr. ROSE: Did the books of the bank purport to show that this paper was worthless?

A. No, sir, the books of the bank do not comment on any of the assets, whether they are good, bad or indifferent; it simply names them, and the date and the amount, and so forth.

Q. Any judgment you have of the value of this paper you have obtained outside of the books of account?

A. To a certain extent.

851 EXHIBIT "VV" Received in Evidence.

(Copy follows.)

"*Worthless Notes Held by the Capital National Bank January* 1, 1892.

100184	E. W. Mosher	$10,600.
112008	E. W. Mosher	5,000.
101065	E. W. Mosher	12,730.01
101068	E. W. Mosher	8,631.20
101281	E. W. Mosher	5,000.
50101	E. W. Mosher	5,903.77
50102	E. W. Mosher	5,505.68
50105	E. W. Mosher	5,623.70
50104	E. W. Mosher	4,307.28
50105	E. W. Mosher	3,968.25
50106	E. W. Mosher	6,000.
50107	E. W. Mosher	1,438.82
50108	E. W. Mosher	6,881.18

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50109	E. W. Mosher	5,963.86
101292	Western M'f'g Co	5,000.
102093	Western M'f'g Co	5,000.
102173	Western M'f'g Co	5,000.
112013	Western M'f'g Co	2,500.
112018	Western M'f'g Co	5,000.
112072	Western M'f'g Co	5,000.
112117	Western M'f'g Co	5,000.
113007	Western M'f'g Co	5,000.
113019	Western M'f'g Co	5,000.
852		
113037	Western M'f'g Co	5,000.
111187	Western M'f'g Co	5,000.
111208	Western M'f'g Co	2,500.
114010	Western M'f'g Co	5,000.
102043	C. E. Turk	6,606.51
102047	Marsh & Hinds	1,000.
102040	C. W. & W. W. Marsh	3,600.
102041	Sycamore Marsh H. Co	4,500.
102044	Marsh Binder Co	9,000.
46665	W. A. Sharrer	7,103.76
50604	Mosher & Outcalt	5,218.72
50617	R. C. Outcalt	5,834.
50618	R. C. Outcalt	5,200.
50691	R. C. Outcalt	4,753.
50620	R. C. Outcalt	6,490.
50607	C. W. Mosher	5,000.
50615	C. W. Mosher	5,000.
50616	C. W. Mosher	7,000.
Total		$223,859.74

853 Q. Now, Mr. Jones, have you made an examination of the books and documents and records of the bank to ascertain some of the assets that were carried in the bank at that time as notes or overdrafts that in your judgment were of no value?

A. I have prepared such a schedule.

Q. And in that schedule have you listed notes that were held by the bank at the time of its failure that had been executed by C. W. Mosher?

A. I have.

Q And also the notes that were held by the bank purporting to have been signed by E. W Mosher?

A. I have.

Q. And also the notes purporting to have been signed by R. C. Outcalt?

A. Yes sir.

Q. And also notes purporting to have been signed by W. H. Barstow?

A. Yes sir.

Q. And also notes purporting to have been executed by the Western Manufacturing Company by E. Hurlbut Jr. manager?

A. Yes, sir.

Q. Have you prepared that in schedule form?

A. I have.

Q. And does that schedule also show some of the overdrafts that were carried on the books of the bank as assets at the time of its failure?

A. It does.

Exhibit "WW" Identified.

854 Q. Is Exhibit "WW" the schedule to which you refer?

A. It is.

Q. And was that compiled from the books and records of the Capital National Bank?

A. It was.

Q. By you?

A. It was.

Q. And is it correct?

A. I think it is a correct schedule as shown by the books of the bank.

—. Now you may state what were the amount of notes of various classes, that is notes of different individuals that were held at the time of suspension,—just give the name of the maker.

A. Notes of C. W. Mosher, $85,281.67 R. C. Outcalt, $54,146.66 Mosher & Outcalt $5,832. E. W. Mosher $107,085.45 Western Manufacturing Company $235,000. Southern Stave and Lumber Company $5,346.15 W. W. & C. W. Marsh, $18,192. Note of W. A. Sharrar, $7,153.76 W. A. Barstow $8,062.02 making a total of $526,299.71.

Some of the worthless overdrafts: C. W. Mosher $2,927.59 C. W. Mosher & R. C. Outcalt, $8983.36 E. Hurlbut Jr. $1756.09 Western Man'f'g Co. $1361.79; firm of Stark & Mosher $1691.84 making a total of overdrafts $16,720.65.

Mr. THOMAS: We offer in evidence Exhibit "WW", being the one from which the witness has been testifying.

POOR C

EXHIBIT "WW" RECEIVED IN EVIDENCE.

(Copy Follows.)

"Partial List of Worthless Notes and Overdrafts on Hand at Suspension of Bank.

Notes of C. W. Fosher.

Note No.	Reg. page.	Date taken.	Date of note.	Due.	Amount.
50,632	288	Oct. 28, 1892	Oct. 27, 1892	Jan. 28, 1893	$10,000.00
132,000	180	Aug. 10, 1892	Aug. 10, 1892	Feb. 13, 1892	1,948.33
50,637	288	Dec. 20, 1892	Dec. 20, 1892	Jun. 20, 1893	5,000.00
50,644	288	Dec. 31, 1892	Dec. 30, "	Jul. 20, "	5,000.00
50,642	288	Dec. 28, "	Nov. 11, "	Mch. 14, "	20,000.00
50,643	288	Dec. 28, "	Dec. 12, "	Mch. 15, "	20,833.34
50,638	288	Dec. 24, "	Dec. 24, "	Jun. 27, "	17,500.00
50,633	288	Oct. 28, "	Oct. 28, "	Apr. 30, "	5,000.00
					$85,281.67

Notes of Edwin W. Mosher.

131,000	170	Jul. 6, 1892	Jul. 5, 1892	Jan. 8, 1893	$5,000.00
131,001	170	Jul. 6, "	Jul. 5, "	Jan. 8, "	5,000.00
131,002	170	Jul. 6, "	Jul. 5, "	Jan. 8, "	5,000.00
131,003	170	Jul. 6, "	Jul. 5, "	Jan. 8, "	5,000.00
134,007	200	Oct. 19, "	Nov. 19, "	Apr. 18, "	12,730.01
134,008	200	Oct. 19, "	Oct. 15, "	Apr. 18, "	10,600.00
134,009	200	Oct. 19, "	Oct. 15, "	Apr. 18, "	8,611.20
134,010	200	Oct. 19, "	Oct. 15, "	Apr. 18, "	5,000.00
134,011	200	Oct. 19, "	Oct. 15, "	Apr. 18, "	5,000.00

Note No.	Reg. page.	Date taken.	Date of note.	Due.	Amount.
136,005	220	Dec. 27, "	Dec. 27, "	Jun. 30, "	2,500.00
50,101	312	Jul. 8, "	May 1, "	Demand	5,903.77
50,102	312	July 8, "	May 1, "	Demand	5,505.68
50,103	312	July 8, "	May 1, "	"	5,623.70
50,104	312	July 8, "	May 1, "	"	4,307.28
50,105	312	July 8, "	May 1, "	"	2,458.77
50,106	312	July 8, "	May 1, "	"	6,000.00
50,108	312	July 8, "	May 1, "	"	6,881.18
50,109	312	July 8, "	May 1, "	"	5,963.86
					$107,085.45
856			Notes of R. C. Outcalt.		
39,164	288	Dec. 28, 1892	Dec. 12, 1892	Mch. 15, 1893.....	$15,000.00
50,639	288	Dec. 24, "	Dec. 24, "	Jun. 27, "	12,500.00
50,641	288	Dec. 28, "	Dec. 11, "	Jul. 4, "	14,166.66
50,630	288	Jun. 18, "	Jun. 18, "	Dec. 21, 1892.....	6,000.00
50,629	288	Jun. 18, "	Jun. 18, "	Dec. 21, "	6,240.00
					$53,906.66
			Notes of W. H. Barstow.		
39,164} 101,007}	3	Feb. 10, 1892	Oct. 3, 1890	Nov. 3, 1891.....	$80.00
116,078	101	Mch. 24, 1892	Mch. 24, 1892	Jun. 25, 1892.....	50.00
116,107		Apr. 5, "	Apr. 5, "	Jun. 7, "	100.00
46,653} 1,165}	309	Sep. 10, "	Apr. 2, 1891	Apr. 5, 1893.....	1,300.00
46,604} 1,199}	309	Sep. 10, "	Dec. 24, 1890	Jan. 4, 1894.....	933.00

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94,186		Nov. 9, 1891			
46,724				.....	306.20
46,649	307	Nov. 9, "	Apr. 9, 1891	Apr. 5, 1892.....	1,000.00
1,061					
101,036					
1,138	308	Feb. 10, 1892	Apr. 2, 1891	Nov. 4, 1891.....	500.00
46,593					
1,153	309	May 10, 1892	Dec. 24, "	Jan. 4, 1892.....	933.00
111,047					
46,657					
1,168	309	Sep. 10, "	Apr. 2, "	July 4, "	500.00
46,658					
1,169	309	Sep. 10, "	Apr. 2, "	Nov. 4, "	500.00
46,710					
1,198	309	Sep. 10, "	Dec. 24, 1890	Jan. 4, 1893.....	934.00
46,603					
					$6,830.00

Notes of Western Mfg. Co.

Signed by E. Hurlburt, Jr., Mgr.

122,018	160	Aug. 24, 1892	Jun. 17, 1892	Dec. 20, 1892.....	5,000.00
122,016	160	Jul. 30, "	Jun. 17, "	Dec. 20, "	5,000.00
131,017	160	Sep. 20, "	Jul. 21, "	Jan. 24, 1893.....	5,000.00
132,012	180	Oct. 19, "	Oct. 20, "	Feb. 25, "	5,000.00
132,009	180	Oct. 17 "	Aug. 6, "	Feb. 9, "	5,000.00
132,008	180	Oct. 17, "	Oct. 1, "	Feb. 4, "	5,000.00
132,010	180	Oct. 17, "	Aug. 14, "	Feb. 17, "	5,000.

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Note No.	Reg. page.	Date taken.	Date of note.	Due.	Amount.
133,009	190	Oct. 10, "	Sep. 22, "	Mch. 25, "	5,000.00
133,011	190	Oct. 19, "	Sep. 19, "	Mch. 9, "	5,000.
857					
133,012	190	Oct. 19, 1892	Sep. 10, 1892	Mch. 15, 1893	5,000.00
133,013	190	Oct. 19, "	Sep. 14, "	Mch. 17, "	5,000.00
133,015	190	Oct. 19, "	Sep. 27, "	Mch. 30, "	5,000.00
134,002	200	Oct. 17, "	Oct. 1, "	Apr. 4, "	5,000.00
134,040	200	Jan. 5, 1893	Jan. 5, 1893	Apr. 8, "	5,000.00
134,039	200	Jan. 5, "	Jan. 5, "	Apr. 8, "	5,000.00
134,038	200	Jan. 5, "	Jan. 3, "	Apr. 6, "	5,000.00
136,000	220	Dec. 9, 1892	Dec. 19, 1892	Jun. 22, "	5,000.
136,001	220	Dec. 10, "	Dec. 8, "	Jun. 11, "	5,000.00
136,002	220	Dec. 10, "	Dec. 8, "	Jun. 11, "	5,000.00
136,003	220	Dec. 10, "	Dec. 8, "	Aug. 11. "	5,000.00
136,008	220	Jan. 5, 1893	Dec. 19, "	Jun. 22, "	5,000.00
136,010	220	Jan. 6, "	Dec. 2, "	Jun. 6, "	5,000.00
137,002	230	Jan. 5, "	Jan. 3, 1893	Jul. 6, "	5,000.00
137,001	230	Jan. 5, "	Jan. 3, "	Jul. 6, "	5,000.00
137,001	230	Jan. 21, "	Jan. 21, "	Jul. 24, "	5,000.00
134,004	200	Oct. 17, 1892	Oct . 1, 1892	Spr. 18, "	5,000.00
134,013	200	Oct. 27, "	Oct. 22, "	Apr. 25, "	5,000.00
135,005	210	Nov. 30, "	Nov. 26, "	May 29, 1893	5,000.00
133,014	190	Oct. 19, "	Sep. 22, "	Mch. 25, "	5,000.00
134,003	200	Oct. 17, "	Oct. 1, "	Apr. 1, "	5,000.00
131,010	170	Jul. 26, "	Jul. 25, "	Jan. 28, "	5,000.00
118,004	120	Feb. 15, "	Feb. 3, "	Aug. 6, 1892	5,000.00
131,011	170	Jul. 26, "	Jul. 25, "	Jan. 28, 1893	5,000.00
133,003	190	Sep. 20, "	Sep. 1, "	Mch. 9, "	5,000.00

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133,004	190	Sep. 6, "	Sep. 6, "	Mch. 9, "	5,000.00
133,781	Not on Disc. Reg.		Sep. 13, "	Mch. 17, "	5,000.00
136,081	Not on Disc. Reg.		Dec. 15, "	Jun. 13, "	5,000.00
135,042	Not on Disc. Reg.		Jan. 10, 1893	*Mat.* 15, "	5,000.00
133,681	Not on Disc. Reg.		Sep. 13, 1892	Mch. 15, "	5,000.00
133,002	190	Sep. 15, "	Sep. 25, "	Mch. 28, "	5,000.00
133,005	190	Sep. 29, "	Sep. 15, "	Mch. 18, "	5,000.00
858					2,500.
132,105	Not on Disc. Reg.		Aug. 16, "	Feb. 16, "	5,000.00
141,017	Not on Disc. Reg.		Aug. 29, "	Aug. 4, "	5,000.00
134,005	200	Oct. 17, "	Oct. 15, "	Apr. 18, "	5,000.00
133,000	190	Sep. 9, "	Sep. 6, "	Mch. 9, "	5,000.00
135,003	Not on Disc. Reg.		Nov. 23, "	May 23, "	5,000.00
133,041	Not on Disc. Reg.		Dec. 17, 1889	Mch. 17, "	2,500.00
	Lost note (Ishperming Nat. B'k, Mich.) Rec. Certificate No. 1094				5,000.00
					$235,000.00
135,003	Note on B/R. held by 1st Nat. B'k, Poultney, Vt.				

Marsh Notes.

122,010	160	Jul. 5, 1892	Jun. 25, 1892	Dec. 28, 1892	4,500.00
102,047 } 39,167 }	3	Mch. 10, "	Jun. 20, 1891	Dec. 23, 1891	1,000.00
122,011	160	Jul. 5, "	Jun. 25, 1892	Dec. 28, 1892	3,600.00
122,012	160	Jul. 5, "	Jun. 18, "	Dec. 28, "	9,000.00
39,131 } 98,247 }	2	May 15, 1891	Aug. 16, 1891		92.00
					$18,192.00

		So. Stave & Lbr. Co. Notes.			
132,078	181	Nov. 26, 1892	Jul. 4, 1892	Feb. 7, 1893.....	5,546.15
		C. W. Mosher & R. C. Outcalt Note.			
50,636	288	Dec. 1, 1892	Dec. 1, 1892	Jun. 4, 1893.....	5,635.00
		W. A. Sharrar Notes.			
131,141	172	Nov. 18, 1892	Nov. 18, 1892	Jan. 20, 1893.....	50.00
46,665	315	Jul. 31, 1891	Nov. 6, 1889	Jun. 26, 1892.....	7,103.76
					$7,153.76
		C. E. Tuerk Note.			
122,015	160	Jul. 22, 1892	Jun. 25, 1892	Dec. 28, 1892.....	7,289.10

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859 Summary of Note Statement.

C. W. Mosher	85,281.67	
R. C. Outcalt	54,146.66	
Mosher & Outcalt	5,832.00	
E. W. Mosher	107,085.45	
Western Mfg. Co.	235,000.00	
So. State & Lumber Co.	5,346.15	
W. W. & C. W. Marsh	18,192.00	
W. A. Sharrar	7,153.76	
W. A. Barstow	8,062.02	
		$526,299.71

Some of the Overdrafts at Suspension.

C. W. Mosher	2,927.59	
C. W. Mosher & R. C. Outcalt	8,983.36	
E. Hurlburt, Jr.	1,756.09	
Western Mfg. Co.	1,361.79	
Stark & Mosher	1,691.84	
		16,720.65
		$543,020.36

860 Q. Now Mr. Jones have you made an examination of the books, documents and records of the bank to ascertain some of the losses it had sustained up to July 1st, 1891?

A. I have and prepared a schedule thereof.

EXHIBIT "XX" identified.

Q. Is Exhibit "XX" the schedule to which you refer?

A. It is.

Q. And by whom has that been compiled?

A. By myself.

Q. From what sources of information?

A. The books and records of the Capital National Bank.

Mr. THOMAS: We offer in evidence Exhibit "XX".

Mr. ROSE: May I ask one question?

The COURT: Go ahead.

By Mr. ROSE: Do the books of the bank openly show those losses,—are they charged to Profit and Loss account?

A. No sir, they were not charged to Profit and Loss. The account wouldn't be large enough.

The COURT: How do you arrive at the conclusion that you have if the books do not show it?

A. In my answer—Mr. Rose's question to me was whether the books showed the losses,—whether they were marked as losses in the books. Now the bo-ks don't show—for instance, the books shows the Donnell, Lawson & Simpson notes; it gives the name of the maker, and the number, the date and the amount. Now I have considered

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in my statement the Donnell, Lawson & Simpson notes as valueless, because they had failed in 1883, and these notes which I testify to are made in 1890 and 1891.

The COURT: You may proceed.

861 EXHIBIT "XX" Received in Evidence.

(Copy follows.)

Losses Sustained by Capital Nat'l Bank Prior to July 1, 1891.

Donnell, Lawson & Simpson a/c (Schedule A-6)		$28,174.70
Donnell, Lawson & Simpson Notes (Schedule 7-A)		30,500.00
Collection a/c Marsh Bros. Mosher & Co. (Schedule 5-A)		14,578.00
Stock & Bond account (Schedule 5-B)		30,000.00
Certificate of Deposit No. 17969 issued to C. H. Willard for $40,000 Bank received nothing when this C/D was issued		40,000.00
Certificate of Deposit No. 21379 issued to J. E. Hill, Dec. 23, 1889 for	$50,000.	
Books show bank received when it was issued	3.00	
(Ex. 146 V. 3, Pg. 315) Loss		49,997.00
Dividends paid out, (Books show no dividends earned as losses exceeded Capital at time they were paid)		211,000.00
Fraudulent certificate of deposit No. 24452 issued in name of J. E. Hill for which bank received nothing		100,250.00
Fraud Dec. 24, 1889, in account of "State Treasurer"		100,000.
Bills of Exchange a/c, (Schedule 8-A)		29,968.
Worthless notes in bank, (Schedule 20-A)		183,183.17
Total Losses		$817,650.87

862 Q. Mr. Jones, where you refer, for instance, to Certificate of Deposit to J. E. Hill as $100250.00, why do you class that as a loss to the bank?

A. Because the books of the bank show that the day this certificate of deposit was issued there was a false charge to the certificate of deposit account of $100,000.00. In other words, the Certificate of Deposit account on that day shows such a certificate paid, when the books and records of the Capital National Bank show that there was no such a certificate of deposit outstanding at that time; therefore, this certificate must be worthless.

Q. And you refer to an item here of $100,000 in the account of State Treasurer. Why do you count that a loss?

Mr. ROSE: You have gone over that, explained that in detail haven't you, in your testimony heretofore?

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A. Some of them I have.

Q. Well this certificate of deposit about which inquiry has been made, you have given your explanation of that once, haven't you?

A. Yes sir, I did.

Q. Why do you call the Collection Account, $14578.00 a loss?

863 A. Because there was $10,000 of that account eliminated by the use of a knife, and the same amount was charged to one of the Omaha banks, and at a later date that account was closed up; on December 16th, 1889 the balance of this account was charged to bills receivable, and the same amount was credited to this account and closed the account.

Q. That was what you referred to as an overdrawn collection account?

A. Yes, sir.

Q. Are there any other items in this Exhibit "XX" that you want to explain, that you have not heretofore explained?

A. Did I testify yesterday as to the amount of dividends paid out up to July 1st, 1891?

The COURT: Yes sir.

A. That was the total amount that had been paid out,—but up to July 1st, 1891 there had only been paid $211,000.

Q. Have you prepared any schedules showing the losses sustained at any other dates?

A. No sir.

Q. Now Mr. Jones, you have been cross examined with reference to whether these losses had been charged to Profit and Loss. Now did you examine the books of the bank beginning with its existence as a national bank,—beginning with the name of Marsh National Bank and up to the time of the suspension of the bank to ascertain if at any time anything was charged off to Profit and Loss, or any similar account,—that is,—any of its bills receivable or bad assets were charged off, as shown by the books?

864–875 A. I have made such an examination.

Q. What did you find from that examination?

A. I have never been able to find anything charged off. That is, charged up to Profit and Loss Account. It is true that the surplus account was reduced some $24,000., as I remember. The books do not disclose on the day that the surplus was reduced that any bills receivable, or anything of a like nature was taken out of the accounts of the bank.

Q. Or that any apparent asset was taken out?

A. No sir.

Q. Either in the form of bills receivable or overdrafts?

A. No sir.

* * * * * * *

876 Cross-examination:

By Mr. ROSE:

Q. What experience as a public accountant have you have?

A. Tell me what you mean by a public accountant.

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Q. Following the profession of an accountant.
A. I never followed the profession of an accountant.
Q. What experience have you actually had in bookkeeping?
A. About thirty years.
Q. What books did you keep?
A. I worked on the books of the State Bank of Nebraska; the Jones National Bank, the Bank of Bee, the Bank of Tamora the Bank of Goehner, and others.
Q. Worked regularly on those books?
A. Principally with the Jones National.
Q. Did you keep the books of the Jones National Bank in your own personal hand?
A. In the early history of the bank I kept certain books of the bank daily.
Q. What books did you keep?
A. The journal and the Remittances.
Q. In actual practice does a bookkeeper check over his own entries, where he transposes balances, does he check them back to see if he has them correct?
A. In a case where he strikes his balance, if it doesn't balance then he would check back, but if it balances he knows his work is correct.
Q. Is it common for a bookkeeper to find that his books will not balance sometimes?
A. Oh yes, that happens.
Q. And have to hunt for the error do they?
A. Yes, sir.
Q. Now when they find an error what do they do?
877 A. Correct it.
Q. How?
A. That is done in different ways, in different books, and owing largely as to where the error is.
Q. Well describe the methods, that is what I asked you.
A. If you will ask me so I can get at what you want I will try to.
Q. You say it is the duty of the bookkeeper to correct an error if it appears in the figures in carrying over? The way to discover an error is to check back, and see whether the items are properly transferred isn't it?
A. To a certain extent, yes.
Q. And test out to see whether they got on the right side of the book always,—the debit or credit side.
A. That would be one way.
Q. And if the books do not balance it is evidence that there has been an error in bookkeeping, an item has been omitted or something.
A. It is evidence that there has been an error made of some character; it might not always be on the book, Mr. Rose; it might be in striking the difference and carrying it forward.
Q. Well that would be in the books?
A. No, that might be on a piece of paper.
Q. Your entry in the book then would be erroneous just the same.
A. Not necessarily. Suppose one side of your journal showed $743,000., and the other side would show $249,000 and then in

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deducting one from the other you might make an error in your subtraction, and if you did and carried that amount forward, it would be an error while your journal would be correct.

878 Q. Still there would be an error in the ledger.

A. Well yes.

Q. The amount carried over would be an erroneous subtraction or addition as the case might be?

A. Yes sir.

Q. Well now when that error occurred you have already explained that it was the custom and practice to correct *to* the books to conform to the facts. Now in ordinary and common practice how would that correction be made?

A. It is ordinarily done by erasing the wrong figure and placing in its place the proper one.

Q. And what means are ordinarily employed to accomplish the erasure,—what instrument or tool?

A. Why an eraser,—a metallic eraser.

Q. Is it an edged tool?

A. Oh yes, steel eraser.

Q. Well now if you go back over a set of books and find that corrections have been made, can you tell at this time whether it is a jack knife or eraser that has been used?

A. No sir, a jack-knife would do just as good a job, if it was in the same condition as if it was an eraser.

Q. If it is a good job of erasing does it leave any imprint of the original figure?

A. Yes, sir.

Q. You can read what was the original figure right through, after it has been erased?

A. Oh, no.

Q. Well that is what I meant,—you couldn't do that?

A. No.

Q. Now when you take a book that has been erased,—I suppose the man who makes the erasure knows what figure he erased, at the time, at least. In the case of a transfer, to the Marsh National Bank books of the ledger balances of Marsh Brothers and

879 Mosher, can you see what the original entry was at this time in every instance?

A. I think not.

Q. Then you arrive, of course, at your conclusions from what naturally would have appeared if the original balances had been carried over correctly, do you—you presume in stating that that amount was $10,000, for example, that originally the ledger balances of the old institution has been correctly transferred into the books of the new institution, do you?

A. I don't remember.

Q. You said the figure "1" had been erased.

A. In the Collection account.

Q. In the Collection Account in the tens of thousands column.

A. Yes, sir.

Q. And yet, you can't see at present the figure "1",—the original?

A. No.

Q. And you never did see the figure one on the page?

A. No.

Q. Then I was just giving you a chance to testify here why you state positively, of your own knowledge that the figure "1" was erased.

A. That is very easy. Because there is nothing in the ledger account, and nothing on the journal that gives any authority for taking that ten thousand away; that was taken away by main strength; no entry in any of the books to authorize it.

Q. So you are presuming that originally the entry did conform to what the ledger balance should be.

A. I arrive at that conclusion from the fact that the ledger account shows it at $10400, and some odd dollars, and then it was transferred to the General Balance book.—I couldn't tell what that amount was, only the books shows an erasure of ten thou-
880 sand dollars, and there is nothing to justify even the erasure or the deduction of that amount.

Q. So you arrive at that as a deduction from the related items in the books of account?

A. Yes sir, and not from the simple fact that it was erased.

Q. You don't pretend that you ever did see the figure that was erased?

A. Oh no.

Q. So you testify to that from conclusion, or grounds that you think justify your conclusion.

A. Yes sir, that the book shows an erasure.

Q. What significance as a bookkeeper or accountant do you attach to the fact that Mr. D. E. Thompson borrowed at times some money from this bank,—what significance do you attach to that fact, if any?

A. My own opinion of it?

Q. Yes,—what significance do you attach as an expert to the fact that he borrowed money from the bank?

A. A bank properly run, the officers of that institution never borrow part of the capital,—or two or three times the amount of the capital of that bank; that is the first institution of that kind that I ever knew of.

Q. I asked what specific significance you attach to Mr. Thompson's loans. Flrst,—what is the highest sum that Mr. Thompson ever borrowed?

A. At any one time?

Q. Yes sir.

A. Let me have the ledger account.

Q. Can't you recall it?

A. Why I would say from memory, $10,000.

881 Q. And how many times in the history of the bank did he owe the bank as much as ten thousand dollars as you recall from your examination?

A. I wouldn't want to testify from memory.

Q. Do you recall more than one instance?

A. I have no recollection off hand of him ever making a note for even $10,000 only once.

POOR C

Q. I don't refer to his making a note of $10,000. I have reference to the aggregate of his indebtedness to the bank at any one time.

A. I will look at the ledger account and then we will get it right. Yes sir,—$10,000.

Q. There was only one time,—only one period during the history of the bank when Mr. Thompson owed it as much as $10,000.

A. That is correct.

Q. Most of his loans were demand loans, shown to have been taken for temporary periods only, weren't they?

A. My schedule doesn't show the length of time that the various loans were made for.

Q. You have that *Thompson* schedule?

A. Yes, sir.

Q. It shows when the loan was paid, doesn't it?

A. It shows the date the loan was made and the date of payment and the amount.

Q. Well just compare those two and you will see that uniformly the note was paid at very short intervals after it was made, wasn't it,—with one exception of four months?

A. I was going to say that it runs from a few weeks to a few months.

Q. And there is only one instance where there is as much as four months?

882 A. It would take quite a little time for me to go over it.

Q. Did you find any loan that he ever made that wasn't paid?

A. No sir: the books show that every note that Mr. Thompson ever gave is marked paid.

Q. Now what significance do you attach to the fact that the total of his loans, just running along during the period of the bank from 1884 to January, 1903, was upwards of $73,000. What significance do you attach to that fact?

A. Simply shows the volume of money which he had borrowed of the bank between those dates.

Q. You mean it shows the aggregate of all notes he ever had in, for a day or a week, or anytime,—it shows the total of all of them.

A. It shows the total amount of money he had borrowed of the Capital National Bank.

Q. Does it show any renewals?

A. The set of books kept by the Capital National Bank doesn't necessarily state when a note was paid off whether it was paid by renewal note, check or cash, or anything else,—it simply shows payment.

Q. But you must admit that an *account* will search the relation of one entry to another, won't he? And if on a day of payment a like sum enters you conclude it is a renewal?

A. Very often, yes sir.

Q. Did you find that any of these notes were renewals?

A. I didn't examine as to that. I will if you want me to.

Q. I just wanted to find out the scope of your examination. Now to begin with, you haven't scheduled any of Mr. Thompson's notes as losses have you?

A. No sir.

Q. You haven't scheduled him as one of the insolvent
883 borrowers have you?

A. I have not.

Q. And you have no information that would justify you in listing his paper in such manner?

A. I consider him solvent.

Q. And so far as you know of its history he was solvent during the period of the bank's existence?

A. I never knew anything to the contrary.

Q. Did you ascertain the total of the funds that were deposited by Mr. Thompson in that bank?

A. No sir.

Q. Did you make any inquiry at all to see how heavy a depositor he was?

A. No sir.

Q. Assuming that he deposited during that same period upwards of half a million dollars, making that his active account, and leaving there the proceeds from his various personal enterprises,—the deposits or proceeds of the various enterprises, which was in that bank, and that they run up to over half a million dollars during that period, would you regard as significant the fact that during that same period the total of his notes during that same period was $73,000?

A. In the first place I think the statement of the amount of money that Mr. Thompson had deposited in that bank to his personal account is a little overstated.

Q. Well that is just assuming, but suppose it is true that he had deposits from 1884 to the time it closed of upwards of half a million dollars?

A. At the time it closed he had twenty dollars and some cents in there.

Q. Just assuming this fact to be true, that from 1884 when
884 he first connected himself with the Capital National Bank up to the time of its failure, he had deposited half a million dollars and upwards, would you regard it worth mentioning that he had during that same period borrowed in the aggregate, from time to time, or had notes of $73,000 in there?

A. No, I don't see any connection between those two subjects whatever.

Q. Is it customary to loan money to a good depositor, if he has demand occasionally for it?

A. A bank?

Q. Yes sir.

A. Always. A bank tries to loan all the money it can, and keep within the pale of the law, to good borrowers.

Q. Is it the custom of a bank to take care of good depositors?

A. A bank always loans as much money as it can.

Q. To its reliable customers.

A. Certainly.

Q. Accommodates good solvent depositors, if it is run right, doesn't it?

POOR CO

A. Yes, sir.

Q. Well have you examined to know if the amount of his loans were at all out of proportion or extravagant, in proportion to his deposits?

A. I never examined, as you state, the amount of money that Mr. Thompson deposited in his personal account during the existence of the bank. I did look at his account the last two months of the existence of the bank.

Q. Well it appeared that the last two months that he didn't keep his active account, his active personal account there didn't it?

A. I couldn't say; it run down to a very small amount.

885 Q. It would indicate, if he was a man of any business affairs that he didn't keep his active account there, wouldn't it?

A. I couldn't answer that. All I answered is what I found in the books.

Q. Now did you find any notes of E. P. Hamer ever taken into that bank?

A. No, I found no notes of Mr. Hamer.

Q. So far as the record shows he never was a borrower of a farthing?

A. Not as I saw.

Q. Was A. P. S. Stuart ever a borrower of that bank?

A. He was.

Q. How much?

A. As my memory serves me, he made two loans of two to three thousand dollars,—something like that.

Q. They were not enough to be significant at all?

A. No, I didn't so consider them.

Q. And the loans of Mr. C. E. Yates, you wouldn't consider as significant?

A. Not taken by themselves, no.

Q. They didn't indicate any reckless resort by him to the funds of the bank?

A. No sir, not the amount that he ever borrowed himself.

Q. Did you check out to see what relation his little loans had to his own deposits?

A. No sir.

Q. He never exceeded over $5,000 at any one time, did he?

A. That is my memory.

Q. The maximum was $4600., and he never had a large loan in the bank. Now the loans of Yates and Stuart were also paid weren't they?

A. The books show them paid, yes sir.

886 Q. Outside of the managing officers, Mosher and Outcalt, there wasn't a director of that bank that ever borrowed money that wasn't repaid within a reasonable time, was there, so far as your examination has shown?

A. The books disclose—they show them paid.

Q. That is, every note of every director, outside of Mosher and Outcalt, was shown to be paid?

A. No, you overlooked Mr. Cap. Phillips.

Q. Did he die with a note in the bank?
A. He did.
Q. What was the amount of his loan?
A. My memory is $1,000.
Q. Wasn't that paid to the Receiver by his estate?
A. Yes sir, it was paid after the bank failed.
Q. So there was no loss by any of the directors was there other than Mosher and Outcalt,—so far as the books show, and so far as the receiver's records show?
A. So far as the books show.
Q. Did you examine to see whether Phillips had been a heavy depositor in the bank?
A. No sir, I didn't.
Q. Now it was only for a short period that W. W. Holmes was a heavy borrower wasn't it?
A. From 1884 to November, 1890; he was a borrower up to the time of his death.
Q. Yes a borrower, but how many times did his borrowings over-reach $30,000,—for how long a period of time?
A. He became,—well from March 26th, 1887 that starts at $37,000. Then it runs up to $75,000,—$76,000.——
Q. When does he get down to less than $30,000?
A. June 18th, 1887.
887 Q. And when did he first get beyond $30,000?
A. March 26th, 1887.
Q. Now there were some periods after those few months where he was above $30,000?
A. Yes sir, it varied.
Q. But not for long periods.
A. No sir.
Q. Now what significance do you attach to that?
A. The simple fact that the books show that at various times the directors of the bank had borrowed more than the entire capital of the bank.
Q. That one director?
A. The directors. This man you are speaking of is one of the directors.
Q. Have you figured out, or made out a balance sheet so you can identify that fact?
A. No, but I can figure it out.
Q. Have you figured out a ledger account showing when the directors at one time had in excess of $300,000 out of that bank?
A. No sir I have not. Just take the figures as they run in this ledger account. Each one of those is what I call a ledger account or balance sheet.
Q. These have never been assembled and made into a grand ledger total.
A. No sir, not to my knowledge.
Q. Have you struck a grand total for any day?
A. No sir.
Q. How can you say that if you haven't figured it up, that on

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any day they borrowed more than the capital,—or can you verify that the grand total would be more than that?

A. I just spoke that in an off-hand way. That was the object I had in getting that list to show that the directors of the bank were exceedingly heavy borrowers.

888 Q. It doesn't appear that they were all heavy borrowers?

A. I don't mean that they all joined on the same note.

Q. Do you know Holmes' standing at the time of his death? He was one of the largest land holders in the state of Nebraska; he left his family opulent; his boy is one of the most opulent men in the state, received from his father W. W. Holmes.

A. That might be. I knew in a general way that Mr. Holmes had considerable property.

Q. And you would regard his loan for any reasonable sum altogether safe?

A. Yes sir, but I wouldn't as a banker loan one man over $70,000 when the capital was only $300,000, when I was a sworn officer to see that that wasn't done.

Q. That is a general Administration rule, you know that, don't you?

A. Yes sir. I know the contrary is true also, that whenever you violate the banking law your charter is subject to forfeiture.

Q. But sometimes a temporary loan to a depositor, assuming he is a valuable depositor and a man of great wealth, is really justified isn't it, even though you rediscount some of it, and is a common practice in banking, isn't it?

A. Not in a national bank and where it is run according to law those things are not countenanced.

Q. But I said in practice.

A. Why in practice my opinion is that among bankers it is to obey the law.

Q. But you couldn't think that the condition of this bank was in any way impaired by any loan that Mr. Holmes made?

A. I couldn't say that it was.

Q. Nor that the condition of this bank was in any way impaired by any loan of any director, excepting the managing officers of the bank themselves, Mosher and Outcalt?

—. ——.

889 Q. You couldn't say that you ascertained that the assets of the bank had been in any way impaired by any loan to any director, other than to Mosher and Outcalt?

A. No.

Q. Did you ascertain that during the last year of the bank's existence Mr. Thompson made another bank connection in Lincoln,—the American Exchange National Bank?

A. Yes, sir.

Q. You knew that?

A. Yes sir.

Q. And became vice president of that bank?

A. Yes sir.

Q. Now calling your attention to the credit of $100,000 to—or was it $100,250 to state treasurer Hill's open account?

A. It was $100,000.

Q. In case that $100,000 had gone into the teller regularly as a deposit, how would that fact be shown by the books of the bank?

A. If it had gone in in cash?

Q. Yes.

A. The cash would have shown an increase of $100,000.

Q. How would the item be shown, or entered in the books of the bank?

A. If it were cash?

Q. Yes sir.

A. Simply by the increasing of your cash to the extent of $100,000.

Q. How would the item be entered upon the books as a separate transactions?

A. No cash coming in.——

Q. Maybe I am not quite clear. How would that specific transaction of $100,000, separate and distinct in itself, be shown on
890 the books of the bank?

A. As far as the cash is concerned?

A No, no. How would the specific item of $100,000 be entered on the books of the bank as a specific item of $100,000?

A. I don't understand the question, Judge.

Q. Just turn to that balance book where that entry is made, Mr. Jones.

(Witness complies.)

Q. Mr. Jones, how is the cash of the bank arrived at?

A. The difference between the debit and credit sides, as shown by your journal.

Q. And entered in the books as one gross item?

A. Yes sir.

Q. There is no cash account of this bank that gives the detail of the items that make up the cash is there?

A. Not a complete account, no sir.

Q. When a deposit is made, where is the amount of that deposit entered on the books of the bank?

A. On the individual balance ledger.

Q. And what does an entry of a credit in the individual balance ledger import?

A. Cash or its equivalent has been received to the amount of the deposit.

Q. Is there any other way of indicating that fact on these particular books?

A. No sir.

Q. Then the entry of $100,000 credit to the account of State Treasurer would import, so far as the book entries are concerned, that cash or its equivalent in that sum, had come into the bank?

A. Yes sir, if it was a genuine transaction.

Q. Well whether it was a genuine transaction or not,—the
891 books would import that it was a genuine transaction of that sort?

A. No sir.

Q. The entries in the books of account are supposed to import a transaction, aren't they?

A. Yes sir.

Q. The import of any entry of that kind is that the money was deposited, or its equivalent?

A. If you take one item alone.

Q. Yes sir, take one item alone,—that is what I am asking about.

A. Yes, sir.

Q. Now in the case of any other deposit on this day, or any day for example, the entry that imports the deposit is the entry in the individual deposit account, is it not?

A. Yes sir, if it is a personal account.

Q. Well now—or if it is an account of any of the depositors?

A. Yes sir. The reason I spoke that way, the individual balance book carries the accounts of the individuals and Certificate of deposit accounts.

Q. Yes, that is correct. Now what you found then in respect to this $100,000 item, so far as its separate entry in the books is concerned, is what you would find in the case of any other depositor, isn't it?

A. Yes, sir.

Q. And there would be no specific or separate entry of the transaction in the book other than that one entry to indicate that the money had gone into the bank?

A. I think there would.

Q. Well now I just asked you a moment ago whether there was any other entry of the deposit, and I understood you to say there wasn't.

892 A. Then why do you ask the same question again, only put it in another form?

Q. Because I thought that was the necessary deduction, to show that your statement that there was no money came in was a mistake. There wouldn't be any other entry than the entry on the deposit ledger to indicate that the money came in,—I mean as a history of that one individual transaction?

A. No specific entry other than that.

Q. Then if that is true what significance do you attach to this one because of the fact that there is no other record in the books?

A. There is.

Q. Of this transaction?

A. This coupled together with the other transactions of the same day's business.

Q. Did you figure out in detail a number of the other transactions of that same day through the journal and cash books?

A. I have.

Q. Did you make a schedule of that?

A. No sir. There is a schedule already made in the books themselves and all you have to do is to foot them.

Q. Foot what?

A. The various accounts.

Q. That is the deposits account alone?

A. The various accounts and transactions of that day's business and strike your difference.

Q. The only one significant fact of it all is the fact that if the books were correctly footed it would throw them out of balance?

A. Yes sir.

Q. That is the only real significance of it, isn't it?

A. No, there is another.

893 Q. Suppose if they were correctly footed they would be in balance.

A. They wouldn't be in balance.

Q. Well if the transaction- were correctly recorded.

A. Yes, but the transactions in this case are not, and that is the reason the books are out of balance $100,000.

Q. And that is the significant fact, isn't it?

A. That they're out of balance $100,000, yes sir.

Q. Now I wish you would tell me what would be the difference in effect, as to the books balancing, as to whether that entry did not represent an actual deposit, or as to whether it did represent an actual deposit, and the man charged with cash had abstracted $100,000,—what would be the difference?

A. As far as the bank is concerned it wouldn't make any difference whether the receiving teller had stole $100,000 or whether they had put the fraudulent credit to a man's account.

Q. And when the only significant fact is that the books were thrown out of balance, how can you tell from that transaction whether it was one form or the other?

A. I went farther than what these books show. I went to the state treasurer and to the state treasurer's pass book.

Q. Do you find an account "State Treasurer R. D."

A. That refers down here, Mr. Rose (indicating on book). That is on this dividing line here. You see between the two head lines is a light blue line. Now then the treasurer's account doesn't go below that blue line. This name here was put in and then they wrote that above to put it below that other line. State Treasurer Hill was the gentleman's book that I inspected and talked with.

Q. You just had his hearsay statement for that?

A. No, no; I saw his book and examined it.

Q. That book is not produced?

A. That was Mr. Hill's private pass baak.

894 Q. That is not produced here so we can have access to it?

A. No sir, we took his deposition.

Q. On the face of these books alone how could you tell what the transaction was?

A. I would know when I run over the business of that day that something was wrong to the extent of $100,000, because the transactions of that day show that there is a shortage in cash of an even $100,000, barring a few cents.

Q. Now if that man's account run through and was checked out, it would mean merely an abstraction of the money by the state treasurer, of $100,000, would it,—in the end?

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A. No sir.

Q. Have you run his account through to see whether he got the benefit of that credit?

A. He did.

A. And checked it out?

A. He did.

Q. Checked out $100,000 of the bank's money, and not his own?

A. No sir, he checked out his own money.

Q. Then what makes you say this money wasn't deposited?

A. There was no such deposit made that day.

Q. Had there been a like deposit made the previous day?

A. There had been a deposit made at a prior date, and that had been abstracted, but put on the state treasurer's book at the correct amount and carried into the books of the bank an even $100,000 short.

Q. What item was that,—the prior item, did you identify that?

A. No.

Q. How do you know then?

A. Because the state treasurer's pass book showed that on a certain day he deposited in round numbers something like one
895 hundred and eleven, or one hundred and twelve thousand dollars, and there was that much put on the state treasurer's pass book, but in entering it on the books of the bank it was just cut short an even hundred thousand dollars.

Q. What day was that?

A. That was during the month of December 1889; I couldn't give you the exact date; I can get the book.

Q. During this same month?

A. Yes sir.

Q. Well the balance book is here for that same month.

A. I say I will go and get it.

Q. Well this is December 1889 right here before us.

A. Yes sir. I will explain further. When this was done that was in the name of J. E. Hill, treasurer. That account was closed and for some reason, unknown, this account under the name of State Treasurer was opened, and that balance carried forward under this account. State Treasurer Hill's pass book was labelled "J. E. Hill, treasurer", and not as this account is here transferred under the name simply of "State Treasurer".

Q. Then you would have to go back and find that under the name of Hill, treasurer, instead of State treasurer?

A. Yes, sir.

Q. That entry has not yet been identified, has it?

A. No, I haven't testified to it, only as it has been brought out now.

Q. Is Hill's pass book here that you refer to?

A. It is not.

Q. Was there any account of the Relief Fund kept in this bank as a deposit?

A. Yes, sir.

Q. Under what name?

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A. The Nebraska Relief Fund.

896 Q. Now with reference to the Certificate of Deposit account. Is it not true that each balance book had a certificate of deposit account run in it?

A. No sir, that can't be right.

Q. Or were they all run in one book?

A. Yes, sir.

Q. They were all a part of the same account weren't they?

A. Not so indicated on the books.

Q. But in fact.

A. I couldn't tell only what the books show.

Q. Entries were made under the letters of the alphabet indiscriminately in each account weren't they?

A. No sir.

Q. Describe how they are kept.

A. This is Individual Balance Book "2" I have open before me for November and December, 1889. This shows C/D, which indicates Certificate of Deposit No. 1. On the second line below, the same thing, C/D No. 2. Now then you see they had through their existence four different accounts; at the time they closed they had accounts, as I remember it, No. 1, 3 and 4. They dropped out No. 2,—or they dropped out one, I don't know which one it was.

Q. Were they all active at one time?

A. That is owing to what you would term active; if you would term red ink lines a dead account, they wouldn't be, but what you mean I suppose is that they made charges and credits to the various accounts.

Q. Yes sir.

A. Yes sir, in a majority of instances.

Q. How were those transferred to the General Balance book?

A. They are a part of the footing, included under the head of deposits.

897 Q. It takes all of those accounts—they all form a part of the certificate of deposit account?

A. The accounts in this book?

Q. No the certificate of deposit Nos. 1, 2, 3 and 4?

A. Yes, sir.

Q. There is, properly speaking, only one certificate of deposit account?

A. They kept from one to four.

Q. How did they distribute their entries into those different accounts; did you ever figure that out?

A. No sir.

Q. Do you know whether they had any system of distributing the entries in the different accounts?

A. I have discovered no particular system for keeping those four accounts.

Q. Now without any system they might pay and charge or credit into one account more certificates than were justified, mightn't they?

A. That is what the books show they did do.

POOR C

Q. And so far as they did that they would relieve another numbered account?

A. There would be that many less certificates to be paid.

Q. In the other account.

A. Or accounts, yes sir.

Q. Now you take the general certificate of deposit account the three parts, and suppose that one account which had not been credited, or charged—which d? you call it originally when it is deposited?

A. It is credited to that account and charged to it when it is paid.

Q. Suppose in one instance, the deposit evidence by the certificate had not been credited into C/D No. 1, but had been charged
898 to C/D No. 1 when it was paid, it would operate to make an overdraft wouldn't it?

A. If the certificate was larger than the account showed a credit, it would.

Q. Even though the transaction was regular.

A. No it couldn't be regular. Now they had some reason for having these various accounts.

Q. Have you figured out that reason?

A. No, if I had the entire set of books and had time I could. I could make up an entire new set of books and get the exact facts.

Q. Suppose, for instance, by some arbitrary method we would just start certificate of deposit accounts number one and number two. We made the first entry to number one of a cred- of $100. The second entry we made of a credit of $1,000 to number two, and they were run in that form, and kept separate balances, and when the $1000 certificate credited, was paid, it would be charged to account number one, what condition would that show number one to be in?

A. It would show an overdraft.

Q. Yet the general certificate account, when it was assembled and footed all in one item, wouldn't show an overdraft would it?

A. No sir.

Q. So unless we figure out the system, if it is apparently a haphazard entry into one division or another of the account there might be an overdraft shown in number one, or number two without the whole account of certificates being overdrawn, isn't that true?

A. Yes sir,—that is, you mean the sum total of them.

Q. Yes sir, that is what I mean.

A. Yes sir.

899 Q. Now you take the status of these accounts at the close. You say that two of them were overdrawn, weren't they?

A. The books showed three accounts two of them overdrawn, and one with quite a good sized credit to it.

Q. Now while that was true of two individual accounts, when all of the accounts. 1, 3 and 4, were assembled together and a balance struck it showed some $86,000 of a credit?

A. About that, yes sir.

Q. So when you speak of the certificate of deposit account being

overdrawn, you don't pretend that you have made footings of all of the items,—I mean of all the parts of the account of Certificate of Deposit, and that it then showed an overdraft?

A. No, I never so testified. Where I testified it was overdrawn I gave the number of the certificate account that was overdrawn.

Q. That is what I am getting at, and I am trying to show the want of significance of that fact, unless we have some way of identifying what certificates belonged to one account and what to the others.

A. They undoubtedly done that by numbers.

Q. There is no numbering on the certificate or the face of the stub that would indicate it?

A. They all bear consecutive numbers, but there is nothing in addition to that. For instance up to a certain time, they would take up to a certain time and they had 24,000 certificates out; they might then open another account and commence with 2000 or whatever they decided on and they might go into this account No. 2.

Q. But you haven't verified that?

A. I couldn't without having the entire batch of paid certificates. Now all the certificates we had here were the certificates that were outstanding at the failure of the bank.

900 Q. So you haven't verified that?

A. No.

Q. What was the date of certificate No. 24452?

A. April 25th, 1891.

Q. Were any certificates paid that day?

A. I haven't examined the books, or if I did for that date, I don't just now remember.

Q. Were two $50,000 certificates combined in order to make that certificate?

A. No sir.

Q. What was the origin of it then?

A. Because the books show that there was a charge to certificate of deposit account that day of $100,000. It is charged as one item and one certificate.

Q. Then this,—$100,000 of this may have been a renewal of that previous certificate,—probably was?

A. No sir, it couldn't have been.

Q. Why couldn't it?

A. Because there was no $100,000 certificate outstanding at that time as shown by the books of the bank.

Q. Well there were two $50,000 certificates?

A. Yes sir, but they show paid at an entirely different date from that, many months.

Q. Was there a previous certificate No. 19272?

A. What about it?

Q. Did you find certificate No. 19272 to G. M. Bartlett for $100,000 in a single item,—do you recall the item?

A. I haven't testified to any such a certificate.

Q. I don't recall that you have Wasn't that a certificate of $100,-

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000 outstanding on this day that was cancelled on this day, the very day that this new certificate of $100,250 was issued?

901 A. 19272?

Q. That certificate in fact was a certificate for $100,000?

A. The book showed it to be a certificate for $5.00, and it was carried into the ledger of the bank at $5.00.

Q. But there is a notation that that was a certificate of $100,000.

A. That is true; that was a pencil memorandum.

Q. Have you seen the certificate?

A. No sir.

Q. Have you seen the debit for that certificate?

A. That certificate was paid and was abstracted.

Q. You haven't seen the certificate?

A. No sir.

Q. Have you got the date of payment?

A. I believe I have among some of my records.

Q. Was it paid as $100,000?

A. I wouldn't want to state Mr. Rose, without looking that up. I think I can look it up and if you want me to I will.

Q. Look it up and see if you can't connect that with this $100,250.

A. I can say positive that it had nothing to do with this transaction.

Q. Now when was that first paid, that certificate of $100,250.00 No. 24452?

A. The 28th day of April, 1891.

Q. What does the entry on the deposit ledger import on that day?

A. It shows that certificate of deposit for $100,250 was paid on that date.

Q. No, the deposit register?

A. It would show that certificates was issued that day.

Q. Is there anything in the deposit account to connect the one with the other, on the face of the record itself?

902 A. No sir.

Q. You connect them up by mere inference and deduction?

A. Yes sir, by tracing the transaction.

Q. Now you gave some other things that you thought might account for the discrepancy in those two accounts. What were they?

A. I gave a number of them. I don't know which you refer to.

Q. No, on that particular day you spoke of something.

A. That particular day certificate No. 24470 was issued in the name of C. W. Mosher, treasurer for $75,000. The prison contract of C. W. Mosher was credited with $15,000. The personal account of C. W. Mosher was credited with $10,000.

Q. Well now if $15,000 had been deposited to the Prison Contract account, it would be entered as a bona fide deposit wouldn't it?

A. Yes, "if."

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Q. Now what is there in the items themselves to connect one with the other of those segregated deposits?

A. Just the general appearances and surroundings, and what I have learned in regard to what this prison contract was, and what Mr. Mosher was.

Q. There was a prison contract?

A. There was an account of that kind carried on the books.

Q. Well Mosher, or one of his men was in fact the contractor of the prison labor by a special act of the legislature, up until the bank failed, wasn't he?

A. I think there was a contract of that kind, but my testimony was simply as to the bank books. I know there was something of that kind.

Q. And you have no personal knowledge as to what legitimate credits were placed to that account, or from what sources they came, have you?

903 A. Only what the bank books show.

Q. Well the entry purports to be a bona fide deposit?

A. On its face it might appear to be.

Q. I mean the entry itself. Suppose a man saw that entry he would say "Well that imports that the Prison Contract account made a deposit of $15,000 that day?"

A. Yes sir, which is a fact, it did.

Q. Now what is the date when you have mentioned an item of $10,000 credited to R. C. Outcalt, Treasurer?

A. April 30, 1891.

Q. From what fact do you conclude that that had any reference to this certificate of deposit that we are trying to trace out the payment of?

A. From an examination of the books, and the character of the entries, and so forth.

Q. Did you examine the account of R. C. Outcalt, treasurer, to ascertain what it was?

A. I have.

Q. What account was it?

A. R. C. Outcalt, Treasurer?

Q. Treasurer of what institution,—what concern's money went into that?

A. As far as the books themselves show, nothing, but from investigation outside of the books, I am of the opinion that he was treasurer of what is commonly called the Lincoln Gas Company.

Q. And as such had no control of the account, except as mere custodian to receive it there?

A. As far as the books show he had absolute control of the funds, and to pay them out on orders properly drawn against the account.

Q. And who drew the orders? Is there any indication that he had any power to draw orders?

904 A. Oh no, the proper officers of that corporation would draw the orders.

Q. So aside from that, being custodian of the funds and to pay

them out on orders properly drawn, he had no other control of the account?

A. No one else could.

Q. You say that a man who has authority only.——

A. Let us not misunderstand one another. When a man is treasurer and the money is placed in his hands he has absolute control of that money, and is supposed to honestly pay that out when a voucher duly executed is presented to him; he will then draw his check and cancel the voucher, and pay it with his personal check on that account, and that check is charged to his account.

Q. Let us assume in this case that the company of which he was treasurer, drew a check,—and without any check of R. C. Outcalt, that it was paid by the bank and charged to that account; that the company drew the check directly on the bank, then he wouldn't control it would he?

A. Yes sir, every man in a bank controls all the money that is placed there in his name.

Q. Although the bank had the authority to pay it out on his check.

A. Why a thing of that kind would be the next thing to ridiculous, it seems to me,—that a man can deposit money in an open account and still the bank have instructions to not allow him to withdraw a dollar of it.

Q. Suppose the gas company deposited this account there, and deposited it under that cognomen, of R. C. Outcalt, treasurer, and then reserved to its own cashier and its president the authority to sign checks on it; it was known as the gas company's check in which R. C. Outcalt had no personal interest whatever. Would that be a foolish thing?

905 A. Why it would look to me like you are having an officer in name, but in fact he is a dummy; what is he there for if he isn't there to act as treasurer?

Q. I am assuming that he is in fact a dummy and couldn't draw a check against this account, and never did in fact draw a check against it. You call it a dummy. You never saw a situation of that kind?

A. No sir.

Q. Now what significance do you attach to the entry of that deposit that day, April 30, 1891, to what we may concede as the active account of the Lincoln Gas Company, of $10,000?

A. I consider it a false credit to that account.

Q. Now what are your evidences?

A. The general character of the transaction.

Q. Not general. Give your specific reasons.

A. In the first place the certificate of $75,000 which was cashed that day I call a fraudulent certificate, because it was a part of the fraudulent certificate of $100,250.

Q. What connection has that with the deposit of the gas company for $10,000. They are separate accounts aren't they?

A. Yes, sir.

Q. One enters into the certificate of deposit account, and the other into the individual balances?

A. Yes, sir.

Q. Now how do you connect the one with the other?

A. Just from my knowledge of these transactions, and the way that they check out.

Q. That won't do. What is your specific connection,—you say your general knowledge, and then hide it. That don't help me out. I want to get at your specific reasons.

A. I don't know as I can answer that question satisfactorily to you. I would if I could.

906 Q. Now isn't it true that in order to reconcile and dispose of it you figured in the different accounts of the bank to find items that would counterbalance the withdrawal? Isn't that true?

A. To a certain extent, yes sir.

Q. And you found this $10,000 item, and another item would counterbalance the amount that the certificate of deposit account seems to indicate was paid out over the counter?

A. Yes sir.

Q. And because those two items were the only counterbalances that would connect in any way the managing officers of the bank with it you though- that might account for it,—that's true?

A. Oh no,—that is true in part.

Q. And you wanted some aggregate amount to reconcile.

A. Not entirely, no.

Q. And you got two items that reconciled to a farthing, didn't you?

A. I think I did.

Q. Well the more items there are the more complicated the reconciliation becomes?

A. Always.

Q. Now you don't pretend to have any personal knowledge as to the bona fides of that credit to the gas company, do you?

A. No, if you mean I saw them made, or anything of that kind.

Q. And so far as you have had access to outside sources,—have you gone over to the books of the gas company and tried to reconcile this particular transaction?

A. No sir, I did not. I made an attempt to, but was told that at the time the institution was transferred to the new institution that no old records went with it.

907 Q. This was after the transfer, and that transfer was the latter part of 1889?

A. I mean the gas company; I inquired of the secretary of the gas company.

Q. You didn't get any information from him that there was any transfer after April, 1901, of the gas company,—between that and the failure of the bank, did you?

A. I asked for these dates and was informed that they had no records as to the cash transactions of the gas company of that date and was told that the records after it went into what they call the

new company—I don't know how many times that has been transferred or anything about that.

Q. Nobody claimed that these books had ever been destroyed or made way with?

A. They said they did not have them. Now I didn't make an examination because they didn't let me into the vaults, and so forth.

Q. Well if you found that a bona fide transaction that would be unimpeached here, of course you would have to change your conclusions?

A. I am always willing to correct a wrong statement.

Q. I wasn't trying to show that your statement was wrong so much as to show that you had to depend upon your judgment in getting at your conclusions.

A. Not alone, no sir. There are facts that will crop out in various ways if you are examining a set of books that will tell you things.

Q. One of the most significant things is to find a collateral source of inquiry outside of the book, that is creditable?

A. Yes sir.

Q. But in this particular book you were unable to run down the collateral inquiry?

908 A. No sir, I wasn't.

Q. You would have run down the collateral inquiry, if you had opportunity to do it?

A. I would, and I did in this instance to my full satisfaction.

Q. What collateral lead did you take in this instance?

A. I have got Mr. Thompson's own statement.

Q. What did Mr. Thompson tell you about it?

A. He didn't tell me anything.

Q. What is his written statement?

A. It is in another case, where he gave the balances of this company on the first day of each month, at the time that R. C. Outcalt was president, and that account clearly shows what is reflected,——

Q. Where is that,—the first day of what month?

A. The first day of May, 1891.

Q. What was the balance on that day?

A. It was in round numbers $10,000 less than is shown here.

Q. Now I wish you would get me that source, so I can see how you test it out.

A. As I say it was a written statement.

Q. You say it is a statement in writing?

A. Yes sir, it is written on a typewriter.

Q. Signed by Mr. Thompson?

A. That statement is not, but his evidence is, which that is a part of.

Q. And from that you conclude that there is something wrong about this item.

A. That was a part of it; that was probably the strongest indication.

Q. That was the next following day, was it?

A. Yes sir, the first day of May, 1891.

909 Q. Now, Mr. Jones, when items enter into the accounts of two different institutions, they pass through one bank and another don't they,—there is a period of transit, even in institutions in the same town, isn't there?

A. From one bank to another?

Q. Well from a bank to its patrons; suppose they sent out notifications of remittances, would there be any difference on the same day in the books of the two institutions? Suppose a bank makes up its mail and its statements and sends its mail out in the evening, the depositor wouldn't get the advice of a transaction until the next following day, would he?

A. That is owing to what the transaction would be now.

Q. Well suppose it is a deposit?

A. If you make a deposit in a bank you certainly get your credit, or its equivalent, at the time you make your deposit.

Q. Suppose you have an item of bonds that is remitted from abroad for the use of one of your depositors, and suppose you have taken the transaction and report it made to the bank, and you enter it on the deposit, and you give a written notification, so that the books of the other concern can be entered up to reconcile with yours, would they be on the same day?

A. I would have to answer that this way. A transaction of that kind they would agree at the value of those bonds, and the bank would accept them the same as they would a draft, and in that case they would give you credit right then and there. The other way they would take the bonds, what I would term for collection, and they would be transmitted to the proper place where payable, and then when the correct amount was ascertained the credit would be given at that time, that might be several days later, but your credit would be of the same date practically that the bank there received its equivalent of cash, or the cash.

910 Q. Well but it might vary a day or two?

A. No, I can't conceive how that is possible. You mean from the time they would take these bonds and send them?

Q. No sir, take your customer's books, the bank books should show the date they received a remittance from abroad?

A. Yes sir.

Q. Then how could you know the other customer's books had the item entered at the same time the bank entered its credit?

A. A collection, it naturally wouldn't; they would notify them, but as far as the bank is concerned, the bank would credit it on the day it would receive it,—the business day.

Q. But would the customer credit it until he received advice from the bank—would he charge it up to the bank as a deposit?

A. The customer has no right to charge anything up to a bank until it has actually made a deposit; if he takes something there for collection, and instructs the bank on the collecting of the item to give him credit and notify him, that is an entirely different transaction.

Q. Then in that case the customer may only properly charge it

up on his books as a deposit in the bank when he gets his advice from the bank that it has been received?

A. If it were possible that this gas company had given the Capital National Bank something to be collected, they might not enter it until the next day, but in a small city like Lincoln it hadn't ought to take more than 24 hours for notification.

Q. But still the period of transit of the advice would make a difference, or may make a difference in the date of entry on the one set of books or the other?

A. A thing of that kind might occur.

911 Q. And it was natural for it to occur, and it does in practice occur?

A. It is the exception rather than the rule.

Q. I thought it was the rule rather than the exception.

A. No sir, the rule you will find is the other way.

Q. In collection matters?

A. It is the custom for the bank to give written advice for every collection sent.

Q. What was the custom in Lincoln in 1891?

A. As I understand it they would credit the proper amount to the proper account; they wouldn't set down and write a letter and say they had done a thing of that kind.

Q. Would they send a postal card and say they had credited the account with so much money?

A. That is the practice between banks, but I never heard of such a practice with individuals.

Q. Isn't it the custom of banks to give written advice by card, "we credit your account" and so on, on a printed form?

A. That might be done.

Q. And isn't it the custom of banks to do it, in towns the size of Lincoln, and was in 1891?

A. No sir, only between banks.

Q. What do you do when a man sends you a deposit by mail,—what do the banks do in that case,—you have no pass book—send it just as a collection. Now how would he get notification when it was received?

A. In all my experience I have never had such an account as that; never had a personal account where the man didn't have a pass book.

Q. Now I have a pass book, but I may be gone away and send something in for collection.

912 A. Then that is credited to your account, and when your pass book comes in at the end of the month, it is made up and that would show on your pass book.

Q. Now what I am getting at was, in addition to that the bank would send its printed card of advice of the items received and credited.

A. I wouldn't say that they don't do that, but I say it is out of the ordinary.

Q. So you have no personal knowledge as to whether or not that was a bona fide credit or not, you only give your inference.

A. I gave the facts as I found them.

Q. And your inference from those facts?

A. Yes, sir.

Q. May I ask you what case Mr. Thompson gave any such testimony in as you refer to so that I may check it back. If you have used it as one of your cources of inquiry I would like to know what it is.

A. I couldn't tell you just what the title of that case was.

Q. What was the nature of the proceeding and where was it?

A. It was a case in the Federal court. I read that—oh, several years ago.

Q. Did you keep a schedule of it?

A. No, I didn't. I made a memorandum from it.

Q. What is your memorandum?

A. Why just referred to this statement which I had read from Mr. Thompson's statement giving the monthly balances.

Q. On the first or the close of the month or when?

A. On the first day of each month.

Q. At the beginning of that day or the close of that day?

A. The statement itself doesn't show; it just states on the first day of each month, unless that had happened to fall on Sun-

913 day, and then it would be the following day.

Q. It didn't state whether those balances would be affected by that day's business?

A. No sir, it is a straight statement of those dates.

Q. Now when you say you carry a certificate of deposit through the ledger account, what is there in the ledger account to identify the item with the particular certificate of deposit, as you examined the books of this bank?

A. The amount.

Q. It is not identified in any other way, is it?

A. No, the name nor the number isn't carried to the ledger account.

Q. Now let us take certificate, just for example, No 24806, Cassius Weese (Weiss). Have you found it?

A. Yes sir.

Q. Is that the correct name, Cassius Weese?

A. Yes sir.

Q. That is a certificate, so far as the stub indicates, and so far as the certificate indicates for $2100?

A. So far as the certificate and the stub is concerned that is correct.

Q. Now when the money is deposited on a certificate of that character, what is the particular account of the bank that *that* would figure in making up its balance,—into which that item would enter?

A. What book?

Q. Yes sir.

A. The first book is the certificate of deposit register.

Q. Are the balances taken into the general accounts from the

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certificate of deposit register,—in other words is the certificate of deposit register in fact a book of account?

914 A. It is one of the books of the bank from which the daily business of the bank is made up.

Q. Is it ever balanced or footed,—is it balanced or footed daily?

A. No sir.

Q. Well what is the account into which the item enters so as to affect the cash of the bank in fact,—its daily balance?

A. From the certificate of deposit register it is carried to the ledger; there it enters into the proper account in the ledger, and then the total of that enters into the general totals for that day which appear upon your general balance book.

Q. Then the changes in the general balances of the bank are only such as are noted in the individual deposit ledger?

A. Carried from the ledger,—the balance book is simply a convenient form of ledger, the balances carried to one page in place of having them scattered through the books.

Q. But in order for the item to influence such balances it must enter on the ledger?

A. The ledger is the account; the general balance book is simply a book of convenience only.

Q. Now what did the ledger show that day?

A. The ledger showed $2100.

Q. What did that ledger entry import, standing alone, by itself?

A. That a certificate of deposit for $2100 had been issued that day.

Q. That entry agrees with the certificate, doesn't it?

A. It does.

Q. And that entry agrees with the stub?

A. It does.

Q. It is the item that affects the cash balance of the bank isn't it, for that day?

A. Yes sir.

915 Q. And when it was paid and charged against the certificate account on the ledger of the bank, the debit and credit entries on the ledger relating to that particular certificate balanced, didn't they?

A. They did.

Q. I notice in many cases you did not give the ledger account in your schedule.

A. I will say for your benefit that where I did not give the ledger account, the ledger account agreed with the amount that the certificate bore.

Q. So that where you didn't give the ledger account the ledger entries respecting that particular certificate,—the debit and credit balanced?

A. Yes sir, otherwise I would have shown it.

Q. And corresponded with the amount shown on the face of the certificate?

A. Yes sir.

Q. Now in that particular class of cases by what process do you

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figure that the credit of that amount,—the correct amount—in the ledger account and the charging of the correct amount to exactly counterbalance, when the certificate was paid, showed that the bank lost anything?

A. I haven't so testified.

Q. Then to what purpose was the recitation made of those numerous certificates in that class?

A. For the reason, to show how they kept the accounts of the bank.

Q. To show that the register and stub was off sometimes?

A. That a certificate would appear on one book as one amount, and in another book at a different amount, and in some instances the certificate register would show the certificate issued to a different name than the certificate bore. Furthermore, the certificate of deposit register is a book in a bank so that the officers of
916 the bank can ascertain at a glance what certificates of deposit are outstanding at all times, because when a certificate is paid, there is a column in a certificate of deposit register wherein they are supposed to show the date of the payment.

Q. Now it is a fact that where the ledger entries of both debit and credit agree with the face of the certificate, the general account books of the bank would then not be affected?

A. That is correct, there would be no loss.

Q. Not be affected by a mere register; it don't have footings to the accounts?

A. Only to this extent, they cannot get a proper amount to carry to their balance register only as they take it from the certificate of deposit register; that is the key to the amount of certificates issued that day, and the amount of them should agree with the amount on your ledger.

Q. In other words, if the register and stub are erroneous the power to check the actual certificates with the ledger balances is destroyed, isn't it?

A. Yes, sir.

Q. And that is destroyed, even though the ledger balance is correct,—you couldn't check it up.

A. It would show a bad state of accounts in the bank, whenever accounts are placed in such a condition they cannot be checked.

Q. That is what I say, instead of affording an apportunity to check, it destroys the ability to actually check the account.

A. No, in that you are not exactly correct. You destroy the way of checking it easy: you can make the same checking by taking the paid certificates and going through the same process but it is just more work, that's all.

917 Q. But you couldn't strike a balance of the certificate account any day in that case, because the certificates themselves of varying amounts are outstanding and not in the bank.

A. No, you are wrong again. You can strike a balance and show the amount of certificates that are outstanding of a bank any day, by checking up the paid certificates, which are always in the possession of the bank. That is the object of that register.

Q. Suppose those are correct you can check up so far as the certificates have been paid, probably, if you know enough to follow them through the register and through the deposit ledger and see how they are debited and how they are credited, but when a certificate comes in and is charged the ledger account doesn't show the number of that certificate in this bank does it?

A. No sir.

Q. And if two certificates are paid the same day, or if one is paid, the only way you have of identifying it is to figure out from those certificates and identify them by the paid stamp.

A. That is the date to show when they were paid, yes sir, and then you can refer back to their book and check up.

Q. You regard that as a very simple process?

A. Oh yes. Didn't you ever check up your bank pass book when your checks were returned to you?

Q. I have done that of course. Now that is all right, but so far as the outstanding certificates are concerned, how can you check those if there is any variance in the amounts?

A. If your account is properly kept,——

A. I am assuming it is not properly kept. How can you check a certificate that is held in New York, or Cincinnati, or Boston, a certificate of $50,000, if the register shows $5,000? Are you not helpless in respect to ascertaining the existing liabilities
918 of the bank, and the certificates of deposit unless the books are kept correctly ?

A. In case that you are going to make fraudulent entries of course it would be more difficult, but that would it seems to me put a man on guard quicker than anything on earth. You can take your check again and find out that it is wrong, that is doesn't agree with your ledger balance.

Q. We can admit that the unerring way to check a chookkeeper or teller is to remove him and take possession of all his cash and his items and documents, and then make them check with the book accounts,—that is the infallible test.

A. Yes sir, but it is not necessary to remove him; you can check over the records of a bank, and you can do it in a bank of that size in two evenings, and the man wouldn't know what was going on.

Q. Suppose you have a system like Mr. Alfred ——, and have it for years running as high as $100,000 behind all the time just at the collection desk, and yet never having made a false entry—every item checked—just by keeping the collection of a day and holding them over one day.

A. How large an institution was that?

Q. The First National Bank of New York. Suppose you employ the same system of delayed entries, and then ultimately enter them with religious accuracy you can keep behind depending upon the volume of business, and depending upon the number of days' delay, and you could keep large sums in a large institution out all the time couldn't you? Now how can you expose that where a man has carried paper and items in his pocket,—not left in his desk,—unless

you go in and ask him to produce his items, and separate him from them in some way?

A. Well all I can say,—of course when you refer to the First National Bank of New York,—of course $100,000 is a very large sum of money, but it is very small in comparison to their
919 day's business, but I will say that there is no bank yet, in the world, where their business has been so big that a good bookkeeper couldn't check it.

Q. Of course, I will agree with you on that. But the final test comes when your cash and everything is counted. Now let us come to the item of discrepancies in the certificate account at the close of the bank. Take the certificates of deposit outstanding at the time of the failure as compared with the books of the bank. Now assuming that there was a record on the books showing outstanding liability for certificates of deposits, just as you have testified, of $86,265.70. Why do you say that the records and the books only showed that much outstanding when the bank closed?

A. Because that is what the books showed.

Q. They did?

A. Yes, sir.

Q. Well now, assuming that that is the utmost that the books showed,—how could it be ascertained by an examination until the outstanding certificates were called in and laid down side by side and checked with the books that the actual certificates outstanding overran $431,733.79?

A. In order to check a certificate of deposit account, or any other account, it isn't necessary that they shall all be in and paid before you can check it up.

Q. Well sir, why do you say in your testimony that the books and the account only showed $86,265.70? Why didn't you say the books and the account showed $517,999.49, if you could check them out independent of the books?

A. Mr. Rose, you do this,—I said we could sit down and if I had all the old certificates, which the Capital National Bank ever issued, and those paid, I could sit down any date and give you the amount of certificates that should be shown in their ledger
920 account. That is not a difficult task for anybody.

Q. I am talking about your proposition that you have reiterated here over and over again that these variances were obvious. How do you say a variance is obvious and reconcile that with your testimony—positive testimony—that the books only showed eighty six and some odd thousand dollars, while the certificates that were outside of the bank and not open to a check, actually showed over half a million?

A. That is the easiest thing in the world.

Q. All right, let's hear it.

A. Take that package of certificates there that foots up that amount. Now then the amount there or a similar amount, there is the amount that showed here in your ledger account, and I made a deduction that shows the amount of certificates outstanding in

excess of what your ledger account shows. Now if you wish me to I will go in there and bring in that ledger so that you may see it.

Q. I will take your word for that. Then if a director who wasn't in active management of the bank should turn to this deposit ledger and undertake to see what the bank's liability was on certificates of deposit, if he had accepted the integrity of the book he would have found the liability only the eighty six thousand and some odd dollars at the close of the bank?

A. If he had just looked at the ledger account.

Q. And if there were these great variances in the outstanding certificates,—you reiterated over and over again certificates that showed discrepancies between the stub book and the register and the face of the certificate which came to the receiver and which were outstanding until after the failure of the bank. That is true?

A. Yes, sir.

Q. Now the register and stub book wouldn't show what the bank's liability was, would it?

921 A. Either one should, but in this case neither one did.

Q. Yes sir, they both should, there's no doubt about that.

Mr. THOMAS: Were there not numerous certificates of deposit in the bank cancelled prior to its failure that showed these same variances between the face of the certificate and what the books showed?

A. Yes sir, numerous instances.

Q. Those numbers were not carried onto the ledger, so you could go to the ledger and call for the certificate; you had to get control of all of the certificates themselves, didn't you?

A. No, no. Now Mr. Rose, there are two ways of checking a certificate of deposit account——

Q. Two ways for a bookkeeper.

A. Yes sir—any man of ordinary intelligence. One is by the certificate of deposit register, which is the simplest and easiest way, for it is what that book is for, and the other is by the paid certificates, just like you would take your bank pass book.

Q. That don't show the liabilities outstanding. The certificates themselves show the discharged liabilities, don't they?

A. Yes, sir.

Q. But here is a bank that had certificates out to one bank or to bankers and others, in Cadiz, Ohio, and in Illinois, and all over this country, of over half a million dollars, that were actually out. Now how are you going to ascertain what those liabilities are, assuming that the records are falsified so as to indicate a mere nominal liability on large certificates: now how are you going to figure that out from the register?

A. May I answer it by illustration?

A. Yes sir, answer it any way at all that is satisfactory to you.

A. All right. Now then we will take your bank account; you have a pass book, and during the month you know that you

922 have deposited $1,000; that is the amount of your deposit during the month; you know that you had issued $750 worth of checks, and at the end of the month your pass book is balanced.

You look at the checks and look at your account and check it up and find that there has only been $500 worth of checks paid. You know by a mere calculation that there is $250 worth of them that are out and unpaid. Now then you will find in regard to your certificate of deposit account, the same thing—just as simple as that; it is the same process; checking the paid certificates back against those issued, and your difference between the two is what your ledger account should show.

Q. But the book item in this case was the unknown item—the certificates out all over the country.

A. That is true, but a mere glance at that book without any figuring of any kind would show that that account was not properly kept.

Q. And would it show that the liabilities of the bank were on that account?

A. No sir. I want to state this to-. You may take your certificate of deposit stubs, your certificate of deposit register and your ledger and I will venture to say that for the past seven years they never agreed on a single day.

Q. How were they carried on the general ledger of the bank; were they carried into the balance ledger?

A. No, they're carried under the head of certificate of deposit accounts.

Q. Is there separate accounts, the certificate of deposits in the general balance book?

A. Oh, no. In the general balance book it is a part of the total deposits.

Q. And carried there every day?

A. Yes sir.

Q. Is this book balanced every day?

923 A. Should have been balanced every day; it shows a balance, but they're not always true balances.

Q. The books are worked on every day?

A. Yes, sir.

Q. The most active book in the bank?

Q. No.

Q. The book that requires probably the most work on?

A. No, the general balance book is simply the accounts——

Q. No, I mean the individual deposit account.

A. Well there are more entries made in that than any other book.

Q. And in a way it is the most complicated book—it consists of three current books?

A. No, there are two of the individual deposits. Numbers 1 and 2, and then there is one of the country banks.

Q. That makes three daily balance books?

A. Yes sir, and then the general balance book, if you would call that one, and that would make four.

Q. Now if you will you may put the balance book before you while I question you about your schedule on that.

(Witness complies.)

Q. Can you tell me now what sum, if any, that report overstates the resources, in the aggregate, of the Capital National Bank, as compared with the exhibit of the resources contained in the balance book for the day ending December 28th, 1886?

A. My answer to that is, these early reports I didn't go into because the amounts in the earliest reports are small, but as the bank grew in years, and the volume of business increased when there was a large difference then I commenced showing it.

Q. Now you showed a mere variance in the loans and discounts over what item in the balance book—what is the ledger account?

924 A. It is marked here B/R. Bills Receivable.

Q. But in the report it is mentioned as discounts?

A. Yes sir, it means the same thing.

Q. Now did you know of the bank loaning, or advancing to Walsh and Putnam, who owned the building that they occupied a sum of several thousand dollars to encourage the building of a suitable home for them? Did you know of that transaction?

A. I did.

Q. Was the item properly charged on the ledger account against Walsh & Putnam for that loan or advancement?

A. I consider not. The bills receivable doesn't show any loans of that kind

Q. I didn't say bills receivable. I said the ledger account. Was that amount, advanced in that manner, and for that purpose, properly charged to Walsh and Putnam, to be paid by credits or monthly rents as they should accrue in the future and ultimately wiped out in that way?

A. I know that there was a contract of record similar to what you speak of.

Q. Well wouldn't that item be a resource of the bank in some form?

A. Yes sir, if it was properly carried.

Q. It would be a resource of the bank, would it?

A. In one sense of the word, yes sir.

Q. It would not be an overdraft would it, if it had been loaned or advanced in that manner?

A. No, it is not an overdraft.

Q. Would it be a loan,—not a bills receivable,—but would it be a loan, done under an agreement by which it was loaned in that manner?

A. All loans I consider bills receivable.

Q. Well they are not all bills receivable. You may have an agreement to loan a man on his check, keeping his check and

925 charge it to him and it may be a loan.

A. Oftentimes banks carry time certificates of deposit as bills receivable,—anything that bears interest.

Q. Well now that would be a good asset, wouldn't it, under those circumstances?

A. That I wouldn't be prepared to answer.

Q. They would get the benefit of that in the saving of their monthly rental from time to time as they occupied the building.

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A. In saving their rents?

Q. Well they would get paid that way instead of paying out the cash, they would credit the ledger debt of Walsh and Putnam, wouldn't they?

A. It would amount to that, yes sir.

Q. Well now assuming it to be a good asset and for money loaned, and there being no balance book entry under the specific title loans, why wouldn't it be both conscionable, honest and correct to add the unpaid balance in that account of Walsh and Putnam to the loans? Is there anything wrong about that?

A. No sir, that might be done and done properly.

Q. Now then suppose you take in this ledger balance, the Walsh and Putnam item as entered there and add that to the bills receivable account and see whether or not the total equals the item of loans and discounts in the published report?

A. Yes, sir.

Q. Then are you prepared to state that when the accounts are reconciled and adjusted in the manner that I have suggested that the loans and discounts are stated larger than the balance book would warrant, considering those two accounts in the balance book?

926 A. I made up the report according to the books of the bank: I didn't try to get amounts and throw them together that would equal a certain amount and one reason why I didn't use this item of Walsh & Putnam,—well in this instance if you will add it in there it brings the amounts to about equal; you will notice in their statements where they use that in various ways. At one time it is added as bills receivable, at another time that is added as due from banks as a cash item, and I made up my mind that an account that was twisted around and used in various ways the way that is, is not properly a bills receivable.

Q. It should reflect that item of the bank's resources somewhere in the report shouldn't it?

A. If properly kept that is true, but the books of the bank will not show that that account was properly kept for this reason——

A. Never mind that now. The only inquiry I am making now is just on your own statement of the variations of the report from the balance carried in the balance book. That as I understood was the basis of schedule "YY".

A. Yes, sir.

Q. Now confine yourself to that, and see whether there is a discrepancy shown on the face of the books, as the balance book entries appear here. Of course the Walsh & Putnam account should be reflected somewhere in the official statement, should it not?

A. Yes, sir.

Q. Now when your attention is called to it, where, if any place, do you think it is reflected in the official statement?

A. I couldn't answer because that account is used in so many different ways, and when the account is finally terminated in accordance with the agreement on record they still carry that account.

POOR

927 A. (continued). That of itself shows that it is a very peculiar account; one day it is real estate and one day it is cash.

Q. When you went to search for and develop discrepancies you undertook to foot the items and bring them together so that they would reconcile with some total, didn't you,—like in the certificates of deposit?

A. Yes sir,—I took the items under the proper headings.

Q. Now you took items in one account and laid them side by side with items in another account. Now why isn't that method applicable here in ascertaining whether this report in fact overstates the resources of the bank, beyond what they are in fact as is shown by the Balance book; how can you tell them unless you take into account every item on this ledger?

A. Well sir, when I go to a Balance book to look for cash I look under cash, I wouldn't look under Bills Receivable.

Q. Is that an answer to my question?

A. Yes, sir.

Q. What does that reference to cash have to do with this report. Did you find in the item of cash in this bank, any variance?

A. Oh yes, in some statements.

Q. Not in this report I am talking about.

A. No, as I stated,—this first report is in the early history of the bank and the discrepancies are not as large as they are later.

Q. You haven't tested out to see whether this report, when all the ledger accounts in it are reflected by the specific titles prescribed by the Comptroller,—whether it will reconcile in the amounts of resources and liabilities or not, with the published report, have you?

928 A. I compared it with the published report and what the books of the bank showed on that day, and I took the accounts under their proper headings, as they kept them. I take it for granted in making the comparison that the books are properly kept.

Q. Listen to the question. The reporter will read the question.

(Question repeated.)

A. That is the first question he asked me in regard to this and I told him that in regard to this report that I haven't made an investigation as to that point.

Q. Now if I suggested the items as I did in the Walsh and Putnam case,—I wish you would look it over on the whole and be prepared to state whether the resources equal the liabilities. Now take the item of overdrafts. Is that the next item,—you have noted a discrepancy in that item have you?

A. Yes, sir.

Q. Are overdrafts a resource?

A. Some overdrafts are.

Q. Is it a resource or liability; which would it be classed as?

A. If it is a good one it is a resource, and if it is a bad one, why it's a bad debt.

Q. Well is it a resource or a liability,—the man owes the bank, the bank don't owe him does it?

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—. No sir,—he owes the bank.

Q. Did you find a ledger account there,—due from E. Hurlbut Jr.?

A. Yes, sir.

Q. Did you find a ledger account there due from Marsh?

A. Yes, sir.

Q. Did you find a ledger account there of Bills of Exchange?

A. Yes, sir.

929 Q. Are those all resources?

A. I sould say no. E. Hurlbut, Jr., was never worth a dollar in the world; Marsh was.

Q. You are testifying as to discrepancies between these reports and the balance book. Now you stay by that proposition.

A. All right.

Q. Now assuming that they are what the balance book shows on its face,—never mind anything else—just the face of the balance book, then they would be resources wouldn't they,—because there would be something due the bank.

A. That's what the book shows.

Q. Now where are they reflected in that report?

A. They're not in the report under the head as disclosed by the books of the bank.

Q. And yet they should be reflected under some head in the report?

Q. Yes, sir; I could have gone into detail and showed that the published statement did not show all three of those items which you mentioned, and they should have showed in the published statement, but they didn't do it unless they done it under some other head.

Q. Do those show as a resource anywhere in there,—as such?

A. Yes sir, they're listed so.

Q. No, but in the published report.

A. No sir.

Q. Now are those balanced off with any other item, or liability?

A. I don't know sir,—the published statement doesn't disclose.

Q. What does the ledger show as due from National banks, or is there any account of that?

A. No, that is the total of these various accounts.

930 Q. Now the overdrafts then were only partly shown in the official statement?

A. That's all.

Q. So that the official statement omitted then to list as such $7,691.54 of that particular class of resources?

A. Yes sir.

Q. And yet that omitted item should appear somewhere as resources of the bank?

A. It should appear under no other head than overdrafts.

Q. Now are the items to which I have referred, of due from Hurlbut, Jr., due from Marsh, $7,691.54 of overdrafts not reported as such, and the Bills of Exchange, $25,485.45 reflected in the published report, as such?

A. They are not.

Q. When they are added to the amount due from banks, does that make up the discrepancy, $34,339.47?

A. I don't know, Mr. Rose. That is not due from banks.

Q. No, no. I am just figuring whether it accounts for the discrepancy, as to whether it should not appear somewhere in the account,—can you say that?

A. No sir. I can't take the amounts due from Marsh and Hurlbut and put it as due from banks.

Q. On the face of this report, are those items reflected anywhere in the report of the items of assets, except as the one item "Due from Banks" is increased?

A. I can't say. I can say this, that the published report doesn't,——

Q. Never mind that now.

Mr. THOMAS: I insist on the answers as the witness gives them.

Mr. ROSE: I have a right to a responsive examination, and to direct the scope of his answers.

A. (continued).—doesn't show any such items.

931 Q. Do they show anything that the balances of those particular resources, listed as such in the balance book, are reflected by the report anywhere?

A. They're not under that head.

Q. Are they under any head shown to reconcile with the total balances?

A. I am unable to state what they done with those particular items. Had they done the proper thing they would appear in the published statement, the same as they did on their bank books.

Q. Now I wish you would tell me what the total footings of all the resources would be if the balance book accounts, changed by the entries of overdrafts, entered into it?

A. Do you want me to read off the amounts?

Q. What should the total footings have been to reflect the total resources as shown by the balance book. I don't want you to read them off unless the alterations in the account of deposits, in the form of this ledger, to make it conform to the Comptroller's report doesn't affect it; if that does affect it I want you to make the change accordingly.

A. If I answer your question I will answer it at what the book shows; not at any statement that I would make up.

Q. Are you not willing to check that out and show that the total resources are the same and would balance? You would do that in fairness, wouldn't you?

A. I will say this,—that the books show that they do balance; there's no contradiction over that; the books show that they balance.

Q. The books show that the resources balance with the resources in the reports?

A. The first question you asked me in regard to this particular report I didn't figure out because I could see at a glance that these early statements there wasn't as much discrepancy in as

932 there was later on.

Q. How did it come that the whys and wherefores of these

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did not excite your suspicion like they did in the certificate of deposits?

Q. You know about the snowball rolling down hill, the fa-ther it goes the bigger it gets.

Q. In one case it seemed to your interest to figure out reconciliations, and in the other case it seemed to the interest of your concern to avoid a reconciliation?

A. That is not true, Mr. Rose. You can't check a single statement where I gave you the figures—unless it is an error in stating the figures—but what the books and published statements will bear me out.

Q. I don't mean to insinuate that and I didn't state that. I notice that in cases where you want to give a different import to the transaction than that shown by the book entry, when you would figure out and show variations, you employed a method of reconciliation of accounts to get totals in different places, where the evidence by that course of reasoning might seem ultimately to tend to the interests of the plaintiffs in this suit. Now I have tried to point out to you that the same process of reconciliation will reconcile these balances in the daily balance books with the published report, and that the reconciliation in that case tends against the interest of the plaintiffs in this case. Now I have asked you if the fact that the interests of the plaintiffs in one case suggested that you pursue the inquiry to its ultimate end, and your interest in the other case suggested that you forego the inquiry, doesn't explain the fact that you tried the process of reconciliation in one case and didn't try it in the other?

A. No, sir, that is not correct, and, let me say further——

Q. Then in that case why didn't you undertake to figure it out. I should think your curiosity would lead you to try to re-cast the whole ledger account, to see if these items are not listed under
933 any specific head in the ledger, or in the body of the report or in the balances in someway, and just see how you would come out by following out the process of Mosher or whoever made this report. Did you ever try to do that?

A. I did just for my own amusement; by a line of elimination I can get exactly the same figures they have in here, but they are not true.

Q. Nobody disputes that they're not the same identical arrangement.

A. Cash is cash, and now if you are going to find out what the cash is, you couldn't take other accounts and call them cash, when the books show they're not cash.

Q. Did you take into account the significance of letters as to the reports tending to show a more favorable condition of the bank than the balance book itself, as a whole?

A. I don't think so. I will say this that from the letters that were written from the Comptroller of the Currency calling the attention of the directors to their false reports to the department it is more specific than I have made in any of mine.

Q. Now I have never seen any of those letters; they haven't been offered in evidence, and this is purely voluntary.

A. Yes, sir, they have been,—in regard to the overdrafts.

Q. Why do you dodge the proposition?

A. I don't, you try to make me say something——

Q. I just asked you if you understood that that was the materiality of this inquiry to show that the published report reflected a stronger condition of the bank than its own balance *book* did: did you assume that that was the pith of this inquiry?

Mr. THOMAS: That is objected to as not proper cross examination.

A. I have shown there where the published reports don't agree with the bank's books, and I have taken the accounts as they appear in the book under the proper heading.

Q. And that is the best you can say?

934 A. Yes, sir, that's all any truthful man would say.

Q. And you haven't tried to figure out whether the published reports as a whole reflected a better apparent condition of the bank than the general balance books, or whether they inflated the resources or liabilities?

A. In every instance those published reports show a better condition of the bank than the bank books show. Had this bank published a true statement of the bank's condition as reflected by its books, it would have been closed up long before, from its customers withdrawing their money.

Q. Where were the assets inflated in the report?

A. If you will take my statement you will find where it is inflated to a very large amount.

Q. Yes, but your statement eliminates assets that you don't bring into the statement at all.

A. I don't think so at all.

(Night adjournment.)

(Feb. 8th, 1911—1:30 p. m.)

Q. Now in giving the discrepancies between the report and balance sheet you have an item of $7,691.54 on account of overdrafts. As a matter of fact that item of overdrafts doesn't appear in the balance book at all, does it?

A. It does.

Q. As such, in the general balance book?

A. It does not.

Q. But you were making your comparison with the general balance book.

A. A statement is made up from the books of the bank: sometimes some banks keep it all in one book, other banks use different forms.

935 Q. Yes, but in this specific case. Here first we have introduced that column of this day's business in the general balance book, and have introduced the reports, and as an expert, as I understand it you have explained the discrepancies between the one and the other, but in the matter of overdrafts you had to have

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recourse to entries other than those in the general balance books, didn't you?

A. They were taken from the balance books proper.

Q. From the individual deposit book balances?

A. Well I will tell you, now let's call it the same name that they had in that bank,—the individual deposit ledger.

Q. Yes, sir,—and as a matter of fact that is a ledger?

A. Certainly, it is a combination ledger.

Q. But overdrafts—the total of the overdrafts is not carried from the deposit ledger to the general balance book?

A. Not in this bank.

Q. And the total of the deposits is not carried from the deposit ledger in this bank to the general balance book?

A. They are, in every instance which I had reason to examine.

Q. The exact totals?

A. Yes, sir, except——

Q. Didn't I understand you to say that the deposit ledger totals was reduced by the amount of overdrafts, and the difference was the item carried to the general balance book?

A. I never made any such a statement as that, no such a question was asked me while I have been on the stand.

Q. Well what is the fact as to whether the account carried on the general balance book is the difference between the overdrafts and the total of the deposits?

A. It is not.

936 Q. Are you sure about that?

A. That is my understanding, and what I arrived at from my examination of the books.

Q. Are the deposit ledger here for the date of this report?

A. I suppose so.

Q. Let's get the deposit ledger for December 28th, 1886, and this same general balance book. Unless the amount of the overdrafts were deducted when the combined item was carried over how would the books maintain thier balance?

A. That would have nothing to do with the balance whatever.

Q. Now you find December 28th, and find what the balance in the deposit account is for December 28th.

A. These books have the date December 28th, on several pages, but in this book it is all under the——

Q. I want the total of the deposits at the close of business under date of December 28th, 1888.

A. This would be the proper book to get that from.

Q. No, I want the ledger account from which this balance is taken, can you find that?

A. There is no such account kept in the Capital National Bank as that.

Q. Well you may refer to the deposit ledger and find the total deposits at the close of business December 28th.

A. The individual deposit ledger will not disclose that, therefore I cannot turn to it.

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Q. How do you say again that the deposit account was carried to the general balance book?

A. I can answer that. The only book of the bank where you will find the amount of the deposits for any day of the year is in the book known as the general balance book. That amount is made up from the totals of the deposits as they appear in two individual balance books, and also the total of the deposits of the country banks.

937 Q. Now you may figure out what those are,—you say it is done with those totals,—those are what you said you preferred to call the deposit ledgers.

A. Yes, sir.

Q. Now a moment ago you said those totals were the basis of the entry under deposits in the general balance book, did you now?

A. The totals which I refer to,—the sum of those totals, after they are footed on a slip of paper, or however they arrive at the knowledge, is carried and put in this book, and this is the only book in the Capital National Bank which will show that.

Q. Very well, that process is plain, I understand that. Now I will ask you if on the contrary from those totals there wasn't first deducted the amount of overdrafts, and the difference between the sum of those totals, and the sum of the overdrafts wasn't the item that was carried to the general balance book?

A. If that's true, produce the books.

Q. You being the accountant, and having under consideration this particular report, I asked you to ascertain for me the total of the deposits at the close of business on July 28th, 1886. That's why I asked you to get the balance book so we could check it right here and ascertain for ourselves. May we do that?

A. If you want me to go to work and make up that day's business, I will, but I think when I give you, as I have given you the figures that that is all you would require of me. If I have made an error in my footings, or something of that kind, that is very easy for you to point out.

Q. No, that is not the purpose at all, of this. You have said that this result was arrived at by a certain process from the deposit account footing and the general balance book. Now of course,

938 personally, I think you are in error, but of course I know it is an honest error, and I just wanted you to check it over and see if you wouldn't personally correct it, that is all, and see if it didn't represent the difference between the totals of the deposits and the totals of the overdrafts.

A. Let me ask you a question; if you done as you say and you find the figures different than the books of the bank,——

Q. I refuse to be an accountant here. Do you see what I mean?

A. Yes, sir.

Q. Now then there's another account you said you didn't understand. The overdrafts are kept in red ink on the deposit ledger, are they?

A. On these books?

Q. Yes, sir.

A. Yes, sir, every one which I have examined.

Q. Now the overdrafts represent a resource, and the desopits a liability of the bank. That's correct is it?

A. Yes, sir, in some instances.

Q. And the overdrafts are not carried as such on the general balance book?

A. In some instances they are; the day that you have before you they are not.

Q. Is there on the page on which this day's totals are entered on the general balance book any account under the specific heading of overdrafts?

A. There is not.

Q. Does the general balance book carry any account under the head of overdrafts?

A. In some instances it does.

Q. Bank overdrafts, or what class of overdrafts?

A. Overdrafts including the bank overdrafts and personal overdrafts.

939 Q. Well does the balance book carry a general account of all the overdrafts of the bank brought together in one column and as a separate item of the general balance book?

A. In some instances the books of this bank do and in some instances not.

Q. But of the date that represents there is no entry in the general balance books?

A. No, sir.

Q. No suppose the overdrafts is omitted in transferring the totals of the deposit ledger,——

A. Yes, sir.

Q. And at the same time the deposits themselves are carried over at their full total,—liabilities are expressed at their full amount, and the resources are d-minished by the amount of the overdrafts, wouldn't that throw the general balance book out of balance?

A. It certainly would.

Q. Then as a matter of fact when the transfer is made and these two items of overdrafts and deposits are combined in one item, called the deposit account in the general balance ledger, isn't the item carried over the difference between the totals of the deposits and the totals of the overdrafts, so that each side of the accounts will be affected alike by the elimination of the overdrafts?

A. I think not.

Q. How would their books be kept in balance then?

A. If you will add the amount of your overdrafts, as you suggest, to your deposits in making up your total deposit, your books will be out of balance to the exact amount which you add to that side of your account. In order for your books to balance, if you are going to add any amount to one side you must add an equal amount to the other, if you wish your books to balance.

940 Q. That was my proposition all the time. But if you subtract a smaller resource from the total of a larger liability you are affected each side of the account alike.

A. That would be the same way; if you deduct an amount from one side of your account, for your account to balance, you must make the same deduction from the other.

Q. Isn't that result accomplished in this case by just the process I mention?

A. I haven't found it so in this case.

Q. Have you investigated it to see?

A. I have.

Q. Well now you test it out and see.

(Witness complies.)

Q. Give me the overdrafts and deposits.

A. On what date?

Q. December 28th—the balance in December 28th,—it would be in this book.

A. Let me understand you again,—you say the 28th?

Q. The 28th, yes sir.

A. Now then the 28th isn't the day from which the bank made up their published statement, neither is it the day I have testified to.

Q. Well take it arbitrarily the 28th and it will check out that way.

A. It will not, Mr. Rose.

Q. Well then take it for both days.

A. Here is the 28th.

Q. Now on this particular day, checking over the accounts indicates that the method I have suggested of subtracting the overdrafts from the deposits gets the result that is carried to the general balance book?

A. The difference between the sums of the other books, less the overdrafts on this day indicates the amount as shown by the
941 General Balance book.

Q. It also indicates that the ledger balances at the close of business on December 28th, were carried forward into the General Balance book as of the date of December 29th; that is the general balance book is one day ahead of the others.

A. At the close of business when they balance up on the 28th, that would appear at the opening of the next day.

Q. Now Mr. Jones, if the report had embodied for the item of deposits the item shown in the balance book of $580,074.05 it would have shown that item of liabilities smaller than the bank actually had outstanding by just the amount of the overdrafts, wouldn't it?

A. I would have to state that like I did before; whatever amount you add to or take from your debit or credit, if you want a balance, that same amount must be added to or taken from the other side.

Q. So that to correctly exhibit the liabilities of the bank it was necessary to add to the deposit account carried in the general balance book for this day $11,665.87?

A. No sir, it wasn't.

Q. We have just indicated the total footings of deposits and found they were $11,665.87 larger than shown on the balance book, isn't that true?

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A. Yes and no. I will say this, and I don't know how I can answer it any plainer. If you wish your books to balance, when you add to or take from either side of your account, you must do the same on the other side. Now this might be technical. The amount of money that they have got in their bank subject to check would be in the judgment of many, the amount of their deposits. Now while they may have some accounts there that are overdrawn, that certainly in one sense of the word is not a depo-it, is it?

942 Q. No, I think we agree that an overdrawn account is an asset and not a liability.

A. And now when you add the amount of the account that is overdrawn to the amount of the accounts which have something there to draw on,—I say it is just whichever way you might look at it.

Q. But you of course understand that the classifications in the report are made up by the Comptroller of the Currency?

A. Yes, sir.

Q. And they require the full resources to be shown and the full liability to be shown?

A. They do.

Q. So that to formulate a report to comply with the requirements of the Comptroller, the balances in the item of deposit account as shown in the general balance book could not be used, could it, the way it was kept in this bank?

A. No, it is not necessary that that report be made up from the general balance book, Mr. Rose, at all. Some banks make it direct from the ledger.

Q. Yes, but you were comparing it with the balance book, and I just wanted to see what the significance of the discrepancies which you discovered was. Then deducting the overdrafts from the total of the deposits would equally decrease the assets and liabilities wouldn't it,—call it the colorable assets and liabilities.

A. Yes, sir.

Q. So it would not be a falsification to add to the balance book entry the amount of the overdrafts which was deducted from the deposit ledger balance?

A. Not if it was properly done, no sir; neither have I testified on that point.

943 Q. But the item of overdrafts is there, and the item of overdrafts is, at least a colorable resource, for the whole sum of the overdrafts.

A. Yes, sir.

Q. And it is proper that the report to the Comptroller reflect it as such in some form?

A. In the form of an overdraft only.

Q. What are the balances shown? You have examined that report,—it is here. What are the total footings shown in the published report. I don't believe you gave that.

(Not answered.)

Q. Now, Mr. Jones, you mentioned, I think, in some instances

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where the register of certificates had a paid entry just written in the register, while the certificate itself was outstanding.

A. Yes, sir.

Q. Some fifteen thousand, or nearly sixteen thousand dollars of entries of that character.

A. Yes sir; I don't remember the amount but that would be my memory.

Q. How would that mark affect the cash, the actual cash in the bank, unless there was some corresponding entry in the ledger?

A. When a certificate is paid the first entry is made on the ledger at the close of the day's business,—the certificates are then shown paid on the certificate register. It should reflect the same as the ledger account.

Q. Well in the case of these fifteen thousand dollars of certificates, did you have any identifying entry in the ledger?

A. Those certificates referred to were certificates outstanding, but marked paid on the certificate of deposit register—outstand-
944 ing at the close of the bank on which receiver's certificates had been issued.

Q. Well what I am getting at,—standing alone, what significance does the entry in the register have—that is not a book of account that affects the cash balance of the bank is it, in itself?

A. Just as much as any other book in the bank; they all have their places and perform their part; when certificates are issued the amount that goes into the day's business, they get it only from this book.

Q. Now in the case of the certificates, numerous certificates where you found the register varied from the ledger, and varied from the face of the certificate. You freely admitted yesterday that the cash in the bank was not affected by an erroneous sum written in the ledger or on the stub.

A. That's true.

Q. Now then that same principle will apply here, if a certificate is marked paid, but is not charged in the ledger account as paid, then the fact that it is outstanding wouldn't affect the cash of the bank, would it?

A. Just the same as if a check had been presented and used in place of a certificate,—or bills receivable, and of course if you make a wrong entry on any of the books, and that entry itself will not add or take anything away from your cash, but it will reflect and show that your books are not in accordance with the facts.

Q. Yes, in so far as that mere register is concerned,—in so far as that purports to give a separate history, apart from the real books of the bank, and account for the cash, why it would be an error. I wouldn't contest that. But suppose the payment was not carried into the ledger as a matter of fact, nor credited to cash, or charged to certificates of deposit, then the erroneous entry on the register wouldn't affect the actual cash in the bank, would it?

945 A. Oh, no.

Q. That's what I am getting at. Did you go through the

record book giving the proceedings of the stockholders and board of directors in order to ascertain the amounts of the several dividends declared?

A. I did.

Q. Do the record books of the bank purport to show that these dividends were paid out of the capital stock or out of the net earnings of the bank?

A. They varied in their wording. Some of those recolutions just declared in this form:—that on a certain day a six per cent dividend shall be declared. Others say that out of the profits of the bank as reported shall be so much declared.

Q. Is there any resolution that declares a dividend that does not also run at least a couple thousand dollars to surplus?

A. I wouldn't like to testify from memory as to that. I know that some of them did order a certain amount carried to surplus.

Q. Ordinarily does the resolution declaring a dividend recite the net earnings?

A. As a rule I think not, but it is in both forms.

Q. You say it is in both forms,—what do you mean by that?

A. One form it will state the amount of net undivided profits, and this: I move that a dividend of a certain per cent be declared, and if my memory serves me correct in some instances without any reference to any amount.

Q. Can you specify any entry in the record where the minutes themselves did not purport to show a report by the officers of the bank of net earnings sufficient to pay the dividend?

A. I think I can, yes sir. Shall I get the book?

Q. You perhaps don't need to stop now.

946 Mr. THOMAS: I can give you one in short order.

Mr. ROSE: Refer to it.

Mr. THOMAS: July 13th, 1886, and another on January, 1887.

A. There's a meeting in July 1885 on motion of Mr. Holmes a dividend of six and a half per cent was declared, one per cent run to surplus and the balance to remain in the undivided profit account. I am just reading the motion as it appears in the book.

Q. So there was nothing on the face of that record to indicate that the dividend was declared out of the capital, was there?

A. They wouldn't be fools enough to put a thing of that kind in there, no. There is nothing there to show that they made single false entry either.

Q. There is at least an inference in there that one per cent is run to surplus, and still leaving a balance of earnings to remain in the undivided profit account, and it is signed by C. W. Mosher, president?

A. I read the record to you.

Q. That is the import you get from it?

A. I think that is correct, Mr. Rose, as you stated it.

Q. And every resolution of the record showing payments of dividends purport to have been declared out of the net earnings of the bank. That is the purport of every entry, fairly interpreted?

POOR

A. All I could say—I would have to read the motion as passed and I would think it meant just what the resolution stated.

Q. Now one of the entries in the record book that you examined was the entry of January 1889, of the Director's meeting?

A. Yes, sir.

947 Q. Did that entry purport to show what the net earnings were for the six months?

A. That one does. The earnings of the bank for the last six months showing net earnings of $20,572.74, undivided profits $305.12, total $20,877.86.

Q. And on that date did you find a report also of the discount committee apparently, finding the paper of the bank satisfactory, right in the records of the bank?

A. Shall I read it?

Q. Well do you find that there?

A. If you would call that a report; I don't know whether it is a report.

Q. Yes, I would like to have you read it into the record.

A. As per instructions of the Board of Directors, we have examined the paper of the Capital National Bank and find the same satisfactory.

Q. Signed by whom?

A. W. W. Holmes and A. P. Stuart.

Mr. THOMAS: What is the date of it?

A. January 20th, 1889.

Q. Did you find any ledger account of the notes of the Western Manufacturing Company, giving the separate balances at any day of the amount that concern owed the bank on any specific day?

A. You mean in the Capital National Bank books?

Q. Yes, sir.

A. No, sir, they kept no ledger account of any of their notes, as far as I have been able to discover; they all appeared in one account.

Q. Now you spoke of certificates of deposit outstanding on which receivers' certificates were allowed. How did you ascertain the allowance of receivers' certificates?

A. I examined the books of the receiver.

948 Q. Do you have those books here?

A. I have not.

Q. You haven't had them here at any time subject to our inspection?

A. Not at this trial.

Q. That is all I am asking about.

A. Well they were at the prior trial.

Q. Now did you find any period of time when the general balance book of this bank was out of balance?

A. Yes, sir.

Q. When was that?

A. In the large amount of practically $100,000.

Q. Turn to the general balance book that shows that. Now I said the general balance book of this bank.

A. Are you technical in your question there?

COPY

Q. No sir, I refer to a specific book. I didn't know whether you understood my question, that was all.

A. The general balance book in itself would not show that the books were out of balance $100,000.

Q. Now that is what I asked you. If at any time the general balance b oks, of which the one before us here, Exhibit No. X-19 is one of the series, are out of balance.

A. No sir, it doesn't show the irregularity, or the books being out of balance $100,000, which they actually were.

Q. It would have been sufficient and just as effective if you had answered whether you found them out of balance or not. That is what I asked you.

A. Then put your question that way.

Q. What I want to have answered by you is whether you found the general balance book out of balance.—You say you did not?

A. No sir.

919 Q. And the general balance book did not reflect the error in footing of the deposit ledger from December 4th, 1889 to December 24th—or about there.—in 1892?

A. No sir, the general balance book doesn't show the discrepancy in the books of $100,000.

Q. But the item of footings as actually carried to the general balance book was an item that preserved the balances in that book?

A. In that book, yes sir, but not of the general balances of the bank.

Q. I understand that, but I was only asking you about the one book. Then it would appear, I suppose, that if the error was purposely made that it was made for the purpose of carrying over a footing into the general balance book that would in a measure conceal it if anyone went to the general balance book?

A. I am unable to state what was in that man's mind,—the man's mind that was doing that.

Q. But if a man should run his eye over the general balance book to see the condition of the bank, the book that brought together in a summarized form, or purported to bring together in a summarized form all of the ledger balances, would show on its face, falsely perhaps, that the accounts of the bank balanced?

A. Yes, sir.

Q. Was the general balance book of this bank in balance at the close of the bank in January, 1893?

A. The general balance book has been in balance every day that I have taken occasion to examine it, I think, with the exception of a few cents, or something like that.

Q. You testified in behalf of the plaintiffs in these same cases in May or June, 1902, in this same court, did you not?

A. I did.

950 Q. At that time you stated the length of time and the effort you had spent over these bank books to-, didn't you?

A. I don't remember as that question was asked me.

Q. You stated that you had spent about six months, all told, on the books at that time, and it is a fact that you had?

POOR

A. Whatever I stated I think would be true.

Q. Since you don't recall it,—it would be about six months from first to last, wouldn't it?

A. I wouldn't be surprised.

Q. And you had done some very strenuous work.

A. I would so consider it,—others might not.

Q. Now at that trial you had examined to see what apparent losses you could show traceable to the bank of Marsh Brothers and Mosher, and the Marsh National Bank up to the time the name of the bank was changed to the Capital National Bank, and its capital stock increased, didn't you?

A. I don't remember; I haven't read that testimony in a long time.

Q. Isn't it a fact that when you testified as a witness in these same cases in 1902 you testified that the losses you had found to have been incurred up to the increase of the capital stock and the change of name to the Capital National Bank was $68,174.70?

A. I wouldn't want to attempt to state from memory what I did testify to years ago, but I will say this that I don't think I testified at that trial, or at this trial the entire losses that either one of these banks sustained; I tried to be fair and state that in my opinion I had found losses of a certain amount.

Q. You are not quite so conservative at this trial as you were on the former trial. You testify to losses of $119,000 at this trial when as to the same item you testified as $68,000 before.

951 A. I am willing to leave it to the record on that, and I want to say further to the Court. When these cases were tried before I was taken sick after about the third day of the trial, and I was not only confined to my bed, but it was a very serious question whether I would survive, and during the latter part of the trial they came down to the house and I testified there and they brought two of my physicians with them, and they questioned me for a while and then the doctor thought they had better let up for that day; they done so and returned the next day, or came the second time to take some more testimony. Now I just speak of that from this fact, that I don't want to claim anything on account of my weak condition at the time I testified for I believe that what I stated at that time were true facts which I can carry out and the books will show them today.

Q. But you were in a physical condition that made you a little more conservative than your present condition, is that it? You were facing the future apparently, is that what you mean?

A. No sir; I will say this, that if I stated before that the losses were sixty eight thousand, I would say that they were at least that amount, and undoubtedly if I had tried to make them twice that amount I could have done it, and I haven't in this trial tried to state all the losses.

Q. You think you were lucid when you testified before?

A. Yes, sir.

Q. And you had before you your schedules all compiled, and used them?

OPY

A. I didn't have my schedules all before me.
Q. You used some of them in giving your testimony?
A. Some of them, yes sir, but they were not all there.
Q. You had them compiled and typewritten?
952 A. I want to correct your statement when you said I had them all there. That is not true.
Q. Now, Mr. Jones,—did you ever see the note, or what purported to be the note of F. S. Johnson & Company of $9,968.00 that purported to have gone into the bills receivable of the Capital National Bank, in 1886?
A. I did not.
Q. You didn't see who signed the note?
A. I did not.
Q. Nor never saw the handwriting?
A. If I didn't see the note I wouldn't see the handwriting.
Q. Did you see the note or what purported to be the note of the First National Bank of Hastings, which purported to have gone into the bills receivable of the Capital National Bank?
A. No sir, I never saw the note.
Q. Or of the First National Bank of Kearney?
A. No sir.
Q. I noticed that you used the expression that those were forged notes. Now do you testify to that as direct evidence, or is that a mere conclusion as an accountant?
A. No, my authority for that is that I talked with the purported makers of those notes,—F. S. Johnson himself.
Q. That would be hearsay, and not evidence.
A. Well that is how I know it; he told me they never signed the note, and Mr. Clark told me the same thing.
Q. You never saw the notes?
A. No, but they told me that they were forged.
Q. You had made inquiries from outside sources?
A. I had asked the people whom they claimed gave the notes, and those people told me personally that they never gave such a note, and that if the books showed such a note it was a forgery.
953 Q. Well you reached a conclusion then from what others told you and not from any personal knowledge of your own: it wasn't a matter of personal knowledge in this case?
A. You mean that I did or did not see the note?
Q. You have no personal knowledge of the transaction at all?
A. I wasn't present.
Q. And you have no personal knowledge except as you have examined the books and heard recitals from others?
A. No sir, the man himself told me that he never made such a note.
Q. That is what I asked you, if you have any personal knowledge.
A. Only that and what the books show.
Q. That is hearsay knowledge?
A. Well I don't know; I am not a lawyer,—I suppose if a man tells me that he never signed such a note,——

Q. Do you honestly think that you may repeat what a third man says as evidence?

A. He was a party.

Q. You honestly think that?

A. I honestly do; you present a forged note to me, and I am the one that is interested; I know whether that is or isn't my note.

Q. Can you recall now when you took the deposition of Receiver McDonald in this case?

A. No sir, I couldn't give you the date.

Q. In the year 18— or about the year 1900?

A. It was prior to the trial of these cases some little time. They were tried in 1892.

Mr. THOMAS: 1902.

A. Yes, 1902.

954 Q. Well at the time you were in the Receiver's office you didn't find Mr. D. E. Thompson there, the defendant, did you?

A. No sir, we didn't ask to take his deposition.

Q. No, I asked you if he was there about the records, like the rest of you were,—you didn't see him there?

A. No sir.

Q. Do you know where he was at that time?

A. I have no personal recollection.

Q. As a matter of fact at that particular time you had no personal acquaintance with Mr. Thompson, did you?

A. I knew him.

Q. To speak to him?

—. ——.

A. You would have known him if you had seen him, that was the extent of that?

A. Yes, sir.

Q. And knew him by reputation, but had no personal acquaintance,—he had never spoken to you had he?

A. Yes sir; one time I remember in particular was in the Capital National Bank in 1890.

Q. Is that the only time you had ever seen him?

A. Oh no.

Q. To speak to him?

A. I think I was in his office when he was superintendent one time, in regard to replevining a car of cattle that was being shipped from here.

Q. Did you see him?

A. That is my recollection.

Q. Had you seen any of his handwriting at that time?

A. Yes, sir.

Q. Where?

A. I have seen his handwriting numerous times.

955 Q. Along in 1890?

A. I couldn't state when I first saw Mr. Thompson's handwriting.

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Q. Would you say now that you saw it before the year 1902 at any time?

A. Yes sir.

Q. In any official way before that?

A. I can't state now, it is a long time ago.

Q. You were not very familiar with his handwriting in 1902 were you?

A. Not as much so as with some others.

Q. You were not familiar enough with it so you could say you recognized it, were you?

A. I was.

Q. Did you ever get his checks through your bank prior to that time?

A. I have no recollection of that.

Q. Did you ever have his note prior to that time?

A. I never had a note of Mr. Thompson's.

Q. Prior to 1902 had you ever received a written communication from him, or that even purported to be signed by him?

A. I won't be certain as to that; I have received a great many letters in my short lifetime; I wouldn't attempt to state who from, and so forth.

Q. You never had the signature card of his in your bank as a depositor?

A. Oh, no.

Q. Can you recall any occasion before 1902 when you ever had occasion to inquire into the genuineness of his handwriting on any paper?

A. No sir, I never did.

Q. Can you tell us how you became familiar with his handwriting prior to 1902?

956 A. Something that runs in my mind in regard to orders at the time he was superintendent,—but I am not clear on that.

Q. The Burlington orders were printed weren't they at that time?

A. I don't refer to orders to railroad men or anything of that kind. What I meant would be in a public way, it seems to me that in the early days that the paymaster's checks and things of that kind bore his name—his signature. Now I wouldn't want to be positive about that, but that is my impression. As I say eighteen or nineteen years is a long time.

Q. You have been getting pay checks of the Burlington for a long while haven't you?

A. Yes, sir.

Q. As a matter of fact they were always signed by the treasurer and countersigned by the pay-master also. To refresh your recollection, do you know that as long as the Burlington has run here the men were paid by a pay-master, who came out in his own car from the headquarters at Omaha?

A. I wouldn't attempt to say what was the custom, but I would say this that I know of my own knowledge that the time was when our railroad men here would wait for the pay-car; I know of times

when they haven't done that; they have been sent to the agent and the agent would distribute them, and I would say as to the forms of those checks, I think that while I was in the banking business they even changed their forms and at times they were signed, I would say, by several people.

Q. The business done by the agent, or the pay checks delivered by the agent were to persons who for some reason or other were absent when the pay car came to their station.

A. Not in some instances I refer to. I will tell you why; there have been some of the men that were at work on the section would want to borrow some money; they would give me an order
957 on Mr. Ost, Freight agent here, and I would accept this order and the pay check would come around from Mr. Ost to me in that way.

Q. Yes, where the company had notice of the assignment of wages, then the paymaster couldn't give it out.

A. Oh no, I don't refer to anything of that kind at all.

Q. I thought you referred to the assignment of the order which you left with the agent.

A. That was simply an order on the agent here; he didn't report that in to the company; the company had no notice of that whatever. It wasn't beyond the home office here.

Q. Well now after all, are you sure when you were in the office of Receiver McDonald, sometime prior to the taking of his deposition that you could verify the signature of Mr. Thompson?

A. I think so.

Q. You just think so on general principles?

A. No, I will say this way; I think I know your signature, and I don't believe I could say now just where I ever saw it even the first time, or the last time, Mr. Rose.

Q. Well I have gone into your bank and worked you to cash a check and you saw me sign it.

A. Yes, sir.

Q. But you never had that experience with Mr. Thompson?

A. No sir, I don't remember of any such experience with Mr. Thompson; I know I didn't have personally.

Q. In the other case, where you said you knew all the signatures except Holmes, in those particular reports the name of Mr. Hamer wasn't appended was it?

A. No sir, my answer to that referred only to those he examined me on, the particular one. I am acquainted with all of the signatures of the directors excepting Mr. Hamer and Mr. Holmes, and there was only one statement here which was signed by Mr. E. P.
958 Hamer.

Q. And when you came to that you said you wouldn't say that you knew his signature.

A. Or words to that effect.

Q. So you had no occasion to mention it except in that one report because that is the only one in which his name appeared?

A. Yes, sir.

Q. Now in respect to Mr. Yates, how long had you known his

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handwriting prior to the time when you allege you saw these papers in the hands of Receiver McDonald?

A. I don't remember.

Q. But the particular instant when you claim to have seen the original signatures were on what purported to be records of the Comptroller of the Currency from Washington that for some purpose he had for the time being transmitted to the Receiver of the Capital National Bank, isn't that correct?

A. That would be, part of it, but you would find among the records of the Capital National Bank in various forms many signatures of these officers.

Q. No, but the records about which you are testifying and the signatures upon which you are testifying to refer to the records which purports to have been sent from the Comptroller at Washington?

A. Some of them went to the Comptroller, and some of them went to the printer.

Q. I understood that you claim to have examined the proofs of publication made up for the Comptroller of the Currency. Is that what you claim to have examined?

A. I examined the original which was made up by the officers of the bank and which was published in the newspapers and was afterwards,——

Q. That is on a purported original,—there was proof of publication on the reverse side, consisting of the notice or the printed
959 statement which is clipped from the newspaper and the affidavit of someone connected with the paper that it had been published in the particular paper on the particular day.

A. That is one side.

Q. And the other side was a statement?

A. Yes, sir.

Q. Made up and forwarded to the Comptroller of the Currency?

A. Yes sir, after this is done.

Q. Now then some years after the failure of the bank you claim that you run across a portion of those original proofs of publication that purported to have been transmitted to the Comptroller of the Currency?

A. Yes sir.

Q. After publication.

A. Yes, sir.

Q. They were properly the files of the Comptroller's office in Washington?

A. Yes sir.

Q. But for some reason that you don't know, they appeared to have been sent out to the Receiver of this bank?

A. They were sent out to the receiver, at the receiver's request to be used in suits brought.

Q. That was your understanding?

A. So the Comptroller of the Currency wrote me; I wrote and asked for some copies and he wrote me to this effect.

Q. You were trying to identify the character of the papers that you claim to have seen the signatures on?

A. Yes sir.

Q. That was at least as early as March 1902 that you saw those?
A. Several years prior to that.
960 Q. 1902 I said.
A. Yes sir, it was prior to that.
Q. Well it was just prior, as I understand you, it was just prior to the time that you took the McDonald deposition.
A. That was the last time I saw them.
Q. I understood that was the only time you ever did run across them.
A. Oh, no. We had them when we was making the examination and preparing to take those depositions; on that day, that you refer to, we had gone in there and arranged the books and papers in the vault that we thought we would use in taking the depositions so as to have them handy.
Q. Now who had access to the vault that day that you know anything about?
A. Who did?
Q. Yes sir.
A. Why it was in charge of Receiver McDonald.
Q. I said, who had access that you know of,—you and Mr. Thomas and Mr. Norval?
A. Yes sir.
Q. And Mr. Dartling?
A. No sir.
Q. Mr. Whitmore?
A. No sir.
Q. Who else?
A. I don't think there was anyone else there.
Q. Only the employees of the receiver.
A. Yes, sir.
Q. There were no employees of any of these defendants there when you saw those papers?
A. On this day that we were arranging them?
Q. Or any of the attorneys of these defendants?
961 **A. No sir.**
Q. Mr. Yates, or Mr. Hamer or Mr. Thompson, none of them were there?
A. Not at the date I was arranging these papers to get ready to take the depositions as I have stated.
Q. You never did see them in the receiver's vault, neither one of them, did you?
A. I don't think I ever did.
Q. You never saw any of the attorneys there either did you?
A. Unless it was——
Q. When they were there in answer to that notice to take depositions?
A. That's the only time when we was taking the depositions, is the only time I ever saw them there.
Q. Now did you ever have any notes, or cash any checks of Charles E. Yates, prior to that time?
A. No sir.

Q. Did you ever have any letter from Charles E. Yates prior to that time?

A. Not to my knowledge.

Q. Did you really have a personal acquaintance with Mr. Yates prior to that time?

A. I knew him in a general way.

Q. Personally—to speak to him and correspond with him,—have a business acquaintance with him.

A. No sir.

Q. Ever have any occasion in business transactions or otherwise to inquire or ascertain about any genuine signatures of his?

A. Oh no, our talk would be general,—just pass the time of day, unless it would be—naturally our talk would drift to banking, he interested in the Capital and I interested in the Jones National.

962 Q. Where did you see him prior to that time?

A. Saw him and talked with him in the Capital National bank.

Q. Now could you really say that you knew his signature at that time?

A. I think so.

Q. What were the sources of your information?

A. From papers on which I had seen his name written.

Q. What papers had you seen his name written on at that time?

A. In the bank there.

Q. When you saw his name written on a paper you could tell without having previously seen it that it was his genuine signature and swear to it, could you?

A. Oh no. We learn signatures the same as we learn many other things; we learn things without actually seeing them done or performed.

Q. And you learn a man's handwriting that way so you could verify it?

A. Yes sir. I have had men come to me with an instrument and ask me if that was their signature, and I would say Yes, it was. Well now I wouldn't ask that gentleman to please write his name so I could compare it.

Q. Do you think Mr. Yates ever before that came to you with a paper and asked you if that was his signature, and gave you any occasion to verify it?

A. No sir, but I can as a banker, I am acquainted with a great many signatures whom I have never saw, or never saw write the name.

Q. And you would take their checks without ever having seen them, or having their signatures vouched for?

A. Well of course there is a certain amount of discretion that is used in all those things. I never saw a single cashier of the eastern banks I have done business with, still I have papers that bore

963 their signatures for a considerable amount of money, and I accepted them as their signature-, and they have done the same thing with me.

POOR

Q. Well you thought their bank would be bound by it anyway?

A. Not necessarily, but I am just saying that it is not necessary to see a man write his name in order to be familiar with his signature.

Q. There is nothing about the occupation of a banker that gives him any intuitive knowledge when he sees a paper that it bears the genuine signature of the man's name whose signature purports to be on it, is there?

A. Oh, no, I could make a good banker out of a very ordinary man.

Q. You have spoken of reading testimony of other persons in other cases. You have made quite a good deal of outside inquiry into the affairs of the Capital National Bank, haven't you?

A. Considerably, yes sir.

Q. You have had the benefits of the records of the suits in the Federal court,—the Gurner suits and other suits, and you consulted freely with receiver Hayden?

A. I did.

Q. And was it receiver Hayden that first called your attention to the incorrect footing of the individual deposit ledger?

A. Of the $100,000?

Q. Yes.

A. Yes, sir.

Q. And he first called your attention to the irregularities in the certificates of deposit?

A. No, Mr. Griffith was the man that called my attention first to those.

Q. And you have spent all told probably six or eight months' continuous work on the records?

964 A. I wouldn't be surprised.

Q. In delving into the affairs of that bank.

A. Yes sir.

Q. You have followed up every lead that you could learn of from any outside source?

A. No sir, I haven't; life is too short to do that.

Q. But you have sought every source of information to show that these particular transactions to which you have testified were different from what the individual book entry would import?

A. I will say that to my own knowledge I have only testified to part of the irregularities which I know existed in those books. The same is true of the falsifications; I have only testified to a part of them.

Q. But you haven't taken time even yet to work out the accounts,—all the accounts where you find irregularities and make up a correct account?

A. I had the time, but I haven't agreed to do that.

Q. Have you read all the book entries of this bank?

A. No sir, I haven't.

Q. Have you examined all the books of this bank at one place or at another?

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A. It is owing to what you mean by an examination; if you mean a complete examination of all the books of the bank, I have not.

Q. You have only traced out the separated, or what you called the related entries or transactions in order to figure out the ultimate result and conclusion as to whether a transaction was bona fide or otherwise?

A. On any transaction that I have testified to I examined all the books and records of the bank that would refer to that particular transaction.

965 Q. This Mr. Hayden who discovered those balances had been an examiner of that bank for a long while, hadn't he?

A. I don't know. He was an examiner at one time; I don't know whether he examined this bank or not.

Q. He examined the books repeatedly in his capacity as United States examiner.

A. Not to my knowledge.

Q. And Mr. Griffith who found discrepancies in the certificate of deposit account told you immediately upon the failure of the bank,—before they came in?

A. He called my attention to it while he was receiver.

Q. Before he was appointed.

A. Well he was acting as receiver.

Q. Well he was custodian as agent for the Comptroller?

A. When he was in charge, whatever that might be technically.

Q. And he never knew of the discrepancies, or how much the certificates would overrun until the certificates came in?

A. He never talked to me along that line; what he talked to me about was these fraudulent ones that appear at one place as one amount and then appeared at some other place *at* a different amount, in different books of the bank, and then oftentimes under different names in the books.

Q. Did you know that including all the irregularities and losses he had discovered at the time he took that bank in charge that after he was in charge of it that he only insisted on $160,000 being made up?

A. I know this that he never made a detailed examination for the reason that he knew that he was simply holding that position temporarily until the department could appoint a receiver?

966 Q. Well he offered to turn it back on the payment of $160,000.

A. I know nothing about that.

Q. You know this, that these discrepancies of nearly a half a million in the certificates of deposit outstanding from what the books showed, he couldn't tell what it was as long as the certificates were out and not in.

A. Oh no, that is true; he couldn't tell all of that.

Mr. ROSE: That is all.

Redirect examination.

By Mr. THOMAS:

Q. Mr. Jones, you have been examined only with reference to the

earliest published report that has been offered in evidence. Now does that report contain as many discrepancies and falsifications as a later one?

Mr. Rose: Each of the defendants objects as merely argumentative, and not proper redirect examination, and assuming.

Objection overruled.

Each of the defendants excepts.

A. It does not.

Mr. Rose: Each of the defendants move to strike out the answer as a mere conclusion, and not proper redirect examination?

Motion overruled.

Each of the defendants excepts.

Q. In the report of July 9th, 1891?

Mr. Rose: Each of the defendants objects as not proper redirect examination.

Q. And I will ask you to state if there are any irregularities in that in addition to what the schedule Exhibit "AC" shows?

* * * * * * *

967 Q. Now I will call your attention to the report on the books of the business of the bank at the close of business July 9th, 1891, with particular reference to the amounts shown by the books in eastern banks, such as the Chemical National, the American Exchange and the Commercial National bank, and compare that with the published report.

A. You want me to take the reports and the books and show it?

Q. Yes sir, show any discrepancies there may be there,—or compare it with the detailed report to the Comptroller.

Mr. Rose: That is objected to by each of the defendants as having been already gone over, and a mere repetition, and the witness has given his discrepancies.

The Court: If there is anything omitted from this Exhibit "AC" I will permit him to state it now.

Each of the defendants excepts.

A. Well the first thing I will speak of then is the Chemical National Bank; the report to the Comptroller of the Currency shows that they have in the Chemical National Bank subject to check or draft $27,672.60. Now then the books of the bank show that they haven't got a dollar in that bank on which they can check; it shows an overdraft of $27,672.60. In other words they represent to the department a credit, when it is an overdrawn account.

The report to the department under the head of the American Exchange National Bank shows $4,109.81 to their credit,
968–974 subject to their check, when the bank book shows that that account is overdrawn $4,109.81. They just simply reversed it. The same report shows the Commercial National Bank of Omaha as $13,123.67 on deposit and subject to their draft or check, when the books show that that account is overdrawn $13,123.61. It

COPY

shows the United States National Bank has to their credit $7,079.74, when the books of the bank show $1,984.76 only. Now if there is any mistake I had rather take the book and call these figures from their own book than from my copy. What do you say Mr. Rose?

Mr. ROSE: You might check them with your copy, and see if you have them correct.

* * * * * * *

975 Q. Now, Mr. Jones, if you as a banker, or if you were doing business with a bank and you were examining its report
976 of its condition, resources and liabilities, would it to you signify any difference whether this amount of fifty odd thousand dollars was shown in that report as overdrawn on its eastern correspondents, or whether it appeared *it* there as a general deposit?

Q. What effect would that have upon the legal reserve of the bank?

A. It increased the legal reserve of the bank.

Q. In what way,—to the amount to which it is falsified?

A. I mean the books themselves show an overdraft, and they have falsified the report by in place of showing an overdrawn account they have shown a credit account,—money which those banks owed them, or they had in those banks subject to draft.

Q. What is the general significance of the item which appears in these reports under the head of deposits, that is individual deposits and demand certificates of deposit?

A. That shows the amount of money that has been deposited in the bank under those various heads.

Q. By whom, in a general way?

A. By people doing business with the bank.

Q. That would be a voluntary deposit by the various parties in the Capital National Bank?

977 A. Yes sir.

Q. Is that a similar transaction to one where the Capital National Bank had overdrawn its account in some other bank?

A. Entirely different.

Q. What would it indicate as to the condition of that bank as to whether it was in good condition or otherwise?

A. It improves the apparent condition of the bank to the amount of the falsification.

Q. Mr. Jones, to illustrate, if a statement—a published statement indicated that the bank had on deposit,—owed its depositors $400,000, we'll say, in one report. You saw that report, but as a matter of fact it only had on hand as actual deposits $350,000 and the other $50,000 of that item classed as deposits was actually an overdraft in its eastern reserve agents, what would be the result,—what effect would it have upon the statement as to showing the solvency or the financial condition of the bank?

A. When a person or a bank is borrowing money it shows that it is short of funds, and no bank would make an overdraft,—borrow money by an overdraft if they were in what we would call good condition.

POOR

978 & 979 Q. A bank of the size of the National Capital Bank at the time of this report, which had overdrawn on its eastern reserve agents upward of $50,000, would that reflect a good or a bad condition?

A. It shows a poor condition of the bank at the time of the overdraft.

* * * * * * *

980 H. J. WHITMORE, recalled — further direct examination.

By Mr. THOMAS:

Q. Mr. Whitmore have you made an examination and comparison of Exhibit X-982 purporting to be a published statement of the condition of the Capital National Bank at the close of business December 12th, 1888, and Exhibit X-1042*a*, purporting to be the condition of the Capital National Bank as shown by its general deposit ledger of the same date, the same appearing under the head line of December 13th, 1888?

A. Yes, sir.

Mr. THOMAS: We offer in evidence Exhibit No. 1042*a* being contained in Exhibit No. X-20 purporting to be the condition of the Capital National Bank as shown by its General Balance book under the head line of Thursday, December 13th, 1888.

Exhibit No. X-1042*a* received in evidence.

(Copy on the following page.)

981 EXHIBIT No. 1042*a*.

THURSDAY, Dec. 13/88.

Capital Stock		$300,000.00
Surplus		20,000.00
U. S. Bonds	50,000.00	
Premium a/c	4,000.00	
Circulation a/c		45,000.00
Redemption Fund	1,730.00	
Stock & Bond a/c	9,148.88	
Furniture	5,650.00	
B./R.	815,148.96	
	65,855.07	
Cash	65,754.97	
Bills of Exchange	32,218.85	
Chemical Nat'l Bank	43,202.41	
American Exch. Nat'l Bank	13,941.49	
Commercial Nat'l Bank, Omaha.		1,904.23
U. S. Nat'l Bank, "	12,713.47	
Omaha Nat'l Bank, "	6,228.26	
Merchants Nat'l Bank, "		4,632.84
First Nat'l Bank, Kansas City	1,496.27	
Schuster Hax & Co	739.33	

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Drovers Nat'l Bank.....	49.29	.....
Blackstone Nat'l Bank.....	951.22	.....
American Exch. in Europe....	725.40	.....
South Omaha Nat'l Bank.....	1,288.94	.....
Merchant's Nat'l Bank, Neb. City	450.82	.....
First Nat'l Bank, Beatrice.....	.....	3,132.95
Bank of Cass County.....	39.86	.....
Commercial Nat'l Bank, Chic...	5,431.53	.....
Clearing House a/c.....	.....	4,892.06
Knauth Hachod and Kuhne....	254.80	.....
Walsh and Putnam.....	8,500.	.....
Undivided Profits.....	.....	305.12
Rediscount a/c	.....	111,180.43
Real Estate a/c.....	22,608.03	.....
C. W. and W. W. Marsh Coll...	4,752.21	.....
Discount, Interest and Exch....	.....	37,309.68
Wages a/c	7,769.93	.....
Suspense a/c	14.62	.....
Interest Paid a/c.....	10,444.14	.....
Expense a/c	2,883.62	.....
	1,128,137.50	528,357.31
Deposit a/c	.....	599,779.99
	21,112.31	11,529.18 O./D.
	.....	41,043.01 D. L.
	10,500.	4,528.93 Bks.
	1,128,137.30	1,128,137.30
	57,101.12	
	1,185,238.42	

982 Mr. THOMAS: We offer in evidence Exhibit X-982 being the published report of the same date.

Exhibit No. X-982 received in evidence.

(Copy may be found at page 423.)

Q. Have you compared these two statements to ascertain if there are any discrepancies or variations in them?

A. Yes, sir.

Q. You may state what they are?

983 A. I examined the statement purporting to be a published report of the condition of the Capital National Bank at the close of business on December 12th, 1888, and compared the same with the General Balance book and the individual ledgers of the bank and I find the following discrepancies: Individual overdrafts according to the balance book $52,572.19; as published $11,529.18. The individual overdrafts as published are $41,043.01 less than the deposit ledger shows. The loans on the books are $815,148.96, and as published $860,944.18 being $45,795.22 more than the books show. Due from all banks, balance book $87,523.09; as published

POOR

$132,760.87 being $45,237.78 more than the books show. Bills of Exchange amounting to $32,218.85 are not shown as such in the published statement. The total as published is $1,185,238.42. The general balance book total, adding the individual overdrafts and the bank overdrafts makes the same amount. There is no deduction of any of the expense items in the published report, but the published report shows the amount of the expense items $21,112.31 being the total of all of the expense items on the general balance book.

984 Q. Mr. Whitmore, have you prepared any schedules which show the amount of directors' paper, that is bills receivable executed by the various directors which was held by the bank and a part of their bills receivable at the dates of the various reports to which you have testified?

A. I have made up from the ledger accounts that are in evidence here the directors' paper,—the amounts that were due from those directors at the time of these various reports.

Q. You have it in schedule form?

A. No, I have it down here on my memoranda.

Q. Not in the form of a schedule?

A. No sir.

Q. You may then state the amount of that paper at the date of the various reports.

A. I will give the name and the amount due from each one.

A. Exhibit No. X-1039, December 28, 1886; I will give the names in the same order on each of these reports. This is December 28th, 1886,—Outcalt $1,500. Phillips, $2,850. Holmes, $3,300; Mosher $5,964.50. Total $13,614.50.

Mr. Rose: May I ask Mr. Whitmore a question in that connection.

The Court: Go ahead.

Mr. Rose: Why do you include Outcalt as a director?

A. I understood he was a director; they gave me these names as names of the directors and I have not examined the reports to see who were directors at that particular time. Of course if he was not, his name should not go in.

985 A. (continued).

August 1st, 1887, Exhibit X-1040:

Outcalt	$1,354.03	
Phillips	1,320.00	
Holmes	4,000.00	
C. W. Mosher	30,977.96	
Total		37,651.99

Exhibit X-1041, October 5th, 1887:

Outcalt	3,937.36
Phillips	2,500.00
Thompson	6,000.00

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Holmes	4,000.00	
Mosher	20,313.12	
Total		36,750.12

Exhibit No. X-1042, December 12th, 1888:

Outcalt	12,410.00	
Phillips	3,952.00	
Thompson	2,500.00	
Holmes	15,000.00	
Mosher	28,464.53	
Total		62,326.53

Exhibit No. X-1043, September 30, 1889:

Thompson	5,100.00	
Holmes	17,000.00	
Mosher	48,311.20	
Total		70,411.20

Exhibit X-1044, December 11th, 1889:

Thompson	2,000.00	
Holmes	16,500.00	
Mosher	48,311.20	
Total		66,811.20

Exhibit X-1046, December 19th, 1890:

Outcalt	8,630.00	
Mosher and Outcalt	3,138.72	
Thompson	5,000.00	
Mosher	60,211.20	
Total		76,979.92

Exhibit X-1047, July 9th, 1891:

Outcalt	20,700.00	
Phillips	5,642.09	
Mosher and Outcalt	5,218.72	
Thompson	500.00	
Mosher	19,711.20	
Total		51,772.01

Exhibit No. X-1048, September 25, 1891:

Outcalt	21,418.	
Phillips	8,206.68	

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Mosher and Outcalt	5,218.72	
Thompson	500.	
Mosher	29,711.20	
Total		65,054.60

986 Exhibit No. X-1049, December 2, 1891:

Outcalt	21,418.00	
Phillips	3,564.59	
Mosher & Outcalt	5,218.72	
Mosher	29,711.20	
Total		59,912.51

Exhibit No. X-1050, December 9, 1892:

Outcalt	12,480.00	
Phillips	1,000.00	
Mosher & Outcalt	5,635.	
Mosher	29,659.53	
Total		48,774.53

I have with each one of these the amount as shown in the copies of the reports that are in the record, if it would be any help to you,—if you want them taken down.

Q. You may give us those for convenience.

A. Exhibit X-1039, total $10,600.00.

Mr. Rose: In the report?

A. In the report.

Exhibit No. X-1040, total in the report		31,790.00
1041, total in the report		14,677.
1042		41,091.83
1043		45,933.33
1044		41,100.00
1046		50,930.00
1047		12,642.09
1048		22,642.09
1049		41,961.31
1050		33,898.72

Q. I will ask you if you have examined Exhibit "D" attached to the depositions of Mr. Ayres and Mr. Biglow that were taken in New York, and purported to be a copy of the ledger of the Chemical National Bank of New York with the Capital National Bank at Lincoln for the month of December 1885 and January 1886, and if you have compared that with the account contained in the ledger of the Capital National Bank with the Chemical National Bank for that same period?

A. Yes sir, I have.

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987 Q. Now with reference in particular to an entry appearing on the books of the Capital National Bank, on its ledger, page 378, and also on the Journal, identified as Exhibit X-31, page 231, under date of Monday, December 28, 1885, there appears a charge to the Chemical National Bank for the sum of $20,300. Have you made an examination of the account of the Capital National Bank for that same period to ascertain if the books of the Chemical National Bank of New York correspond in that regard with the books of the Capital National Bank?

A. Yes sir, I have.

Q. What is the result of that examination?

A. I have examined the copy of the ledger account of the Chemical National Bank as it appears in the testimony, or the deposition,—the exhibit referred to, and I am unable to find that the Chemical National Bank has ever credited the Capital National Bank with that item of $20,300.00.

Q. Have you examined the ledger account of the Capital National Bank for that period to ascertain whether an apparent reconciliation had been made of that account?

A. Well I have examined the account, and what appears to be a memorandum of reconciliation, made by some one, as it appears in lead pencil on the ledger for December, 1885.

Q. And what does that indicate?

A. Opposite the item of $20,300.00 charged to the Chemical National Bank on December 28th, 1885 the word "out" is written in lead pencil, and after two other items, one on the 21st of September of $137.09 and one on the 28th of $125.00.

988 Q. Calling your attention to Exhibit X-1037 contained in ledger, Exhibit No. X-3, and being a charge to the United States National Bank of $20,000, with the indication "N. Y." I will ask you if you have examined the books of the bank to ascertain if any corresponding credit is made to any New York bank on that date?

A. Yes sir, I have.

Q. What are the facts?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

A. I am unable to find any corresponding credit on that date, to any New York bank.

Q. Or the day following?

A. Nothing on the day following.

Cross-examination.

By Mr. ROSE:

Q. Mr. Whitmore, in the account last mentioned, or in the account in which you found pencil notations with the word "out"

opposite the item of $20,300, when was that pencil notation made there?

A. I haven't any knowledge on that, it was there when I first examined the books.

Q. By whom was it made?

A. I don't know that.

Q. Was it made during the life of the bank?

A. I presume it was.

Q. What is your personal knowledge of that?

A. I have no personal knowledge except what I found all through the books.

989 Q. I just want to know what your personal knowledge is.

A. I find throughout the ledger,——

Q. But in this account here?

A. I have no personal knowledge except the fact that the word "out" is there.

Q. You couldn't verify the entry?

A. No sir.

Q. Now there is just as much evidence isn't there that somebody has been working throughout the balance books when these reports were made, as there is to think that somebody had been reconciling that account with the Chemical National Bank?

A. Well from what I know about the practice of banks with their correspondents, why the evidence all through that book in these accounts indicates that they attempted to make a reconciliation of them every month; I wouldn't say every month, but there are entries there when they made them; of course they may have taken two or three months at a time, and did the work on it at one time. They might not have reconciled each account the first week of the following month, and they might have accumulated.

Q. That is correct as far as that is concerned. I wasn't criticising you. You do know also that in making out a report, assuming that the balance book entries corresponding to the date of the call are in the ma-n the basis of the report, you know from the way this bank kept its books that there would have to be some reclassification, or some change in the deposit account in order to bring the deposit account up to where it should be and also to show the overdrafts, don't you?

A. Yes sir.

Q. And a reconciliation of the changes would naturally be made in compiling the report?

990 A. There would be some figures added at the bottom of the totals of the deposits; that is, the overdrafts would be added.

Q. And you find evidence that somebody at the dates of these reports has noted in pencil there, changes made from the balance book?

A. I find those figures there.

Q. Corresponding with every day when a report appears to have been compiled?

A. Yes sir, I think they are there at the bottom of the page, as I testified the other evening.

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Q. Now if an item had been charged,—suppose an item had been charged to New York, whether it is regular or not to charge the item up to New York at the time of remittance, it is sometimes done by correspondent banks, on the presumption that the rediscounts would be accepted?

A. Remittances are charged on the day that they're sent; remittances that are sent from a bank are charged upon the day that they're sent, because the items go out of the bank and are mailed, and naturally they want something on the books to show for it.

Q. And the same course, whether it is strictly accurate or not, is in practice sometimes pursued in rediscount paper, when it is forwarded?

A. Yes, sir, sometimes they charge up the rediscounts at the time they send the paper out.

Q. My own understanding is that they are not entitled to charge it until they get an acceptance of it; it sometimes happens that the correspondent bank refuses to rediscount the paper, doesn't it?

A. Yes sir, sometimes.

Q. Now suppose that notes aggregating $20,300., had been sent and charged in that way to the Capital National Bank, and that the rediscounts had not been accepted but had been returned and
991 assuming that the aggregate of the rediscount items had been charged on the date of forwarding, would it be possible then to reconcile the accounts of the two banks, the one with the other as to that item?

A. Why if it was refused, it would be credited back by the home bank.

Q. It was credited back in this case, wasn't it?

A. I have not been able to find it as credited back.

Q. The balance finally reconciled in the course of time?

A. I don't know how the account stood at the time the bank closed.

Q. There had to be a corresponding credit to make the account balance?

A. I don't know what the condition of the bank's books was at the time they closed.

Q. How long after the date of this entry did you follow the books of the Capital National Bank,—well what was the corresponding credit, if any?

A. I didn't find any.

Q. You don't mean to say that from 1885 to the failure of the bank the books never reconciled as to balances?

A. I don't know what they did.

Q. You haven't traced it out?

A. No I couldn't; all of the journals are not here, but I looked through the ledger accounts of the Capital National Bank with the Chemical National for two or three months after that time and found nothing to correspond with that entry.

Q. Now I want to ask you in respect to the certificates of deposit that you found where upon the certificate register there seems to have been a notation "paid", and for which claims were, you say, ulti-

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mately allowed by the receiver aggregating $15,954.35. Where did you ascertain about the allowance of those items by the receiver?

992 A. Why I think Mr. Rose, you are mistaken as to my testimony. Did I testify that receiver's certificates were issued for certain items?

Q. You said there were certificates outstanding, and marked paid on the books,—but the certificates were outstanding,—you said that there were certificates outstanding, and I am not sure but you gave a list of them in the early part of your testimony, which had been marked paid on the books, aggregating $15,954.35. My recollection is that you said Receiver's certificates were issued for them upon the surrender of the certificates, after the failure of the bank.

A. You are mistaken as to that, Mr. Rose. Those amounts were $15,231.58.

Q. I have it $15,954.35.

A. I think I remember now what it was.

Q. Have you got such a list as that?

A. Yes sir, I have a list of that.

Q. I don't care particularly only to identify the items. You recall the schedule now, do you?

A. Yes sir. I was confused with the proof I made of the overdrafts in the certificate account.

Q. Well now, where did you ascertain, or obtain the proof of the receiver's allowance of those?

A. I examined the receiver's record of receiver's certificates that were issued.

Q. Is that book here—has that book been identified here upon this trial?

A. No, I think not.

Q. Not been produced here at all has it?

A. No, it is the books of account kept by the receiver of the Capital National Bank; they open up a set of books themselves.

993 Q. But it is the source of inquiry from which you ascertained that evidence, and it has not been presented here in court so we could have any opportunity to check it over?

A. I think not; I think the certificates themselves are all of them here in evidence.

Q. Probably they are.

A. I have examined all of those certificates, and none of them are stamped as paid.

Q. As long as those certificates were outstanding how could you check against them?

A. There is no way, Mr. Rose, to determine the amount of a certificate of deposit while it is outstanding except by an inspection of the certificate itself.

Q. Now what significance do you attach to the mere fact that the certificate register had a notation of payment in these cases?

A. Because that indicated if the certificates were marked paid and were actually outstanding at that time, that there was a falsification of the books of the bank on that register?

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Q. Are there daily footings of the register,—is that strictly speaking a book of account, the register?

A. That is a book of account.

Q. You are prepared to say that is a book of account?

A. Yes, sir, that is the book of original entry, really, of the certificates.

Q. Well now, Mr. Whitmore, did you check that register with the ledger account?

A. No, sir—I have checked it some.

Q. Do you know whether at the time of payment there is a corresponding debit to the certificate of deposit account on account of that very certificate?

994 A. No, I don't know; I could tell if a certificate of that amount was charged up as paid on that day.

Q. But you haven't even checked that, have you?

A. No, sir.

Q. But of course you have noted in many cases where the certificate stub, or the reguster showed a small amount in comparison with the face of the certificate. But the deposit account of certificates was actually credited with the correct amount as shown on the face of the certificate?

A. In some cases it was and in some cases it wasn't.

Q. Well it was in a number of cases?

A. Yes, sir; I have a list of them here; they are all shown here.

Q. So in order to determine whether that entry on the register in fact affected the general accounts of the bank, the general ledger accounts, you would have to check up the certificate of deposit ledger and ascertain by some means *hw*ether there was a withdrawal of any funds on account of the entry in the register wouldn't you?

A. Oh, if you wanted to check up any particular certificate, you would, yes, sir.

Q. And you would have to do that with each certificate?

A. Yes, if you wanted to check the account through.

Q. Now you testified in respect to certificate of deposit No. 25097, in which the stub and register entries both agreed at $50.

A. The stub was $50.00 and the register was $50., yes, sir.

Q. What was the corresponding entry, if you have been able to trace it, in the deposit ledger account?

A. Fifty dollars, when it was issued.

Q. You traced that, did you? The deposit ledger showed an increase of that account, $50.00?

A. Yes, sir.

995 Q. Now the import of those entries, so far as the books showed at that time, while the certificate was outstanding, was that fifty dollars had been deposited upon a certificate of deposit?

A. Yes, sir.

Q. While that certificate was outstanding, what way would there be of checking the integrity of the item?

A. There would be no way except to call in the certificates of course.

POOR

Q. You understand that a certificate is negotiable, and you might be able to call it in and you might not?

A. Yes, sir.

Q. Certificates No. 21379 and 25097 were each for $50,000 were they not?

A. Yes, sir.

Q. Now isn't it a fact that when they were actually surrendered that they were merged into, or a new certificate of deposit was issued for $100,000?

A. I could tell if I had the certificate register here.

Q. I will pass that for the present; it will take you sometime to look it up. Now have you given testimony as to the aggregate which the certificates of deposit produced here and which came into the hands of the receiver after the failure of the bank, overran the deposit account?

A. No, sir.

Q. Did you ever check that up?

A. I think I checked it up eight years ago, with the receivers books and the certificates. I think there is a list of those certificates that I checked over and compared the certificate with that list.

Q. Of course what you said in respect to this $50.00 item while the certificate was out would apply to those items. While the certificates themselves were out, there would be no way of telling that the outstanding certificates in face over-ran the sum of $86,000 and upwards which the books showed were out, by a sum approximating half a million dollars,—that couldn't be checked, with the certificates themselves out?

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A. The amount of certificates actually outstanding could not be determined from the books of the bank,——

Q. But of course when they came in you would have an absolute check upon them?

A. As these books were kept.

Q. Or as any books are kept, if a false amount is credited to the deposit account, and that false amount carried through the register and stub, and every other record, there is no system of books then that would disclose that until the certificate itself came in?

A. No, sir, in such a case as you state it couldn't be determined without an inspection of the certificate.

Q. That is, where you have a criminal in the bank who will take in money on a certificate of deposit and make a false entry in the book to hide the fact that he has negotiated it for a large sum of money, there is no way of checking that until you can get the item home?

A. As to one entry made in that way, Mr. Rose, so long as that certificate was out there is no way of determining that a certificate is out for a greater sum than the books show.

Q. Of course where the members of the Board of directors I suppose, who are not active managers of the bank get knowledge that one of the officers, or have their suspicions aroused that one of the officers had done a thing of that kind, they probably could employ an accountant and undertake to check and audit all the books, but

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was the use of a public accountant in vogue, that is in private business generally in this country until within twenty years past?

997 Mr. THOMAS: Plaintiffs object as not proper cross-examination.

Objection overruled.

Plaintiffs except.

A. I don't know Mr. Rose, how long there have been public accountants in use in this territory,—in Nebraska, in private business, I mean.

Q. But the audit companies in actual practice were not employed like they are now here twenty years ago?

Mr. THOMAS: Plaintiffs object as not proper cross-examination.

(Question withdrawn.)

Q. Now your schedule of dividends. Did you assist,—or were you assisted in that by any reference to the record book of the bank?

A. I think that I referred to the record book of the bank also, eight years ago in checking it over.

Q. And checked it down so as to show that there was action taken by the board of directors declaring so much dividend and then you multiplied that—first, is there a dividend account?

A. Yes, sir, there is a dividend account in the bank.

Q. Did the dividend account agree with the minute book,—with the action taken by the directors, so far as you recall?

A. As to that I don't know. I think I went through the minute book not for the purpose of getting at the amount of dividend, or anything of that kind, but I read the minute book through to see when dividends were declared or ordered, but as to comparing the amounts, I didn't care anything about how much the directors had ordered to be paid; it was a question of how much the books showed.

Q. You would want to know, too, whether the dividend was authorized,—you did in fact do that, didn't you?

A. I think in certain cases I looked through just simply to satisfy myself whether there was action of the board in regard to that.

998 Q. I want to know if you found in the minute book of the meetings there, giving the proceedings of the board of directors at a time dividends were declared anything importing notice to any of the directors who were not the managing officers of the bank that any dividends were declared out of the capital of the bank, or out of any other source than net profits?

Mr. THOMAS: Plaintiffs object as not proper cross-examination.

Objection overruled.

Each of the plaintiffs excepts.

A. I don't recall that I examined the minute book with reference to that, and I don't recall anything now that would indicate anything of that kind.

(Adjournment until Thursday, February 9th, 1911, at *p* a. m.)

999 THURSDAY MORNING, Feb. 9th, 1911.

The WITNESS: Referring to the schedule of Director's paper in the bank I find that two notes of D. E. Thompson, that one July 9th, 1891 and the one on September 25th, 1891 that I had included, I find on looking at the leuger account that Mr. Thompson's paper had been take out. I have taken that out of the schedule now.

Exhibit "AF" identified.

Q. Now in the schedule that you have prepared, and which I have had identified as Exhibit "af" you included during that whole period the indebtedness of Outcalt?

A. Yes, sir?

Q. You haven't checked up yet to see whether he was a director?

A. No.

Q. Did you look up to see whether he had ever qualified at any time as a director?

A. No, I haven't examined the record, Mr. Rose, on that point at all.

Q. Now the item in this schedule in red ink, under the heading "Report" is taken from a schedule on the back of the official report?

A. Yes, sir.

Q. And of course is not part of the published report?

A. No.

Q. The schedule in the report showed directors loans in excess of all the loans of directors other than Mosher and Outcalt, at all times, didn't it. If you exclude the loans which the books showed were outstanding to Mosher and Outcalt at the period of any report then the total of the loans scheduled on the back of the report would exceed in every instance those of all the other directors?

A. No.

Q. Show me one.

1000 A. The first one,—Mr. Outcalt has $1,500. Deduct that from $13,600 and you have $12,114.50, and the report says $10,600.

Q. I said the managing officers, Mosher and Outcalt.

A. Oh, yes, that's true.

Q. There was no period when any one of these defendants here, Yates, Hamer or Thompson attested any of these reports that they had personal loans which would import to them knowledge that the loans on the schedule was not stated correctly?

A. I don't know whether I know all of the reports that these three defendants attested.

Q. That would be true of all of the reports that are here.

A. I have not examined the records to see whether these three defendants attested any of these reports at the same time. I could look it up.

Mr. ROSE: I offer in evidence Exhibit "AF" as a part of the cross-examination of the witness.

Exhibit "AF" received in evidence (Copy on next page).

COPY

EXHIBIT "AF."

Directors' Paper at Time of Report.

	12/28-86	8/1-87	10/5-87	12/12-88	9/30-89	12/11-89
Outcalt	1,500.00	1,354.03	3,937.36	12,410.00	.....	.....
Phillips	2,850.00	1,320.00	2,500.00	3,952.	.....	.....
M. & O.	.....	.....	.....	.....	.....	.....
D. E. T.	.....	.....	6,000.00	2,500.	5,100.00	2,000.00
W. W. H.	3,300.	4,000.	4,000.	15,000.	17,000.	16,500.
C. E. Y.	.....	.....	.....	.....	.....	.....
C. W. Mosher	5,964.50	30,977.96	20,313.12	28,464.53	48,311.20	48,311.20
	13,614.50	37,651.99	36,750.48	62,325.53	70,411.20	66,811.20
Report	10,600.	31,790.00	14,677.00	47,091.83	45,933.33	41,100.00

	12/19-90	7/9-91	9/25-91	12/2-91	12/9-92
Outcalt	8,630.	20,700.	21,418.	21,418.	12,480.
Phillips	.....	5,642.09	8,206.68	3,564.59	1,000.
M. & O.	3,138.72	5,218.72	5,218.72	5,218.72	5,635.
D. E. T.	5,000.00	.....	.....	.....	.....
W. H. W.	.....	.....	.....	.....	.....
C. E. Yates	.....	.....	.....	.....	.....
C. W. Mosher	60,211.20	19,711.20	29,711.20	29,711.20	29,659.53
	76,979.92	51,272.01	64,554.60	59,912.51	48,774.53
Report	50,930.00	12,642.09	22,642.09	41,961.31	33,898.72

THIS PAGE BOUND VERTICAL IN BOOK
POOR

1002 Q. Neither Yates, nor Hamer had any loan at the bank at the time of any of these reports,—that is what your schedule shows as I understand it.

A. I think that is true.

Q. And the highest loan that Mr. Thompson had at any report period was $5,000?

A. $6,000 it was.

Q. Was there any ledger balance kept from day to day showing the footings of the paper of the Western Manufacturing Company carried in the bank?

A. No, sir.

Q. To ascertain the amount of that paper carried at any particular day, it was necessary for you to check over the bills receivable register and tabulate it and make up a ledger account giving the daily balance?

A. That is what I had to do. I will qualify my first answer Mr. Rose; I didn't appreciate the scope of it exactly. I will say that I found no book which contained the daily balance of any borrower. Now whether this bank kept what is called a loan register, or loan ledger I don't know. Most large banks keep what they call a loan ledger, which is really a ledger account, such as I made up here of these different borrowers.

Q. But you found no record of that kind?

A. At the time I examined the books of the Capital National Bank I found no such book.

Q. You found no trace of such a book having been in existence, and no reference to any such a ledger?

A. They wouldn't refer to the page. It is simply a book which is kept for the convenience of the officers of the bank, to know how much certain borrowers have at any time.

Q. And so far as you know no such record was kept by this bank?

1003 A. So far as I know no such record was kept by this bank.

Q. Now any notes of this character that were presented as a liability of the bank by holders after the bank failed would have to be ascertained,—that is their existence would have to be ascertained by reference to some source independent of the books of the bank, wouldn't it?

A. Well the existence of a note which was not upon the discount register of the bank, and which they had endorsed and become liable upon as a rediscount, or in any other way, of course would have to be shown by the note itself, but the liability of the bank upon that note would be evidenced——

Q. But what I am getting at is, that fact couldn't be ascertained by an examination of the books so long as the note itself was outstanding, that is what I am getting at. You referred to some of those notes being in existence, and I wanted to know what opportunity there would be for discovering those from an examination of the books, while the note itself was outstanding.

A. There is no way of discovering any rediscounts which have not passed through the discount register of the bank.

COPY

Q. Now from December 24th, 1889 to December 24th or 28th, 1892, whichever the date was, did you find a general balance book in balance?

A. I think so. I don't think I footed it on every day for that length of time.

Q. So far as your examinations have extended you found it in balance, unless there was a variance of a trivial sum?

A. Yes sir, but I don't recall any variance in the footings put down. Of course I didn't foot the general balance book every day during that time.

Q. Then the error in the footing of the deposit ledger, that proceeded during that entire period was not shown in the ledger balances that had been transferred to the general balance book?

1004 A. Well in the matter of the deposits the ledger balances are not transferred only as the total of the three books that they had. You see they had an individual book from "A" to "K", and that was numbered "1"; No. 2 was from "K" to "Z", and then a third book in which was kept the accounts with their country banks. Now the totals of those three books were added together, and from the aggregate was deducted the amount of all the overdrafts on the three deposit ledgers and that result was then entered upon the general balance book as the net amount of deposits for which the bank was liable.

Q. But entered in such form as to preserve the balances in the general balance book?

A. Well it was entered as correct I think in all cases except one,—that is the correct amount taking the computation—the figures that they had on these three books.

Q. Yes, but it was that footing in the deposit ledger that was erroneous?

A. They used an erroneous footing in making up the net amount of deposits.

Q. Of course the deduction of the overdrafts from the total footing would not tend to disturb the balances in any way?

A. No sir.

Q. It would simply reduce both the resources and liabilities in the amount represented by the overdrafts.

A. Yes, sir.

Q. And that would preserve the balances as the items went over into the general balance book.

A. Yes, sir.

Q. Now,—there are a number of leaves or sheets, of course in these balance books?

A. Yes, sir.

Q. And this persistent error in footing, while it continued

1005 every day, it wasn't in the same form, or on the same leaf every day?

A. No.

Q. Some days in footing the leaf where the $100,000 item was dropped,—the footing of that particular leaf would be false.

A. Sometimes the footing of that——

Q. That is, if there had been an item of $100,000 on the page it would be simply dropped in the footing and not reflected in the footing of the page,—is that correct?

A. No. There were no deposits after that time, as I recall, of $100,000 on any one day. What they did was simply to drop at $100,000 in the footing of that particular column.

Q. Then another day the column would be correctly footed and the $100,000 would be dropped in transferring the footing of that leaf to the next succeeding leaf?

A. Yes, sir.

Q. And it would be transposed,—the dropping of the $100,000 would be done sometimes in one leaf and sometimes in another?

A. Yes, sir.

Q. But the figures which reflected the total balances of the particular deposit ledger for each day would, with the explanation you have made of the footing being changed, by taking the difference between the footings of overdrafts and deposits, would be the ones that were correctly carried over to the general balance book?

A. Yes sir, except in one instance. I discovered that on July 9th, 1891 there is a discrepancy of $1.54. I don't know how it arose, but taking the deposits on the balance books and making a computation they have $1.54 more in their ned deposits than they should have.

1006 Q. Evidently had not been checked back.

A. I don't know how it comes, but it's there. I have not gone through to see where the mistake occurred.

Q. That is such a mistake as would not be uncommon, except that it might be uncommon in that it hadn't been checked out and finally corrected.

A. Yes, sir.

Q. That deposit ledger is the most voluminous account in the bank,—that is it is checked and balanced every day, isn't it?

A. Yes sir.

Q. And do you attach any significance to the fact that the dropping of the $100,000 is shifted from one place to another in that ledger, and that the system by which it is done is changed from one day to another during all that period?

A. Well I think the explanation would be that they desired to conceal it as much as possible, that is, to avoid discovery.

Q. Now what significance do you attach to the fact that when on December, 1892, the correct balance or footings of the individual deposit accounts were restored, that notes of Mosher and Outcalt appear to have entered the bank, without anyone taking credit for them?

A. Well I——

Q. I speak of the notes,—I treated them all as notes, because in the instance of the notes that were credited to Mosher and Outcalt the balance of that credit seems to have been appropriated by their joint check.

A. It seems to me that those entries you speak of were made for

COPY

the purpose of enabling the deposit ledger and the General balance book to be made to agree.

Q. And the fact that the two managing officers of the bank
1007 assumed personal liability for the whole discrepancy of $100,000 would furnish some indication that they probably received originally the fruits of the falsification, or they wouldn't have assumed the liability,—was that your inference?

A. One would naturally assume that they were the persons who knew about it, and were responsible for the discrepancy in the first place.

Q. And that is the real significance of the appearance of their paper in that form for $100,000 in December, 1892?

A. I think so. Of course it would not follow, Mr. Rose, that they had taken out $100,000 of money. They may have used it to conceal losses in different ways that were apparently existing in the bank at that time, and they may have gotten the money, and someone else may have gotten the money.

Q. They may have had a Prison contract, or a state treasurer to elect, or something of that kind.

A. They may have had a Western Manufacturing company to float.

Q. But their responsibility seems to be indicated; that is all you claim for it; their responsibility for the discrepancy seems to be indicated by the fact that they became personally liable for the whole amount?

A. Well they seem to have known all about it, and one would infer that they were, or thought they were responsible at least.

Q. Referring now to certificate of deposit No. 24452 for $100,250. The face of that certificate was charged to the certificate of deposit account, was it, April 28th, 1891?

A. Credited I think, Mr. Rose.

Q. I thought they called a withdrawal,——

A. When they issue a certificate they credit. It is the same as a deposit.

1008 Q. It was paid, as I understand, April 28th, 1892, and therefore charged as a withdrawal?

A. It was issued April 25th, 1891.

Q. And marked paid April 28th, 1891?

A. On the register, yes sir.

Q. And what was the entry—I understood it was on the ledger too,—that is, there was a charged to the certificates of deposit on the ledger of April 28th, 1891, wasn't there?

A. I think not, not for that amount.

Q. Well when was certificate No. 24473 issued?

A. Yes sir, that is right, Mr. Rose,—April 28th, 1891, for that amount.

Q. That amount was charged to the certificate of deposit account?

A. Yes, sir.

Q. And a new certificate then issued to C. W. Mosher for $75,000?

A. That is true, Mr. Rose.

POOR

Q. Now those two entries read together then, without reference to other entries would import that $25,000 in cash was withdrawn on account of that certificate from the funds of the bank, or from the deposit funds of the bank?

A. Well it would indicate that that certificate for that amount was paid.

Q. $75,000 of it was left still on deposit however, evidenced by the new certificate?

A. A certificate for $100,250 was paid on that day and a certificate for $75,000 was issued.

Q. Well you construed those two entries together, as I understood you?

A. Yes, sir.

1009 Q. Now the new certificate would account for the disposition of $75,000 of the funds withdrawn wouldn't it?

A. Yes sir, if it was issued to the same person, or if it was in connection with the $100,250 certificate.

Q. Your inference was, if I understood you correctly, that the two items were related.

A. I thought so.

Q. Now that would leave of the cash paid out $25,250 unaccounted for, would it not?

A. Yes, sir.

Q. Then the two credits of $10,000 to C. W. Mosher's personal account and of $15,000 to Prison Contract would lack $250 of accounting for the discrepancy between the face of those certificates?

A. Yes, sir.

Q. Have you accounted for any entry for that $250?

A. No sir.

Q. The book entries apart from the credit items that you have referred to would simply import that $25,250 had been withdrawn from the deposit account of the bank?

A. Yes, sir.

Q. You couldn't absolutely verify the conclusion that the proceeds of that certificate not accounted for by the $75,000 item were the two items of Prison Contract and the deposit to Mosher, could you?

A. No sir.

Q. Those things we work out by inference, and by tracing what would be the natural conclusion of all of the related entries?

A. Yes, sir.

Q. And they are subject to be altered or changed by collateral inquiry in any case as to the integrity of any one of the items which you have had in connection with them.

A. Yes sir.

1010 Q. You have had no opportunity to follow out any collateral inquiry in this case as to whether the Prison Contract credit of $15,000 was really a bona fide credit?

A. No sir.

Q. Now omitting some of the intervening items in that particular schedule, you have undertaken to follow out some transac-

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tions until the $100,250 seems to be entirely consumed. April 30th, was the period when one of the certificates of that series was surrendered and a new certificate issued, wasn't it?

A. Yes sir.

Q. And the new certificate on that day was for $62,500?

A. Yes, sir.

Q. And the $75,000 certificate,—the item of $75,000 was charged against the certificate of deposit account that day?

A. Yes, sir.

Q. So that you infer that $12,500 was withdrawn on account of that transaction?

A. Yes, sir.

Q. Now in connection with that entry you mentioned that Mosher and Outcalt, the same day, took credit for $2500, and that R. C. Outcalt's account as treasurer took credit for $10,000.

A. Yes, sir.

Q. Those two items would represent the exact amount of the difference between the old and the new certificates?

A. Yes sir.

Q. Now have you made any collateral inquiry to check out the integrity of the credit item to R. C. Outcalt, treasurer?

A. No, sir.

Q. Do you know whether that was his personal account or not?

A. It was R. C. Outcalt, treasurer.

Q. That was the account of the Lincoln Gas Company, so understood?

1011 A. I don't know whether it was or not; I have heard it stated so.

Q. The title of the account imports that it wasn't a personal account?

A. Yes, sir.

Q. Do you know whether or not the Gas Company on that day made a bona fide deposit of that sum?

A. I do not.

Q. And you have had no means of running that out, or checking it so as to ascertain with any definiteness whether the credit to Outcalt, treasurer was a bona fide credit or not?

A. I have no way of determining it, I have not seen the pass books of the gas company that was in use at that time; if I had that I could probably determine it.

Q. And you haven't seen the journal or the ledgers of the gas company kept at that time by Mr. J. K. Honeywell?

A. No sir, I have not seen the ledgers or journals of the gas company.

Q. And you have had no opportunity to make an effort to reconcile the two accounts?

A. No sir.

Q. Or to see whether their journal reflected any transaction that would place $10,000 to their credit on that date in the Capital National Bank?

A. I have not.

Q. Now the last payment which would cover the balance of that certificate was charged to the certificate of deposit account as $24,-570.00 wasn't it?

A. No sir.

Q. What was it?

A. $12,500,—well the last item was the payment of the certificate for $7,500, for which there is no corresponding entry.

1012 Q. You couldn't find any counter balancing entry for that?

A. No sir.

Q. So that the last payment imports merely the paying of so much cash?

A. Simply imports the payment of the certificate in some way.

Q. Now referring to the Donnell, Lawson & Simpson notes. There were entries soom after the organization of the Capital National Bank mentioned in your schedule, which purported to take that item of assets out of the bank entirely?

A. At the organization?

Q. After the organization,—(former question repeated).

A. Yes sir, there were entries which charged the amount up to, or a part of the amount to other banks, and they were disposed of

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in various ways. In May, 1894 the Chemical National Bank was charged with $10,000. May 26th, the Commercial National Bank was charged with $10,000. May 27th the account of Donnell, Lawson & Simpson was credited to balance the account $8,174.70, but that didn't actually balance the account at that time; there were some entries made apparently of drafts that had been returned, and remittances that had been charged,—diverted after the failure of Donnell, Lawson & Simpson, that were made after this entry of $8174.70, but that seems to be taken in connection with these others,—it seemed to balance the account.

Q. And the import of that entry, if it stood alone would be to show the payment of that balance of Donnell, Lawson & Simpson?

A. Yes sir, in some way.

Q. That was in 1884?

A. Yes, sir.

Q. And the name of the Marsh National Bank was
1013 changed to the Capital National Bank in May, 1884?

A. I think they made the change on the books June 1st.

Q. But that reorganization was in process in that very month of May?

A. Well the Act of Congress was passed sometime about that time, authorizing them to change the name from Marsh National to the Capital National. I don't understand that there was any reorganization.

Q. Well there was a reorganization in this sense, that the concern was localized by increasing the stock and taking in local citizens?

A. Well they increased the capital, that is, the capital of the Capital National Bank, that is when the name was changed on June

COPY

1st was $100,000, and that increase was put in as an asset due from stockholders, $100,000, and some premium.

Q. Well call that a change, whether it is technically so or not; that is what I refer to. Now the Marsh notes disappeared to-, didn't they as assets?

A. No sir.

Q. Not at any time?

A. I don't think they did.

Q. There were large credits made on account of thos- notes weren't there?

A. There were debit and credit entries made in regard to those notes, but I don't think there was a time from the organization of the Marsh National Bank down to the close of the Capital National Bank that the Marsh paper was not in the bank to a greater or less extent.

Q. Well now you take the notes of F. S. Johnson & Company, The First National Bank of Kearney, and the First National Bank of Hastings, the book entries import that the Capital National Bank had those particular assets, did they?

1014 A. Yes sir, entries were made on the discount register that indicated that notes of those particular institutions and individuals were carried.

Q. And if you had examined the books you would have found entries indicating that those were assets of the bank?

A. Yes, sir.

Q. What do you figure was the counter balancing entry to that. What did you conclude was the counter balancing entry to that?

A. At the time those notes went in?

Q. Yes, sir.

A. At the time those notes went in Bills of Exchange were credited on the 20th of July, with $19,968.00, and on the 29th of July Bills of Exchange were credited with $10,000, which made $29,968, which was the amount of those three notes.

Q. Now that imported that those Bills of Exchange had been converted into cash or some other form of asset?

A. Yes sir, it imported that they had been in some way taken out of the account.

Q. Now in finally reconciling the accounts and testing out the integrity of these items recourse would have to be had to the records of the other banks, wouldn't it?

A. Not, necessarily, no sir.

Q. That is one source of inquiry isn't it?

A. It would be if those notes were marked paid on the books of the Capital National Bank.

Q. Or it might be necessary also, if the books purported to have disposed of them as a rediscount somewhere?

A. Yes sir, if the books had shown that they were disposed of as rediscounts.

Q. At any time when the notes were not actually in the bank's possession it would be necessary to have recourse to some outside information to check the integrity of the items?

1015 A. Yes, sir.

Q. And where items were charged to the Chemical National Bank, if they were connected with any of those assets which you have now concluded were losses prior to the change of the name of the Capital National Bank, you would have to reconcile the books of that bank and test out the correctness of the books of account of both banks?

A. Not necessarily, no.

Q. That would be the usual way of doing it?

A. No, the Chemical National Bank furnished the Capital National Bank each month with a statement of account; the Capital National Bank was drawing drafts on the Chemical National, it was a reserve agent; at the end of each month the Chemical National Bank would make up its account with the Capital National Bank and would send to the Capital National Bank all of these cancelled vouchers that had been received up to that time. Now each day the Chemical National Bank sends a letter, or whenever it is necessary, sends a letter to the Capital National Bank, advising them of the receipt of remittances to the credit of the items as they are received, or as they are credited. For instance, the Capital National Bank sends a letter of remittance to the Chemical National Bank today and encloses a number of items of various kinds; those are listed in the letter. The Chemical National receives that letter with those items of remittance; it checks them over; those that it accepts it credits to the account of the Capital National Bank on its books, and those it refuses it may return with a letter of advice to that effect, or if there are some items that they do not treat as cash items, but give credit upon presentation and payment, they will hold them until they are collected and then give credit, but it always advises the Capital National Bank of its action on all those matters. Now all these letters are in the hand
1016 of the Capital National Bank, together with the statements, at the first of the month.

Q. But that correspondence passes, of course, immediately between the executive officers of the two banks, whoever has charge of it at the Capital National, as executive officer, or remittance clerk.

A. Well the communications pass between the banks as banks; they may be handled by different individuals.

Q. But the business of the bank of course is done by certain officers, who are active in the management?

A. Usually the mail of a bank goes to one individual, in a large bank, who opens it and who distributes it, unless—that is he opens all of it, unless they have specially addressed envelopes which have been sent to correspondents, and which are used for a particular purpose, and then those envelopes with the enclosures go to the particular officers who have charge of that department, after being opened by the cashier, or by some assistant cashier, or the person who is charged with the duty of examining the mail.

Q. Now then in this particular case, you in fact have examined what purports to be exhibits of the ledgers of both the Chemical National Bank and the Capital National Bank?

COPY

A. For certain months, yes sir.

Q. And you have had the benefit of depositions taken in these cases made by officers of the First National Bank of Hastings, and the First National Bank of Kearney?

A. No sir.

Q. Depositions of witnesses?

A. Mr. Clark was a witness here from the First National of Hastings, and I think there has been no witness or deposition from the First National of Kearney.

Q. But you have had the benefit of some outside information?

1017 Q. (continued). Information outside of the books to aid and reinforce your conclusions in those cases?

A. No sir, I have not based anything upon anything outside except the copies of the books of the Chemical National Bank that are in evidence here. I don't think they refer to this particular transaction. If you are speaking of these three notes I have not based anything upon the information or testimony of any witnesses. I have examined the ledger of the First National Bank of Kearney for this period.

Q. You have?

A. Yes, sir.

Q. And of course an examination of this character it is really very important to follow any collateral lead that would lead to a verification or exposure of any particular item by rather definite and conclusive proof?

A. Oh I would want to pursue all of the avenues of information, of course. If I could have had access to the correspondence of the Capital National Bank why I could have verified, probably, every one of these definitely, and if I had the remittance register of the Capital National Bank I could verify a great many of these charges that were made against these other banks.

Q. That remittance ledger was left there, as I understand it, wasn't it?

A. I never saw the remittance register of the Capital National Bank; of course that remittance register is supposed to have upon it every item of remittance that is made by the bank to its correspondents; I couldn't find that register; when I looked in 1902 I couldn't find the remittance register, and the same is true of that account called the Bills of Exchange.

1018 Q. Now when you were called in here to make this examination you found a rather complete examination had been made by or under Mr. Jones' direction before you were called in, didn't you?

A. I don't know how much of an examination had been made by Mr. Jones, or under his direction.

Q. But primarily you were called to check over items that he had discovered, and to give your own conclusions of those?

A. Well he knew about a good many matters that he had called to me attention at that time. Now how he acquired his information I am not advised.

POOR

Q. Of course you got the benefit of his knowledge?

A. No, I got the benefit of what he told me; whether he told me all he knew or not, I don't know of course.

Q. Well I mean his knowledge of those things.

A. Yes, sir.

Q. And you had that lead to start on?

A. Yes, sir.

Q. So you didn't have to take books and go through them without your suspicions aroused, or without being directed to any item?

A. He found a good many of these things, yes sir.

Q. Now you have spent a good deal of time over these books haven't you?

A. Oh I have worked on the books at different times quite a good deal.

Q. You have *septn* some weeks or some months on them?

A. Well I gave it on the other trial,—I think I put in all together during the trial and before that time what I called about thirty days.

Q. And how long this trial?

A. And during this trial, I have worked here, let's see—counting this week I think about 12 days,—that is, what I have been charging Mr. Jones for.

1019–1022 Q. You haven't charged him extra for night work and the like of that?

A. No.

Q. Now it would take three or four days to make up a ledger account of the Western Manufacturing Company's paper, wouldn't it?

A. Well the ledger account of the Western Manufacturing Company paper I made at the time of the other trial, and I rechecked it and had it copied.

Q. Well it took three or four days originally to make that?

A. Well it took sometime to go through the discount register as I had to in order to get the notes, but I did it in connection with other work; as I went through the registers why I would list the Western Manufacturing Company paper and other paper.

Q. But that was a big job in itself?

A. Oh, it is in the manner in which the books are kept.

Q. Bookkeeping is somewhat of a science,—something of an attainment in and of itself?

A. Yes sir.

Q. Auditing is a profession?

A. It is.

Mr. Rose: I think that is all.

* * * * * * *

1023 Q. Now, Mr. Whitmore, speaking of the footings while the books were out of balance. The question was asked you if these changes in the footings were shifted around from day to day. Now is it not true that in a great many cases the error remained in the same place for months at a time?

A. Oh, they would for quite a number of days, the change would be made in the same place, and on the same page, it would be just succeeding columns; the footing would be just $100,000 less than it should be at the bottom of the page; that might run along for some time, and then they would shift that to some other page, or would enter the correct footing at the bottom of the page and carry the total forward to the next page at $100,000 less than it should be.

Q. And in referring to certificate of deposit No. 24452 for $100,250 you were asked in regard to the entry of the day that that was marked paid, I think it was April 28th, 1891, in which it appeared that the entries that you accounted for were only $100,000, and lacked $250., of accounting for that certificate. Now at the time that certificate appears to have been issued for $100,250., did you testify that the books indicated a certificate of $100,000 as having been paid at that time?

A. I think there were two certificates,—no, one for $100,000 indicated on the books as having been paid.

Q. Isn't that difference of 250 on that date,—isn't that accounted for on the day that the certificate for $100,250 is cancelled and marked paid?

A. I don't know whether it is or not. They might have received $250 in money when that was issued.

Q. That is, it might indicate that there was paid into the bank $250 when it was issued and they deducted $250 when it was paid?

1024 Q. So it practically balanced.

A. Yes sir. Of course I don't know what the actual cash in the bank was; I haven't had access to the teller's cash book.

Q. Now, Mr. Whitmore, I think there was something asked about—in a part of your examination several days ago—if you had attempted to reconcile any of these reports with the statements, or the balance books with the published reports. If you had made any effort to ascertain how those published reports were made up?

A. Such a question was asked me.

Q. Did you last night take any of the reports and try to figure out how they arrived at the published statement from the figures as shown by the balance book?

A. Yes sir, I made some attempt to reconcile, as they call it, what Mr. Rose would please to call a reconciliation,—I don't call it a reconciliation.

Q. What report did you take?

A. I took the report of July 9th, 1891.

Q. Have you made a sort of a schedule of that?

A. Yes, sir.

Q. And is that your theory of how that was made up?

A. Yes, sir.

The COURT: This was the particular schedule that Mr. Thompson signed, was it not?

A. Yes sir.

Q. Have that schedule identified by the reporter.

(Schedule so identified, as Exhibit "AG.")

Q. Is Exhibit "AG" the schedule in which you have attempted to reconcile or figure out how the purported published report of July 9th, 1891 was made up from the books?

A. Yes, sir.

Q. Explain that schedule, Mr. Whitmore, and show by what process you have reached the conclusion you have?

1025 A. Sheet No. 1, is intended to show the assets at the close of business July 9th, 1891; the first column shows the figures and is headed General Balance book figures; it gives the figures as shown on the General Balance book of the assets, with the total as shown on the General Balance book; following that I have made up a statement from the General Balance book and the deposit ledgers, both individual and bank showing the amounts of the several assets as they would be with the individual overdrafts and the amounts due from banks,—that is the bank overdrafts, shown with the total. Then I have shown the published figures as taken from the published statement which is in the record. Then I show the published figures, where they exceed the figures shown by the books, and then where the published figures are less than shown by the books I indicate in another column, and then in the last column the items that are unaccounted for,—as I say, are indicated. The totals are given in each column, and in the last column I have totaled those items and then added the totals in the preceding column of the amounts that were published less than as shown by the books, and that total agrees with the total as shown in the third column from the last of the amounts that were published more than as shown by the books. Now this would show the loans as published $96,230.60 more than as shown by the books; the amount due from reserve agents is $50,000 more than as shown by the books, making a total of $165,765.71 more assets

1026 shown in these three accounts than are shown by the books,—this includes also the item of amount due from other National Banks which is $19,535.11 more than as shown by the books.

Then in the next column the amount of overdrafts is $40,000 less than shown by the books; the amount of stocks, securities, claims, etc., is $50,000 less than as shown by the books; the amount due from other state banks is $7202.36 less than is shown by the books; making a total of $97,402.36 less shown in the published statement than the books show. The items that I have not accounted for are Bills of Exchange $9332.75; Real Estate $53,230.60 and Walsh and Putnam $2,800.—making a total of $68,363.35. Add this to the amount that is shown more than published makes $165,765.71, which is just the amount of the excess in the publication, that is, that the published statement shows more than the books. In other words the amount shown less than the books equalizes the amount shown more than the books, when you add these three unaccounted items.

Now the stocks and securities is $50,000 less than the books show. The amount due from reserve agents *if* just $50,000 more than

the books show, so that it would appear they had taken $50,000 off of stocks and securities and added it to the amount due from reserve agents, and the amounts due from reserve agents are all of them wrong as shown by the General Balance ledger and as shown by the ledger of the bank. The amount of overdrafts is $40,000 less than shown by the books; adding that to the $56,230.60 of real estate, makes $96,230.60, which is just the amount that the loans and discounts as published exceed the loans and discounts as shown on the books.

The amount due from other National banks is $19,535.11 more than the books show. Adding the $7402.36 deducted from
1027 Due from state banks, and the amount of Bills of Exchange $9332.75, and the account known as Walsh and Putnam, $2800., we get the amount that the Due from other National Banks exceeds the books $19,535.11.

Now it would appear that they had shifted these accounts in that way in order to arrive at the figures in the published statement of assets.

On Sheet No. 2 I have shown the liabilities of the bank. First the general balance book figures; second the general balances with the figures from the deposit ledger, giving the total of individual deposits subject to check, the total certificates of deposit, and the amounts due to banks, and the amount of rediscounts, being all the items they have.

These would be the correct figures taken from the books. The amounts of undivided profits, and discount, interest and exchange.—those two items are bunched in the published report, $17,384.87, which is correct.

Q. The deposits shown in the published report are $367,258.70, which is $1.54 more than I get the deposits on the deposit ledger. There seems to be a difference there but I have not attempted to reconcile it; I have not had time in fact.

Mr. Rose: Look at the total of the deposit account in the deposit ledger; I think you will find the difference there, and it was carried over at that difference.

A. Well there is a difference between the individual ledgers and the general balance book; in making the computation of the overdrafts they got the wrong amount in some way.

Mr. Rose: Well you will find that it is just carried over $1.54 long.

A. Yes but their books wouldn't balance if they took the $1.54 off, the general balance book would be out of balance then.

Q. Then the general balance book is simply forced to make up that $1.54?

1028 A. Well it looks like they hadn't found it; I don't know how it was. Now the certificates of deposit shown by the books are $90,257.34; the published figures are $139,199.07 which is $48,941.73 more than the books show. The amount due from National banks is $3999.39 less than the books. They have taken the amount from the balance book,—the bank ledger of balances and have put this in the published report, and ther- is an item of

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$3999.39 due to the First National Bank of Beatrice that is on their general balance book and on their general ledger which is not included in the amount due to other National Banks, so that it makes the amount due to other National Banks $3999.39 less than the books show.

The amount due to state banks as published is the amount shown on the bank balance book of these country banks as they call them, but on the general ledger itself there is an amount of $36.32 due to the Bank of Cass County, which is not included in this total in the published statement. That $36.32 I have put in the column which is less than the books show. The total published more than the books show $48,941.73, does not include this $1.54.

Items that are not shown in the published statement and which I say are unaccounted for are the amount due to reserve agents. The General Ledger showed at that time that they were overdrawn with the Chemical National Bank $27,672.60; the American Exchange National Bank, $4109.81; the Commercial National Bank, $13,123.61; making a total of $44,905.02 that they owed their reserve agents the day that this report was made up.

Q. That amount was not shown on the report?

A. No sir. Now adding that amount to the total of those items that were less than the published report, we get $48,941.73 which makes the amounts as shown published more than the books agree with the amounts less than the books, counting this $44,905.02 as being less than the books show.

1029 Now the report shows that they took the amount due to the Chemical National Bank and put it in as amount due them,—simply reversed it and made it amount due from the Chemical National Bank, instead of the amount due to the Chemical National Bank, $27,672.60; the amount due to the American Exchange National Bank was changed into amount due from the American Exchange National Bank $4,109.81; the amount due to the Commercial National Bank was changed to amount due from the Commercial National Bank,—they simply reversed those three entries,—making the amount due from the Commercial National $13,123.61, and then they added an amount to the amount due from the U. S. National, which made the U. S. National instead of owing them $1984.76, it owed them $7079.74.

Q. Now you may state, Mr. Whitmore what effect that would have as to the reserve, the amount on deposit with the reserve agents, that is, the difference between what the books themselves show and what the published report showed?

A. The amount of legal reserve in the bank when the published statement was made up showed better than it was as shown by the general balance book. In fact it gave them a good legal reserve, while the figures as shown by the general balance book indicated that they had much less than the legal reserve.

Q. Do you mean to say that the balance book itself from which this report was presumably made showed that the legal reserve was considerably under the required amount, whereas the report as

published showed that they had more than the amount of legal reserve required by law,—is that what you mean to say?

1030 Q. Explain more fully, Mr. Whitmore, what you mean by that.

A. National banks are required to keep fifteen per cent of their deposits as a legal reserve.

Q. What does that mean,—that is in cash in reserve banks?

A. They are permitted to carry a certain amount of it in what are known as reserve agents; amounts due from approved reserve agents, and then a certain amount of it in legal tender or in certain species of actual money, which would be specie, gold and silver and legal tender notes. In computing the amount of reserve——

Mr. ROSE: Let me ask you whether those specific things are provided for by statute?

A. Yes sir.

Q. Have you given every item that could be counted as legal reserve?

A. I have given the item in this published statement that would be counted as legal reserve. I was going to explain that the bills of other national banks are not used as a part of the legal reserve, but in getting at the amount upon which they must compute the legal reserve, the amounts of bills of other national banks, and exchanges for clearing house, checks on other banks in the same city are permitted to be deducted from the total of deposits.

1031 Q. By that you mean total deposits of smaller banks.

A. No, those are deducted from the total deposits. Now the amount due from other national banks and other state banks and bankers is permitted to be deducted from the amount due to other national banks and state banks and bankers.

Q. But not from the general deposits?

A. Not from the general deposits. In other words, if they have nothing due to other banks then they couldn't deduct the amount due from banks from their deposits. They can only use what is in their approved reserve agents, and then they may deduct bills of other national banks and exchanges for the clearing house and things of that kind in the town. Getting at the legal reserve, of course you get that from their report of the condition to the Comptroller, or the published statement, but the general balance book simply shows the balance of cash which would be the total of cash that they had; the teller's cash book, however, separates the cash, as a rule, into the different classifications, so that they may arrive at the amount of reserve money that they have.

Q. Mr. Whitmore, schedule "AG" is the one which you have referred to, and concerning which you have been testifying as giving your theory of how the published report of July 9th, 1891 was arrived at?

A. Yes, sir.

Mr. THOMAS: We offer schedule "AG" in evidence.

Exhibit "AG" received in evidence.

1032 (Here follow sheets 1 and 2, Exhibit "AG," appearing at page 1032.)

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1033 Q. Mr. Whitmore, in referring to the amount of time you had spent in these matters, did that include the time you were on the witness stand at the prior trial, and at this trial?

A. Yes, sir.

Mr. THOMAS: I think that is all.

Recross-examination.

By Mr. ROSE:

Q. Did you say that acts of Congress did not permit the redemption fund deposited with the United States treasurer to be counted as a part of the bank's legal reserve?

A. I did not.

Q. Does it?

A. The- use that in computing their reserve.

Q. That is an item that you omitted. Did you foot up the items that the bank might justly count as its legal reserve including the item of $600 on deposit with the United States treasurer at the time of this report?

A. I did not make any computation, except just to look at it.

Q. I understood you to say that you found it was not equal to fifteen per cent of its deposits after making appropriate deductions from the deposits of the banks?

A. The actual condition there, I said; I didn't say the published report.

Q. How could you confirm that if you haven't figured it out to ascertain what, under this particular report here, the 15% would amount to?

A. I didn't figure it out, I just run it over in my head and I could see that it was less.

Q. Well how much less?

A. Let me see that schedule.

1034 Q. Did you figure out what amount of deposits the 15% would have to be calculated on?

A. Yes, sir.

Q. What is the amount?

A. I think it is about $565,000.

Q. Did you figure out the amount that they had for reserve?

A. They had two items in their cash,—they had $45,000 in round numbers, and about $2,000 in round numbers due from reserve agents, would make about $47,000.

Q. And $600 on deposit with the United States treasurer, redemption fund?

A. Ten per cent of their deposits would be about,—something like $54,000, and then you add one-half of that, would make about $79,000 was the amount of their legal reserve, and they had about $47,000.

Q. They had in excess of $47,000?

A. They might have had a little bit more, but about that.

Q. Now in respect to the sums due from the Chemical National Bank and other banks that were not otherwise shown in the report,

you figured it, as I recall $48,941.73. That was shown as a liability in the report, wasn't it,—in the item of deposits?

A. They showed the liabilities of due to other national banks, which was the amount of the total balances due to national banks on their individual bank balance book, then they showed the amount that was due to state banks and bankers which was the total of balances on the individual bank balance books, but they did not show the amounts that was due to the three reserve agents.

Q. Yes but they figured that as a liability in their general statement by increasing the amount of their deposits that much, didn't they?

1035 A. Why they increased the amount of their certificates of deposit the amount of those three items, due to reserve agents.

Q. So that a like sum was reflected in the report as a liability,—the total footings of liabilities were sufficient to include those items?

A. Certainly.

Mr. ROSE: I would like to recall the witness for cross-examination on another matter.

Q. Now have you since I asked you about the report of December 29th, 1886 undertaken to ascertain how that report was made up?

A. No, I have made no schedule.

Q. You have made no schedule, but have you run it down so you could analyze that for us?

A. I think I run down one of them, but I don't remember whether it was that report of '86 or not. Mr. Mullen and I were talking about one of th m.

Q. How did you happen to pick the one of July, 1891?

A. I was requested to take that one.

Q. You did check over a number of them, that's the truth of it, isn't it?

A. I think I went over them hurriedly but I didn't make a schedule such as I have made here, but I can if you want; I can make a schedule for each of these reports.

Q. I don't want to bother you, but as a part of your cross-examination it was my judgment that the correct examination of an expert should show how each report was made up.

A. I want you to understand me as saying that the probabilities are that if I could take time enough I could probably show how they had taken from one account and added it to another account and made up the balances in that way, but what I want you to understand is this: that it simply shows that they have juggled

1036 all of the accounts,—that is, they have juggled the accounts in every instance when they have made up these statements, unless they have taken the wrong day for making up the report, and that I say was just as much a juggling as to change the figures from one account to another.

Q. Well it might merely have been an inadvertance on their part.

A. It might have been and it might not have been.

Q. And you couldn't tell that without seeing whether there was

any material change in any of the sensitive items of the accounts or not, and as I understand you, you haven't checked that out.

A. No, but they simply haven't published the statements in accordance with the facts; I think that is true of every report.

By Mr. THOMAS:

Q. Could you prepare sheets and schedules for all of the reports similar to this one, if the other parties want it?

A. I think I could; I don't know. It might be that they have taken part of an account in one instance and added—that is they have taken the difference between what they published and what the books show and added that to some other account,—or part of it to one account and part of it to another, and in that case I wouldn't be able to determine unless I would go through and figure it out and spend time on it. Then I would have to have all the balance books here.

Q. Now I am going to ask you, Mr. Whitmore, to refer to the balance book entries, and to the deposit ledger, as far as you need to, and to the report. I want to ask you first if in carrying the balance book entries into the reports, the items of Interest Paid, and Undivided Profits, were not bunched as you expressed it?

1037 A. Well in that report of December 29th, 1886,—Exhibit X-1039 they seem to have added the undivided profits and the Discount, Interest and Exchange together which made $36,654.28 then deducted the interest paid $8,214.90 which left $28,439.38 as undivided profits in the report.

By Mr. ROSE:

Q. Now that process of course wouldn't in fact misrepresent the condition of the books of the bank, would it, of itself?

A. Not if they published the remainder of the expense items on the other side.

The COURT: What expense items on the other side were omitted, Mr. Whitmore?

Q. In this case were the current expenses,—expense items and taxes paid, published?

A. $8,885.65 is the totals of wages and expenses.

Q. Correctly published in the report is it?

A. They're in the report of the condition—let me have the report as published. Yes, it is correctly published in the statement.

Q. Does the report over-state the items of cash, or reserve, if you have ascertained that?

A. I didn't compare the cash,—made no statement about the cash. The cash is $55,378.44. Now what was the published—the cash is divided up on this. Well it seems to be about the same; I haven't footed it exactly. The amount of cash agrees with the balance book.

Q. Does the amount due from reserve agents agree?

A. Yes sir, the amount due from reserve agents agrees.

Q. Then in respect to this report there was no misrepresentation of the bank's reserve, that is compared with the face of the balance book,—comparing the report with the face of the balance books?

A. The amount due from reserve agents and the amount of cash as stated in the report agrees with the balance book.

1038 Q. The discrepancy in the amount of loans and discounts is made up of the ledger balance of Walsh and Putnam, that has been discussed here, isn't it?

A. The ledger shows $11,600 due from Walsh and Putnam, and I had a difference of $11,400.

Q. Suppose you check that over again and see if the ledger balance isn't exactly that amount.

A. No, there is $200 difference there that is not accounted for.

Mr. ROSE: That is all.

Mr. THOMAS: I want to offer in evidence the following portion of Exhibit X-26 being the By-Laws of the Marsh National Bank and the Capital National Bank, as is shown at the top of page 11 of the exhibit; I offer paragraphs 14 and 17., and I further offer all the minutes of the stockholders and directors' meetings held during the existence of the bank beginning at page 25 and extending to and including all the intermediate pages up to and including page 69.

Mr. ROSE: Each of the defendants objects as immaterial and irrelevant, and so far as pages 68 and 69 they are objected to as incompetent, and not proven.

Objection overruled.

Each of the defendants excepts.

The evidence offered is received, and copy follows:

1039 *(Copy of Paragraph- Offered in Evidence.)*

14. The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the second Tuesday of the months of January, and July [and October.]* The Board may also hold special meetings upon the call of the President, Cashier, or any three or more members, and whenever there shall not be a quorum at a regular or special meeting the members present may adiourn the meeting from day to day until a quorum shall be obtained, and any meeting may be adjourned from time to time by a vote of a majority of a quorum present. But no business except adjournment shall be transacted in the absence of a quorum."

Amended Jan. 10/88.

Amended Jan. 10/88.

17. No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order, unless the drawer of such check or order at the time of the presentation thereof have on deposit in the bank funds sufficient to meet such check or order.

[* Words and figures enclosed in brackets erased in copy.]

1040 *Minutes of Stockholders and Directors' Meetings Offered in Evidence.*

Page 25 of Minute Book.

"At a meeting of the following named stockholders of the Marsh National Bank, towit: Chas. W. Marsh, Chas. W. Mosher, Rich'd C. Outcalt, Ed. W. Mosher and Wm. A. Sharrar held at the office of said bank in Lincoln, on the 25th day of June, 1883.

The following proceedings were duly had and done, to-wit: Chas. W. Mosher, Chas. W. Marsh, Rich'd C. Outcalt, Ed. W. Mosher and Wm. A. Sharrar were elected a Board of Directors. No further business coming before the stockholders, meeting was adjourned."

Page 26 of Minute Book.

Oath of Directors.

STATE OF NEBRASKA,
Lancaster County, ss:

We, the undersigned Directors of the Marsh National Bank of Lincoln, of Lancaster county, of the State of Nebraska do solemnly swear that we are citizens of the United States and residents of the state of Nebraska, and that we will so far as the duty devolves on us, diligently and honestly administer the affairs of the said bank, and that we will not knowingly violate any of the provisions of the revised statutes of the United States, under which this bank has been organized; and that we are the bona fide owners in our own right of the number of shares of stock subscribed by us, or standing in our names on the books of said bank, and required by said Revised Statutes, and that the same are not hypothecated, or in any way pledged as security for any loan or debt.

1041 (Signed) CHARLES W. MOSHER.
RICHARD C. OUTCALT.
EDWIN W. MOSHER.
WM. A. SHARRAR.

Subscribed and sworn to before me this 25th day of June, 1883, a notary public of said county,

[SEAL.] J. H. McMURTRY,
Notary Public.

1042 *Certificate of Officers and Directors.*

The undersigned, Chas. W. Mosher, President, R. C. Outcalt Cashier, and C. W. Mosher, E. W. Mosher, Wm. A. Sharrar, Chas. W. Marsh, R. C. Outcalt Directors of the Marsh National Bank, organized under the sections of the Revised Statutes of the United States, which authorize the organization of National Banking Asso-

ciations, approved June 22, 1874, and of subsequent acts in addition to an amendatory othereof, do certify that One Hundred thousand dollars have been paid into said bank, on account of its capital stock, as permanent capital; that the residence of each director, and the amount of stock of which each director is the bona fide owner, are as follows:

Name of director.	Place of residence.	No. of shares
Chas. W. Marsh.....	Sycamore, Ill.....	265
Chas. W. Mosher.....	Lincoln, Nebr.....	350
Richard C. Outcalt.....	" "	100
Edwin W. Mosher.....	York, "	10
Wm. A. Sharrar.....	York, "	10
William W. Marsh.....	Sycamore, Ill.....	265

And that this bank has in good faith complied with all the provisions of said act required to be complied with before receiving authority to commence the business of banking.

CHAS. W. MOSHER, *President.*
R. C. OUTCALT, *Cashier.*

1043 CHAS. W. MARSH,
CHAS. W. MOSHER,
RICHARD C. OUTCALT,
EDWIN W. MOSHER,
WILLIAM A. SHARRAR,
Directors.

STATE OF NEBRASKA,
County of Lancaster, ss:

On this twenty fifth day of June, 1883, before the undersigned, a notary public, of Lancaster county, Nebraska, personall- appeared Chas. W. Mosher, President, Richard C. Outcalt, Cashier, and Chas. W. Mosher, Edwin W. Mosher, Wm. A. Sharrar, Chas. W. Marsh, Rich'd C. Outcalt, Directors of the Marsh National Bank of Lincoln, Nebraska, and made oath that the foregoing certificate and the matters and things therein set forth are true to the best of their knowledge and belief.

Subscribed and sworn to before me this twenty fifth day of June, 1883.

J. H. McMURTRY,
Notary Public. [SEAL.]

1044 *Directors' Meeting.*

At a meeting of Directors of the Marsh National Bank of Lincoln, Nebr., held at the office of said bank on the 25th day of June, 1883, the following named directors being present: to-wit: Chas. W. Mosher, Chas. W. Marsh, Rich'd C. Outcalt, E. W. Mosher, and Wm. A. Sharrar; the following proceedings were had and done,

towit—Chas. W. Mosher was elected chairman, and Wm. A. Sharrar, secretary.

Officers of the bank were elected as follows, towit:
Chas. W. Mosher, President,
Chas. W. Marsh, Vice President,
Rich'd C. Outcalt, Cashier.

By-Laws were also adopted. No further business coming before the Board, meeting was adjourned.

C. W. MOSHER, *Pres't.*

W. A. SHARRAR, *Sec'y.*

Appointment of Reserve Agents.

Treasury Department.
Office of Comptroller of the Currency.

WASHINGTON, July 6", 1883.

Sir: Your letter without date is received and The Chemical National Bank of New York, and the Commercial National Bank of Chicago named therein as depositories for a portion of the lawful money reserve of your bank are hereby approved for that purpose according to law.

Very respectfully,

J. S. LANGWORTHY,
Acting Comptroller.

C. W. Mosher, Esq., Pres't Marsh Nat'l Bank, Lincoln, Nebr.

1045

Stockholders' Meeting.

At a meeting of the following named stockholders of the Marsh National Bank, held at the office of said bank on the 8th day of January, 1884, Chas. W. Marsh, Chas. W. Mosher, Rich'd C. Outcalt, Edwin W. Mosher and Wm. A. Sharrar, the following named persons were duly elected a Board of Directors: Chas. W. Mosher, Chas. W. Marsh, Richard C. Outcalt, E. W. Mosher, and Wm. A. Sharrar, after which meeting was adjourned.

C. W. MOSHER, *Pres't.*

WM. A. SHARRAR, *Sec'y.*

Directors' Meeting.

At a meeting of Directors of the Marsh National Bank of Lincoln, Nebr., held at the office of the said bank on the 8th day of January, 1884, the following named directors being present, towit: Chas. W. Mosher, Rich'd C. Outcalt, Edwin W. Mosher and Wm. A. Sharrar, the following proceedings were had and done, towit:

Chas. W. Mosher was elected President of the Board and Wm. A. Sharrar, secretary and the following officers were dul*t* elected,

Chas W. Mosher, President,
Chas. W. Marsh, Vice President,
Rich'd C. Outcalt, Cashier.

It appearing to the Board that the net profits of this association amounts to the sum of fifteen thousand and seventy four 42/100 Dollars for the preceding half year, ending Dec. 31st, 1883, it is hereby directed that the sum of Twenty five hundred dollars, shall be set aside as a surplus fund. And it is further directed that a dividend of 12½% be and hereby is declared, which amounts to the sum of $12,500 payable Jan'y 15, 1884. No further business coming before the Board, meeting adjourned.

C. W. MOSHER, *Pres't.*

WM. A. SHARRAR, *Sec'y.*

1046 *Directors' Meeting.*

At a meeting of Board of Directors of Marsh National Bank held at their office on Feb'*t* 14, 1884, the following named directors being present: C. W. Mosher, R. C. Outcalt, E. W. Mosher and W. A. Sharrar. It was decided to sell the present bonds held by the Comptroller to secure circulation — and buy 4½% registered U. S. Bonds. No further business coming before the board, meeting adjourned.

C. W. MOSHER, *Pres't.*

R. C. OUTCALT, *Sec'y.*

Directors' Meeting.

At a special meeting of the Directors of the Marsh National Bank held at their office, Feb'y 20th, 1884, it was unanimously decided to increase the stock of the bank on June 2nd, 1884, to $200,000.

50%	of	said	increase	payable	May 31,	1884
10%	"	"	"		June 30,	"
10%	"	"	"		July 31,	"
10%	"	"	"		Aug. 31,	"
10%	"	"	"		Sept. 30,	"
10%	"	"	"		Oct. 31,	"

It was also decided to change the name of the bank from The Marsh National Bank to the Capital National Bank of Lincoln, Nebr., said change of name and increase of stock to commence on June 2, 1884.

No further business coming before the board, the meeting was adjourned.

C. W. MOSHER, *Pres't.*

R. C. OUTCALT, *Sec'y.*

1047 *Authority to Change Name of Bank.*

2988.

Treasury Department.

Office of Comptroller of the Currency.

WASHINGTON, May 14th, 1884.

Whereas, the Congress of the United States by an act approved May 3, 1884, did authorize "The Marsh National Bank of Lincoln" located in the city of Lincoln, county of Lancaster, and state of Nebraska, to change its name to "The Capital National Bank of Lincoln" whenever the board of directors of The Marsh National Bank of Lincoln, shall accept the new name by resolution of the said board, and cause a copy of said resolution, duly authenticated to be filed with the Comptroller of the Currency,

And Whereas the board of directors of The Marsh National Bank of Lincoln at a meeting called for the purpose on May 6 1884 did vote to accept the change of name to The Capital National Bank of Lincoln,

And Whereas the President, in accordance with Section 1 of said act, has executed a certificate under the corporate seal of the bank specifying the action taken by the directors of said bank, as above, and their determination as to such change of name, and has caused the same to be recorded in the office of the Comptroller of the Currency,

Now therefore, I, Henry W. Cannon, Comptroller of the Currency, do hereby declare that by virtue of said act the name of The Marsh National Bank of Lincoln, is changed to The Capital National Bank of Lincoln.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the city of Washington in the District of Columbia, this 14th day of May, A. D. 1884.

[SEAL.]

H. W. CANNON,
Comptroller of Currency.

1048 *Stockholders' Meeting.*

May 23rd.

Stockholders' Meeting. At special meeting of stockholders present W. A. Sharrar, E. W. Mosher, R. C. Outcalt and C. W. Mosher, it was decided to amend Articles of Association so as to have seven directors, instead of five and Comptroller to be instructed. Adjourned.

C. W. MOSHER.

R. C. OUTCALT, *Sec'y.*

Directors' Meeting.

Ap special meeting of directors held May 5th, 1884, at office of Marsh National Bank, there were present W. A. Sharrar, R. C. Outcalt, E. W. Mosher and C. W. Mosher.

Whereas Information has been received from Washington, D. C., notifying this bano of the passage by Congress of the Bill changing our name to The Capital National Bank of Lincoln, Neb., be it therefore resolved that said name be accepted, with all the contingencies, as may be set forth in the law authorizing above change, and that authority be asked for, from Comptroller allowing the change of name above referred to, and that a copy of these resolutions be forwarded to the Comptroller of Currency. Adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec'y.*

1049 *Special Meeting.*

At special meeting of directors held May 23, 1884, at office of Marsh National Bank, there were present W. A. Sharrar, E. W. Mosher, R. C. Outcalt and C. W. Mosher.

On motion of Mr. Outcalt the name of the bank shall be Capital National Bank after May 31st at close of business on that day and that out of the undivided profits as shown by the books at close of business May 31st, $1500 shall be carried to surplus a/c, and the balance of profits shall be divided among stockholders in lieu of regular July dividend.

That on June 1st the Capital stock of this bank shall be increased to $200,000 and proper notification of same be forwarded to the Comptroller of Currency.

Resignation of C. W. Mosher as Vice Pres't, having been received same was accepted and H. J. Walsh elected to fill the vacant place, to commence at close of business on May 31st, 1884.

The number of directors having been increased to seven, C. E. Yates and E. P. Hamer were elected to make up the number to commence May 31st, 1884.

Messrs. R. C. Outcalt, C. W. Marsh, E. W. Mosher, W. A. Sharrar resignations having been handed in, same were accepted and the names of A. P. S. Stuart, W. W. Holmes, R. O. Phillips and D. E. Thompson proposed in their places, and were duly elected to take office at close of business May 31st, 1884. Adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec'y.*

Receipt for United States Bonds.

Treasury of the United States.

WASHINGTON, D. C., June 10th, 1884.

Received of the Capital National Bank of Lincoln, Nebraska registered bonds of the United States of the kinds and amounts described below, in the name of the Treasurer of the United States, in trust for said bank, amounting to twenty-five thousand dollars, which are held by the treasurer of the United States as security for the redemption and payment of any circulating notes that have been or may be delivered to said association by the Comptroller of the Currency.

No. of bank, 2988, Register 2.
No. of Deposit, 3, Folio 180.

A. U. WYMAN,
Treasurer of the United States.

Duplicate.
Date of bond, June 9, 1884.
Rate of interest 4½
Title of loan, July '70 and Jan. '71
When redeemable, 1891.
No. 11816— $5,000
No. 30550—$10,000
No. 30549—$10,000

$25,000

1050 *Authority to Increase Capital.*

No. 2988.

Treasury Department.

Office of Comptroller of the Currency.

WASHINGTON, June 11, 1884.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the Capital stock of the Capital National Bank of Lincoln, Nebraska, has been increased in the sum of One hundred thousand dollars ($100,000) in accordance with the provisions of its Articles of Association, and that the whole amount of such increase has been paid in, and that the paid-up capital stock of said bank now amounts to the sum of Two hundred thousand dollars ($200,000)

Now, it is hereby certified that the capital stock of the Capital National Bank of Lincoln, Nebraska, aforesaid has been increased as aforesaid, in the sum of one hundred thousand dollars ($100,000) that said increase of capital has been paid into said bank as a part

of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof I have hereunto affix- my official signature and seal of office.

[SEAL.]

H. W. CANNON,
Comptroller.

Stockholders' Meeting.

At meeting of stockholders held second Tuesday in January of 1885 there *was* present A. P. S. Stuart, W. W. Holmes, R. E. Moore C. E. Yates, D. E. Thompson, C. W. Mosher and R. C. Outcalt. Upon motion of Mr. Stuart the old board of directors were renominated and upon vote of stockholders unanimously elected. Meeting then adjourned.

C. W. MOSHER, *Pres't.*

R. C. OUTCALT, *Sec'y.*

Directors' Meeting.

At a meeting of directors held this second Tuesday in January 1885, present, A. P. S. Stuart, W. W. Holmes, C. E. Yates, D. E. Thompson and C. W. Mosher. Motion of C. E. Yates was carried to effect, that out of the undivided earnings of the past six months, that a dividend of 6½% be paid. 1% carried to surplus and balance to remain in undivided profits a/c. Upon motion of A P. S. Stuart the old officers were elected. Meeting adjourned.

(7½ paid)

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Cash. Sec'y.*

1051 *Directors' Meeting.*

At a regular meeting of directors held this second Tuesday in July, 1885, there *was* present C. W. Mosher, W. W. Holmes, A. P. S. Stuart, C. E. Yates, E. P. Hamer.

Upon motion of W. W. Holmes, a dividend of 6½% was declared. 1% run to surplus and bal. to remain in undivided profit a/c. Meeting adjourned.

C. W. MOSHER, *P't.*

—— ——, *Cash.*

Stockholders' Meeting.

At regular meeting of stockholders this second Tuesday in January, 1886, the following were present: W. W. Holmes, A. P. S. Stuart, Geo. Ballantine, C. W. Mosher, R. C. Outcalt. Upon motion of W. W. Holmes, the old board of directors were re-elected.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Cash., Sec'y.*

Directors' Meeting.

At regular meeting of Directors held second Tuesday in January, 1886, present W. W. Holmes, A. P. S. Stuart, C. W. Mosher, R. O. Phillips, C. E. Yates Upon motion of R. O. Phillips, a dividend of 8% and 1% run to surplus was declared. Meeting adjourned.

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Cash- Sec'y.*

Stockholders' Meeting.

At special meeting of stockholders held June 2, 1886, at office of Bank, present, C. W. Mosher, R. C. Outcalt, C. E. Yates, H. J. Walsh, A. P. Stuart, G. Ballantine, R. E. Moore, D. E. Thompson, W. W. Holmes. Upon motion of H. J. Walsh a resolution was passed asking the Comptroller for permission to increase capital stock to $300,000 on July, 1886. Upon vote it was carried as follows:

C. W. Mosher	600	H. J. Walsh	100
R. C. Outcalt	330	W. W. Holmes	100
G. W. Ballantine	100	A. P. S. Stuart	100
D. E. Thompson	140	C. E. Yates	50
R. E. Moore	10		

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Cash., Sec'y.*

1052

Directors' Meeting.

At special meeting of directors held June 21, 1886, present R. O. Phillips, W. W. Holmes, A. P. S. Stuart and C. W. Mosher. A resolution was introduced and upon vote same was carried to authorize the Comptroller of Currency to transfer the bonds held by him in trust for the Marsh National Bank to the credit and for the use of the Capital National Bank. Meeting adiourned.

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Cash., Sec'y.*

Authority to Change Bonds.

Treasury Department.
Office of Comptroller of the Currency.

WASHINGTON, June 26, 1886.

DEAR SIR: In accordance with the requirements of the 5167th section of the Revised Statutes, you are hereby advised that $25,000 *Dollars* of United States Bonds, deposited with the treasurer of the

United States, and held by him to secure the redemption of the circulating notes of the Marsh National Bank of Lincoln, Neb., have been assigned to the Treasurer, U. S., in trust for The Capital National Bank of Lincoln, Nebr. The bonds so assigned are described as follows:

No. of bonds.	Numbers.	Loan.	Denominations.	Amount.
1	11603	4½	5,000	5,000
1	646	"	20,000	20,000
	Total amount.....			$25,000

Treasurer's receipt of Feb'y 26, 1884 cancelled. Above bonds have been transferred to treasurer U. S. in trust for The Capital Nat'l Bank of Lincoln, Nebr.

Very respectfully,

V. P. TRYDER,
Deputy Comptroller.

To Cashier Capital National Bank, Lincoln, Neb.

1053 *Receipt for United States Bonds.*

Treasury of the United States.

WASHINGTON, D. C., June 29, 1886.

Received of the Capital National Bank of Lincoln, Nebraska, registered bonds of the United States of the kinds and amounts described below, in the name of the Treasurer of the United States, in trust for said bank, amounting to twenty five thousand dollars, which are held by the Treasurer of the United States as security for the redemption and payment of any circulating notes that have been or may be delivered to said association by the Comptroller of the Currency.

C. N. JORDAN,
Treasurer of the United States.

No. of Bank 2988. Register 2.
No. of deposit, 4. Folio 180.

Date of bond.	Rate of interest.	Title of loan.	When redeemable.	No.	Par value.
June 28, 1886	4½%	Funded loan, 1891	1891	13,486	5,000
" " "	"	" " "	"	699	20,000
				Total	25,000

Duplicate.

Authority to Increase Capital.

2988.

Treasury Department.

Office of Comptroller of the Currency.

WASHINGTON, D. C., July 9th, 1886.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency, that the capital stock of The Capital National Bank of Lincoln, Lincoln, Nebraska, has been increased in the sum of one hundred thousand dollars ($100,000) in accordance with the law and provisions of the act of May 1, 1886 and that the whole amount of such increase has been paid in, and that the paid up capital stock of said bank now amounts to the sum of three hundred thousand dollars ($300,000)

Now, it is hereby certified that the capital stock of The Capital National Bank of Lincoln, Nebraska aforesaid has been increased as aforesaid in the sum of One hundred thousand Dollars ($100,000); that said increase of capital has been paid into said bank as a part of the capital stock thereof; and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof I hereunto affix my official signature and seal of office.

——— ———,
Comptroller.

1054

Directors' Meeting.

At regular meeting of Board of Directors held at Bank Room on July 13, 1886, there *was* present C. W. Mosher, A. P. S. Stuart, E. P. Hamer, R. O. Phillips and C. E. Yates. On motion of A. P. S. Stuart, it was voted to declare a dividend of 7% and run 1% to surplus out of the undivided profits of the bank.

No further business coming before the board meeting adjourned.

Directors' Meeting.

Special directors' meeting held at office of Bank, Oct. 15, 1886, present R. O. Phillips, C. W. Mosher, W. W. Holmes, C. E. Yates. On motion of R. O. Phillips the following resolution was passed:

Resolved: That the President of the Capital National Bank be authorized to endorse the notes and bills discount of said bank when it may become necessary to re-discount the same.

No further business coming before the meeting they adiourned.

R. C. OUTCALT, *Sec'y.* C. W. MOSHER, *P't.*

Directors' Meeting.

At regular meeting of board of directors held Jan. 11, 1887, present C. W. Mosher, W. W. Holmes, E. P. Hamer, D. E. Thompson & R. O. Phillips. On motion of W. W. Holmes a dividend of 6% was ordered declared & $2000 ordered placed to surplus a/c. No further business coming before the board they adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec'y.*

Stockholders' Meeting.

At annual meeting of stockholders held Jan. 11, 1887, there *was* present—

C. W. Mosher.....	570 shares	C. L. Hall.....	20 shares
R. C. Outcalt.....	350 "	C. Hammond.....	100 "
W. W. Holmes....	150 "	E. P. Hamer.....	75 "
H. J. Walsh.....	150 "	D. E. Thompson..	255 "

On motion of Mr. Hammond the old directors were all re-elected & the clerk authorized to cast the ballots to that effect. Meeting adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec'y.*

1055 *Directors' Meeting.*

At meeting of directors held January 11, 1887 there were present C. W. Mosher, E. P. Hamer, W. W. Holmes & D. E. Thompson.

Upon motion of Mr. Thompson the old officers were all declared duly elected for ensuing year. Meeting adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec'y.*

Directors' Meeting.

At regular meeting of directors held at office of bank there *was* present on July 12, 1887 A. P. S. Stuart, C. W. Mosher, D. E. Thompson, E. P. Hamer.

Upon motion of D. E. Thompson a dividend of 6% was declared & $2000 ordered put to surplus.

A. P. S. Stuart made motion that J. W. Maxwell be made Asst. Cashier. Meeting adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec'y.*

Stockholders' Meeting.

At annual meeting of stockholders there *was* present on Jan. 10, 1888—

A. P. S. Stuart	150	shares
D. E. Thompson	230	"
R. C. Outcalt	350	"
H. J. Walsh	150	"
R. O. Phillips	150	"
C. W. Mosher	550	"

Upon motion of Mr. D. E. Thompson the Sec'y was instructed to cast a ballot for re-election of the old board of directors.

Motion of R. O. Phillips meeting adjourned.

R. C. OUTCALT, *Sec'y.* C. W. MOSHER, *P't.*

1056

Directors' Meeting.

At regular meeting of Directors held at 8 p. m.. June 10, 1888 there were present, A. P. S. Stuart, R. O. Phillips, D. E. Thompson, C. E. Yates, C. W. Mosher.

Upon motion of Mr. D. E. Thompson the by-laws were amended to read as follows:

Section 14, line 5 erase April & October.

Section 17 amended to read: "No money shall be paid out on any check drawn upon this bank or on any order unless the drawer of such check or order at the time of the presentation thereof had on deposit in the bank funds sufficient to meet such check or order, except on the approval of the President *of* Cashier". Motion unanimously carried.

There being a net profit on the business of last six months of 20,024.41 upon motion of R. O. Phillips a dividend of 6% was declared & $2000 carried to surplus.

Meeting adjourned.

R. C. OUTCALT, *Sec.* C. W. MOSHER, *P't.*

Directors' Meeting.

At regular meeting of Board of Directors held on July 10, 1888 A. P. S. Stuart, C. W. Mosher, W. W. Holmes, E. P. Hamer present.

Upon motion of E. P. Hamer a dividend of 6% was declared & 2000.00 carried to surplus.

Meeting adjourned.

R. C. OUTCALT, *Sec* C. W. MOSHER, *P't.*

Stockholders' Meeting.

Annual meeting of stockholders held at office of bank on Jan 8/89 at 8 o'clock, there were present:

D. E. Thompson...	230	shares	H. J. Walsh.....	150	shares
C. E. Yates.....	103	"	H. Gemer.....	50	"
A. P. S. Stuart....	150	"	C. W. Mosher.....	550	"
W. W. Holmes....	150	"	J. McConnuff.....	37	"
R. C. Outcalt.....	300	"	C. Thompson.....	50	"
				1820	

On motion of Mr. Yates the Sec'y was instructed to cast the ballot for directors the ensuing year as follows: A. P. S. Stuart, R. O. Phillips, C. E. Yates, C. W. Mosher, D. E. Thompson, W. W. Holmes, E. P. Hamer.

Motion of A. P. S. Stuart meeting adjourned.

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Sec.*

1057 *Directors' Meeting.*

On motion of Mr. Thompson the old officers were elected to serve for the ensuing year.

Mr. Thompson moved that directors Holmes, & Stuart be appointed a committee to examine the notes of the bank & also to make as many such examinations of notes & books as they may see fit.

The earnings of the bank for the last six months showing

Net earnings of	20,572.74
Undivided profits	305.12
	$20,877.86

On motion of Mr. Yates a dividend of 6% was declared payable at once & %2000 carried to surplus fund. Meeting adjourned.

C. W. MOSHER, *Pt.*

R. C. OUTCALT, *Sec.*

LINCOLN, NEB., Jan. 20, 1889.

As per instructions of the Board of Directors we have examined paper of Capital National Bank & find same satisfactory.

W. W. HOLMES,
A. P. S. STUART.

Directors' Meeting.

At regular meeting of directors held at office of bank at 8 o'clock P. M., July 9/1889 there was present A. P. S. Stuart, W. W. Holmes, D. E. Thompson, C. E. Yates & C. W. Mosher.

The earnings of the bank showing as follows—

Net earnings & Undivided profits $20,595.38

Upon motion of Mr. Stuart & seconded by D. E .Thompson a dividend of six per cent was declared & $2000 run to surplus.

Upon motion of C. E. Yates, meeting adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Sec.*

Stockholders' Meeting.

At regular annual meeting of stockholders held at office of bank at 8 o'clock, Jan. 14, 1890. It was moved by Mr. Stuart to increase the number of directors from seven to nine & that the Sec'y be authorized to cast the vote of stockholders for directors for ensuing year with the result that A. P. S. Stuart, E. P. Hamer, H. J. Walsh, R. O. Phillips, D. E. Thompson, W. W. Holmes, C. E. Yates, R. C. Outcalt & C. W. Mosher were elected.

The number of shares of stock being present & voted as follows:—G. W. Ballantine, 200; E. F. Hamer, 75; W. W. Holmes, 150; A. P. S. Stuart, 150; R. O. Phillips, 100; R. C. Outcalt, 350; C. W. Mosher, 550,—total 1575.

Upon motion of Mr. Outcalt meeting adjourned.

C. W. MOSHER, *P't.*

1058

Directors' Meeting.

Regular directors' meeting held at office of bank on Jan. 14/90 at 8 o'clock. There was present, R. O. Phillips, R. C. Outcalt, W. W. Holmes, E. P. Hamer & C. W. Mosher.

The earnings of the bank showing as follows:—

Net earnings & undivided profits 18,098.54

It was moved by A. P. S. Stuart that a dividend of 5% be declared & $2000 run to surplus.

Upon motion of C. E. Yates meeting adjourned.

C. W. MOSHER, *P't.*

Directors' Meeting.

Regular meeting of directors held at office of bank July 11, 1890. There was present, R. O. Phillips, C. E. Yates, W. W. Holmes, A. P. S. Stuart, C. W. Mosher.

The earnings of the bank showing as follows:—

Net earnings & profits 17,500.19

It was moved by A. P. S. Stuart that a dividend of 5% de declared & $2000 added to surplus.

Upon motion of C. E. Yates meeting adjjoujrned.

C. W. MOSHER, *P't.*

Stockholders' Meeting.

At regular annual stockholders' meeting held Jan. 13, 1891 at 7:30 at office of bank there *was* present,

C. E. Yates	113 shares	C. Hammond	50 shares
D. E. Thompson ..	250 "	E. P. Hamer	75 "
A. P. S. Stuart ...	150 "	R. C. Outcalt	350 "
W. W. Holmes ...	150 "	C. W. Mosher	550 "
			1688 shares

Upon motion of C. Hammond the Sec'y was authorized to cast the vote for old directors,—so done.

Upon motion of D. E. Thompson meeting adjourned.

C. W. MOSHER, *P't.*

1059 *Directors' Meeting.*

At regular meeting of directors held at office of Bank on Jan. 13/91 at 8:30 there was present C. E. Yates, D. E. Thompson, W. W. Holmes, A. P. S. Stuart, W. W. Holmes & C. W. Mosher.

It was moved by C. E. Yates that all the old officers be elected for ensuing year, which motion was unanimously carried.

A. P. S. Stuart moved & it was carried that a dividend of 5% be declared & $2000 run to surplus out of the $17,162.11 of undivided profits on hand.

C. W. MOSHER, *P't.*

Directors' Meeting.

At regular meeting of board of directors held at office of bank July 13, 1891 at 8 o'clock, there was present C. E. Yates, E. P. Hamer, D. E. Thompson, R. O. Phillips, C. W. Mosher.

The books showing the following earnings & expenditures:

Left over from Jan. 1/91		162.11
Gross earnings to July 1/91		37,878.65
		38,040.76
Wages paid	6,644.98	
Int. paid	8,943.71	
Expenses paid	5,198.28	
		20,786.97
Net earnings		17,253.79

It was moved by R. O. Phillips that a dividend of 5% be declared & 2000 run to surplus.

A. P. S. Stuart moved that R. C. Outcalt be elected to fill the vacancy caused by death of W. W. Holmes. Motion was seconded by E. P. Hamer & was unanimously carried.

Moved & carried by R. O. Phillips that Oscar Funke be authorized to sign dfts. for cashier until further notice.

Upon motion of D. E. Thompson it was resolved as follows:

That the Comptroller of Currency be and he is hereby authorized to withdraw $50,000 U. S. Bonds deposited with the treasurer of the U. S. by this bank to secure circulation and described as follows: $50,000 of the Loan 1891, 4½% interest, and that the Chemical Nat. Bank be and is hereby authorized to sell, assign & transfer the same and to appoint one or more att'ys for that purpose.

Upon motion of Mr. A. P. S. Stuart & seconded by all present the following Resolution was unanimously adopted & written copy ordered for purpose of delivering to the family of Mr. Holmes.

Upon motion of C. E. Yates meeting adjourned.

C. W. MOSHER, *P't.*

1060 *Stockholders' Meeting.*

Held for Jan. 12, 1892 at office of bank at 8 o'clock, there was present the following stock:

C. E. Yates.....	113 Shares	H. Gerner	100 s
C. Thompson	50 Shares	J. K. Honeywell...	50 s
R. O. Phillips.....	50 s	A. P. S. Stuart....	150 s
C. W. Mosher.....	550 s	H. J. Walsh.....	150 s
R. C. Outcalt.....	350 s		
			1563

Mr. Stuart moved that old board of directors be declared re-elected for ensuing year.

Mr. Honeywell moved to adjourn, which was carried.

C. W. MOSHER, *P't.*

Directors' Meeting.

Held Jan. 12, 1892, there was present A. P. S. Stuart, C. E. Yates, C. W. Mosher, R. O. Phillips, R. C. Outcalt.

Upon report of Pres't that there was 18,128.02 net profits it was moved and carried to declare a 5% dividend, run 2000 to surplus and leave remainder in undivided profits.

Upon motion of Mr. Stuart the old officers were elected unanimously. Meeting adjourned.

C. W. MOSHER, *P't.*

Directors' Meeting.

Held at office of Bank, July 12/92 at 8 o'clock; present R. O. Phillips, A. P. S. Stuart, E. P. Hamer, C. W. Mosher, C. E. Yates.

Upon report of president that there had been earned net in previous six months 14,026.81 in was moved & seconded that a dividend of 4% be declared & 2000 added to surplus a/c.

Meeting adjourned.

C. W. MOSHER, *P't.*

Directors' Meeting.

At a special meeting of directors held Feb. 20-92 there was present A. P. S. Stuart, E. P. Hamer, C. E. Yates, D. E. Thompson, R. O. Phillips, R. C. Outcalt, C. W. Mosher.

Upon motion of Mr. D. E. Thompson, E. P. Hamer was put upon the Discount Committee in place of W. W. Holmes deceased.

Under date of Feb. 16/92 a communication was received from the Comptroller regarding some matters pertaining to the bank affairs & a full explicit reply was made thereto under date of Feb. 20/92 & signed by each director. After further discussion of the affairs of the bank, meeting adjourned.

C. W. MOSHER, *P't.*

1061 (At page 68 of Minute Book, three slips of paper are pinned as follows:)

"Left over		26.81
"Net received		25,915.72
		$25,942 53
"Wages	7,159.98	
"Int. paid	5,995.39	
"Expense a/c	6,328.96	
		19,485.33
		6,457.20

"Phillips moved that dividend——
"E. S. D.

1062 (Page 69 of Minute Book, the following appears in pencil on letter head of Capital National Bank.)

"EXHIBIT X-107."

LINCOLN, NEB., Jan. 22, 1893.

Special meeting of Directors of bank held at 3 o'clock, Jan. 22/93. Present Walsh, Hamer, Outcalt, Yates, Mosher.

Upon motion of Mr. Yates it was resolved to turn the bank over

CHARTS

TOO

LARGE

FOR

FILMING

into the hands of the Comptroller of Currency & seconded by Mr. Hamer.

Upon motion of Walsh, meeting adjourned.

E. S. D. C. W. MOSHER, *Pt.*

* * * * * * *

1063–1090 H. J. WHITMORE recalled for further cross-examination:

* * * * * * *

1091 Q. I will ask you if you have made a so-called reconciliation, or attempted reconciliation of the statement of the condition of the Capital National Bank at the close of business December 19, 1890, as it appeared in the newspapers and as it appeared in the balance book?

A. Yes, sir.

Q. Is Exhibit "AJ" the statement which contains the figures concerning that so-called reconciliation?

A. Yes sir, that is made on the same plan as the other two that were introduced here, the one of December 28th, 1886, and of July 9th, 1891.

Mr. THOMAS: We offer Exhibit "AJ" in evidence.

1092 Exhibit "AJ" received in evidence.

(Copy on following page.)

Q. Was that compiled from the same books, and in the same manner as the one you made with reference to December 28th, 1886?

A. All except the item of check deposits and certificates of deposits. The bank ledger for December 1890 is not here and I took the figures from the copy of the report that is in the record on those two items. I assumed that they were correct, in fact I proved them, except as to the division between the check deposits and the certificates of deposit. In fact the check deposits prove out just as they report them.

Q. What report is that?

A. December 19th, 1890.

Witness excused.

1093 (Here follows sheet No. 1, Exhibit "AJ," appearing at page 1093.)

1094 H. T. JONES, recalled.

By Mr. THOMAS:

Q. I have you Exhibit No. 107, and will ask you——

Mr. ROSE: I will say this that we have concluded that so far as the records of the proceedings and the minutes alone are concerned, we will not interpose the objection. As to Exhibit No. 107 we withdraw the objection.

Mr. THOMAS: Exhibit No. 107 is offered in evidence then.

Exhibit 107 received and read in evidence as follows:

"C. W. Mosher, Pres't. H. J. Walsh, Vice Pres't. R. C. Outcalt, Cashier.

Capital National Bank.

Capital $300,000.

LINCOLN, NEB., Jan. 22, 1893.

Special Meeting of Directors of Bank held at 3 o'clock, Jan. 22/93. Present, Walsh, Hamer, Outcalt, Yates, Mosher.

Upon motion of Mr. Yates, it was resolved to turn the bank over into the hands of the Comptroller of Currency, and seconded by Mr. Hamer.

Upon motion of Walsh meeting adjourned.

C. W. MOSHER, *Pt.*

Mr. THOMAS: We offer in evidence Exhibits X-1074 and X-1075, each containing six statements with the certificates attached.

Mr. ROSE: Each of the defendants objects to each of these as incompetent, irrelevant and immaterial under the issues tendered, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

1095 Exhibits 1074 and 1075 received in evidence.

(Here follow six statements with certificates attached marked Sheets Nos. 1 to 6, appearing at folio 1095.)

CHARTS

TOO

LARGE

FOR

FILMING

1095½ Ex. 1074 (7 Sheets). O. P. H.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

O. P. H.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Lawrence O. Murray Deputy and Acting Comptroller of the Currency, do hereby certify that the papers hereto attached are true and complete copies of the original reports of the condition of "The Capital National Bank of Lincoln" Neb., on the 28th of December 1886; 1st of August 1887; 5th of October 1887; December 12th 1888; September 30th 1889; December 11th 1889, made to the Comptroller of the Currency in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, and of the whole of such originals on file and of record in my Office.

In testimony whereof, I have hereto subscribed my name, and caused my Seal of Office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this 22d day of April, A. D. 1899.

[SEAL.] LAWRENCE O. MURRAY,
Deputy and Acting Comptroller of the Currency.

1096 (Here follow six statements with certificate attached marked Sheets Nos. 1 to 6, appearing at page 1096.)

1096½ EXHIBIT X-1075.

Ex. 1075.
O. P. H.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

O. P. H.

Under the provisions of Section 884 of the Revised Statutes of the United States, I Lawrence O. Murray, Deputy and Acting Comptroller of the Currency, do hereby certify that the papers hereto attached are true and complete copies of the original reports of the condition of "The Capital National Bank of Lincoln, Neb.", on the 2d of October, 1890; 19th of December, 1890; 9th of July 1891; 25th of September 1891; 2d of December 1891; and 9th of December 1892, made to the Comptroller of the Currency in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, and of the whole of such originals on file and of record in my Office.

In testimony whereof, I have hereto subscribed my name, and caused my Seal of Office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this 22d day of April, A. D. 1899.

[SEAL.] LAWRENCE O. MURRAY,
Deputy and Acting Comptroller of the Currency.

1097 Mr. WALTER T. SCOTT, called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. THOMAS:

Q. You may state your name to the reporter.
A. Walter T. Scott.
Q. Where do you reside?
A. In Lincoln.
Q. How long have you lived there?
A. Since April, 1872.
Q. What has been your occupation since you have lived there?
A. Bookkeeping.
Q. Were you,—since you have lived in Lincoln were you acquainted with Charles W. Mosher, and Mr. Outcalt?
A. Yes, sir.
Q. And were you acquainted with the bank—the banking concern that was known as the Marsh Brothers, Mosher and Company?
A. Yes, sir.
Q. Were you ever in the employ of that company?
A. I was.
Q. Now you may state as near as you can recall when you entered the employ of Marsh Brothers, Mosher & Company of Lincoln, Nebraska?
A. Sometime in July, 1882.
Q. What did you do for that company; what class of work?
A. I was bookkeeper.
Q. And did you know a man by the name of S. K. Hale, otherwise known as Colonel Hale?
A. Yes, sir.
1098 Q. Was he working there at the same time?
A. Yes sir, he was working there.
Q. And were you in Seward some weeks ago and examined the books in this room, that purport to be the books of Marsh Brothers, Mosher & Company, and the Marsh National Bank, and of the Capital National Bank?
A. Yes, sir.
Q. Did you look into those books, and see the handwriting and examine them?
A. I did.
Q. Did you find any of your handwriting on them?
A. I did.
Q. Did you find the handwriting of Mr. Hale?
A. Yes sir.
Q. Now did you find books that were marked on the backs of them Marsh Brothers, Mosher & Company?
A. Yes sir.
Q. And some marked "M. N. B", Marsh National Bank?
A. Yes, sir.
Q. And others purporting to be of the Capital National Bank?

A. Yes, sir.

Q. What can you say as to whether or not those are the books that were kept in the regular course of business and in which the transactions of those various institutions were recorded?

A. They were the books that were in the bank at the time I was there.

Q. And you were head bookkeeper, or who was?

A. Hale was head bookkeeper at the time I went in there.

1099 Q. How long did you continue to work in those various concerns?

A. Until 1887.

Q. Did you work there continuously from the time you began there in 1882, until you quit in 1887?

A. Yes, sir.

Q. Now you were with the bank when the—what was known as the banking company of Marsh Brothers, and Mosher, became the Marsh National Bank?

A. Yes.

Q. Now did you ever have any conversation with Mr. Mosher, or do you know from other sources where the assets of the Marsh National Bank came from,—that is, what became of the assets of the Marsh National Bank when it was incorporated?

A. They were transferred to the Marsh National Bank,—it was Marsh Brothers, Mosher & Company, and they just simply transferred the balances onto another set of books.

Q. And did you ever have a talk with Mr. Mosher in regard to what started the bank,—what entered into it?

A. I was riding out to a baseball game one day and Mr. Mosher told me how he came to get into the banking business; he used to work for his uncles,—the Marsh Brothers were his uncles,——

1100 A. (continued). and he told me he worked for the- and saved up his money and bought some stock in the Marsh Harvester Company, and he afterwards sold that stock for $2,000, and he came to Lincoln, and he bought into what was called the old State bank, and Dick Outcalt was cashier of the bank, and he asked Dick Outcalt what he could invest that money in, and Dick told him to start a bank, and Mosher told me he laughed about starting a bank with $2,000, but finally they came to some agreement and started a bank at Ninth and "O" street-, and Dick Outcalt was to go in as cashier, and that is the way it was started.

Q. Go ahead and give us the entire conversation.

Q. As to what entered into the bank, and what made up the assets of the bank.

A. Marsh Brothers were Mosher's uncles, and Outcalt was the Company; Marsh Brothers, so he told me just loaned them the money,—in fact the bank was kind of a collection agency for the various Marsh companies' notes.

Q. Didn't have much banking business, you mean?

1101 Q. Did the Marsh Brothers companies afterwards fail?

Q. What do you know about the failure of Marsh Brothers companies?

Q. Did you have any talk with Mr. Mosher in regard to the failure of the Marsh Brothers, and changing the name of the Marsh National Bank to the Capital National Bank?

A. Yes, sir, I did.

Q. You may state what that conversation was.

A. He told me that the Marsh Harvester Company had failed and that they would have to change the name of the bank, and that they were going to make a national bank of it, and he asked me to suggest a name, and I told him to make it the Second National Bank, and he said No, they didn't want to play second fiddle to the First National Bank, and in a day or two he came to me and asked how the Capital National Bank would be, and I said that would be a good name.

1102 Q. Did he say anything with reference to getting other stockholders?

A. Yes, sir.

Q. What was it?

A. He said they were going to take in a lot of new stockholders, and raise the capital to $200,000, and that they wanted to get R. E. Moore, and D. E. Thompson and such men as that in because they would give stability to the bank, and that they were going to get them if they could even if they had to give them some stock to go into it.

Q. When did you say you quit the employ of the Capital National Bank?

A. In 1887.

Q. How did you happen to quit, and what business did you go into at that time?

A. I went into the laundry business; I was interested in a laundry and I wanted to tend to it myself, and I left the bank to attend to my own business.

Q. And did you have any business transactions with the bank after that?

A. Yes, sir.

Q. What was the nature of those transactions?

1103 A. I used to borrow money of them, and used to keep my account there,—my laundry account there, and I was often in the bank.

Q. And do you remember of having given the Capital National Bank, or Mosher or Outcalt, or some of them connected with the bank some notes and mortgages along in 1891?

A. Yes.

Q. What was the amount of those notes, and give us the transaction; how you happened to give them to them, and just what was done at that time.

A. I was owing the bank at that time something over eighteen thousand dollars, and Mosher came to me one day and said they needed some money, and asked me if I couldn't raise money and pay up some of those notes. I told him I couldn't pay them but would do what I could, so I collected what I could and paid him something over $5,000, and gave him two notes of $6,500 each to

run five years, for the balance, then I gave him a mortgage on my property for $10,000, and he was to raise $10,900 on that if he could and apply it on the $13,000 of notes I gave him.

Q. How did that $10,000 note and mortgage happen to be given; give us the circumstances?

A. He asked me if I couldn't raise him some more money, and I told him I couldn't; times were hard and I didn't think I could raise any more money, and he says "Well," he says, "couldn't
1104 you raise it on a mortgage on your property?" "Why," I says, "Mosher I would have to put every piece of property I have got into a mortgage to raise $10,000 these hard times, and I doubt even if I could raise it then, there won't anybody loan it on real estate." "Well," he says, "I can get the money if you will make the note and mortgage,—I can get the money." So I made the note and mortgage and give it to him with the understanding that if he sold the note and mortgage the $10,000 was to go on the two notes of $6,500 each, but I afterwards learned,—after the bank failed——

Q. Now that $10,000 note you say was secured by a mortgage on your property?

A. Yes.

Q. What became of it when you last heard of it?

A. It was sold to a bank—I forget the name of the bank. This was long since,——

A. And I suppose Mosher used the money himself.

Q. Was the mortgage,—that $10,000 mortgage was it foreclosed,—did you lose your property?

A. The mortgage was afterwards foreclosed.

Q. Was the property sold?

1105 A. And the property was sold for eleven thousand and some odd dollars; I forget what the exact amount was.

Q. Did you ever get credit on your two $6,500 notes for this $10,000 note and mortgage?

A. I did not.

Q. And did you ever pay the two notes for $6,500 each?

A. I did not.

Q. Now after this talk in August, '91, did you have any talk with Mr. Mosher, subsequently?

A. Yes, sir. I had a talk with him after that, he came to me again and said he would like to——

Q. You may state what the conversation was.

A. I met him one day and he asked me to call around at the bank; said he would like to see me.

Q. When was that?

A. That was sometime in the early part of September, '91, and I went around and Mr. Outcalt let me in at the side door; it was after banking hours.

1106 A. (continued). —and he asked me if I could raise him some more money and I told him I couldn't; I didn't have anything I could raise it on; I says, "You have a mortgage on everything I've got," and I says, "I couldn't raise any more just now."

Q. Well now what happened after Mr. Outcalt let you in at the bank?

A. I think they was having a meeting there of the stockholders when I went in.

Q. You mean directors or stockholders?

A. Directors, or what ever you call them, and there was a number of them there; there was Mr. Mosher and Mr. Outcalt, and A. P. S. Stuart and H. J. Walsh and D. E. Thompson and several others; I didn't see them all, but when Mosher came out of the room,—when I went in they was talking pretty loud; seemed to be quarreling about something; some letter they had got from the Comptroller, and Mosher when he came out he seemed flushed and angry, and I overheard Mr. Thompson say that he thought the whole thing was rotten right through and he was going to get out of it.

Q. That was in September, 1891?

A. Yes, sir.

Q. How long did you stay there?

1107 A. Oh I didn't stay very long; a few minutes; I didn't stay because they had a meeting there; I told Mosher I couldn't raise any more money and I left.

Q. And how well were you acquainted with these men who were interested in that bank—did you know all of the directors of the bank?

A. Yes, sir, I knew them all.

Q. And were they around the bank frequently?

A. Some of them.

Q. Well what ones were there, that were around there frequently?

A. Well H. J. Walsh,—he owned the building,—he used to be there quite often, and A. P. S. Stuart was there a good deal to-, and W. W. Holmes when he was alive, he was around there a good deal, and Mr. Thompson, and several of them were around there.

Q. And Mr. Yates?

A. Yes, sir, but he wasn't there very often though; he didn't come there as frequently as the others.

Q. And was Mr. Hamer?

A. Mr. Hamer and Cap. Phillips, they used to drop in there occasionally.

Q. What occupation are you engaged in now?

A. Bookkeeper.

Mr. THOMAS: That's all.

Cross-examination.

By Mr. ROSE:

Q. Mr. Scott what was the particular business that took you to the Capital National Bank in September, 1891?

A. I went at Mr. Mosher's request.

Q. For what business?

Q. Well he asked me if could raise him some more
1108 money, and he wanted to see me.
Q. How long were you in the bank at that time?
A. I wasn't in there but a minute or two, I guess.
Q. What's that?
A. Just a few minutes.
Q. You went in at the side door, did you?
A. Yes, sir.
Q. Mr. Outcalt let you in?
A. Yes, sir.
Q. How do you fix the time of that interview?
A. It was the early part of September, I don't know just what day it was.
Q. Well I asked you how you fixed the date?
A. I fix- the date because I had just given him these notes, and I thought it was rather strange that he should ask me for some more money after I had given him those notes.
Q. That's the way you fix- the date?
A. Yes, sir.
Q. Did you ever keep any memormandum of that conversation?
A. No.
Q. When did you first go into the laundry business?
A. Well I had an interest in it in '86, and then I bought my partner out in 1887.
Q. In 1886 when you acquired that interest what was your business?
A. I was in the Capital National Bank as book-keeper.
Q. What was the real cause of your severing your relations with the Capital National Bank?
A. I left to attend to my own business.
Q. Did you have some difficulty with Mr. Outcalt before that?
A. No, I had no difficulty.
1109 Q. Never did have?
A. Not as I know of.
Q. Well you would know it if you did, wouldn't you?
A. Yes I would know it if I did.
Q. What was the origin of your indebtedness to the bank?
A. I borrowed the money to buy that property.
A. Was that the origin of all the inedbtedness of yours?
A. Yes, sir.
Q. Absolutely?
A. Yes, sir.
Q. You had some difficulty with Mr. Outcalt in connection with which you employed Mr. Newt C. Abbott as your counsel did you not?
A. I don't remember.
Q. Is your memory pretty good or not?
A. I don't remember anything of the kind; I may have done it, I don't remember it though.
Q. Well is it possible that you could have had a difficulty in connection with which you would go to an attorney, and not remember it?

A. I may have done it; I don't know; it's so long ago, my memory isn't as good as it used to be.

Q. Would you remember it if you had abstracted moneys of the bank and covered it up by false entries in the books?

A. I would remember it if I had I should think.

Q. You would have remembered it?

A. Yes.

Q. Did you have a difficulty over that very subject with Mr. Richard C. Outcalt?

A. No, sir.

Q. And did you meet Mr. Outcalt over that subject matter in the office of Abbott, Sellick & Lane in the Burr block in the city of Lincoln about 1887 shortly before you quit the bank, in
1110 which Mr. Outcalt threatened to send you to the penitentiary for embezzlement from the Capital National Bank?

A. No sir, he never threatened anything of the kind.

Q. And did you then and there present to him some patched up remnants of paper that you had picked out of the waste basket and pasted together, to show promissory notes that had been destroyed and thrown in bits into the waste basket by C. W. Mosher?

A. No sir, I didn't.

Q. If you had any such transaction as that your memory is all gone about it?

A. Yes sir.

Q. And did you tell Mr. Outcalt at that time and place, in the presence of Newt C. Abbott, and A. W. Lane, that "if you send me to the penitentiary, I'll have company"?

A. No sir, I never made any such a remark.

Q. Let me ask you from what source did you get your means to acquire an interest in the laundry business?

A. From my salary.

Q. What was your salary?

A. I had a thousand dollars a year.

Q. Did you have any family?

A. No.

Q. Your laundry was a little shack out at 24th and "O" street-, wasn't it?

A. It was out on 24th and "O".

Q. It wasn't a very large affair?

A. Well it wasn't a very small one.

Q. Right in the creek bottom there?

A. It was right on Antelope creek.

Q. That was the property that you pretended to have, is it?

A. That was the property that I had at that time.

111 Q. And that was all you did have, wasn't it?

A. Yes,—no, that wasn't all I had. I had some lots out in South Park Addition,—five lots.

Q. Paid for?

A. Yes sir, paid or; I sold two of them and three of them I give in that mortgage.

Q. They were out towards the Asylum?

A. It was near the hospital, the St. Elizabeth's Hospital, on 10th and Charles street-.

Q. And you went right into the bank and borrowed money in the ordinary commercial way?

A. Yes sir.

Q. Now, as a matter of fact, didn't you give your notes to the bank to cover the amount of an embezzlement or larceny of yourself from the bank, committed while you were a bookkeeper of the bank?

A. No sir, I gave those notes to buy that property. I bought an undivided half interest at first for $5,000 and paid five hundred dollars down and was to pay $500 each six months,—I bought that in August.

Q. 1886?

A. Not in August,—In July '86, and then in February I think it was, '87, I bought the other half.

Q. And when you made both purchases you were still a bookkeeper of the bank?

A. Not when I bought the second part.

Q. Weren't you a book-keeper of the bank in February, 1887.

A. Yes sir, I was a book-keeper at that time.

Q. What time did you give the mortgages?

A. I give the mortgages in May, I think it was.

Q. Have you looked up the books?

A. No sir.

1112 Q. Then you bought the property,—half of it in 1886 and a part in February, 1887, but you gave your mortgages to the bank in May, 1887?

A. Yes.

Q. And you quit your services with the bank in May, 1887 to-just before you gave the mortgages?

A. Somewhere about that time, yes sir.

Q. And the giving of the mortgages was connected with your accounts at the bank, wasn't it?

A. No sir, it was to pay for them lots; the lots were bought on five years.

Q. How did you happen to get $18,000 borrowed in that way?

A. The lots was bought in five years time, and they loaned me the money to pay for all of them before the time expired so as to have a clear title to them, and then I sold one of the lots to the city, and another I sold to a man by the name of Crandall, and the rest I give them a mortgage on.

Q. How did you happen to have so big a mortgage as $18,000 or such an indebtedness?

A. Well I had borrowed money before; I borrowed money to buy those lots out in South Park.

Q. You don't mean to say that you had any considerable portion of $18,000 in any enterprise of that kind, do you?

A. The block cost $10,500, and then the lots out there, and then I borrowed money to buy machinery to put in the laundry.

Q. At what time was it that your indebtedness was $18,000 to this bank?

A. That was in 1891.
Q. What made it so much then?
A. Well I had borrowed money at different times, for different purposes.
Q. You mean to say that you had a good credit at this bank?
1113 A. And when I gave the mortgage it was to cover my indebtedness or any other loans I might need. I think it is so stated in the mortgage, and when I needed any money I went to Mosher and got it.
Q. What was the date when your laundry was foreclosed on?
A. Foreclosed on?
Q. Yes.
A. The lots were foreclosed on in 1893 or '4—I don't know just when the date was,—I don't remember,—I think it was 1893; I am not sure.
Q. Was it before the bank failure or after?
A. After.
Q. Have you looked up the records to ascertain recently?
A. No sir.
Q. Who was it that sued you in that case?
A. I don't know who it was,—I was sued on these notes.
Q. By the Capital National Bank of Lincoln?
A. I don't know whether it was them or the receiver. The Receiver, I think.
Q. The foreclosure of your mortgage?
A. The mortgage was foreclosed by the party who held the note; I think it was some bank back east.
Q. It was purchased in by the Capital National Bank, wasn't it?
A. What was?
Q. The laundry property out there and afterwards sold to Crandall?
A. It wasn't sold to Crandall; there was only one lot sold to Crandall?
Q. Well it was a part of the property foreclosed?
A. No, the lot was sold to Crandall long before the property was foreclosed.
Q. Who sold it to Crandall?
1114 A. I did.
Q. Where did the purchase money go to?
A. It went to the bank to apply on my notes.
Q. Went to the Capital National Bank?
A. Yes sir.
Q. Wasn't your mortgage to the bank, in fact, a deed?
A. I gave them a warranty deed at one time, and then give the mortgage.
Q. You conveyed it by warranty deed to them,—when did you do that?
Q. That was in 1887 I think,—I believe it was in 1887.
Q. What time in 1887?
A. In,—I think it was in May, I believe.

Q. You gave the deed just about the time you quit the bank didn't you?
A. Yes.
Q. And you gave the deed under pressure to-, didn't you?
A. No sir.
Q. Now you said you couldn't remember whether you might have had the trouble with Outcalt that I referred to, but since I have mentioned it and called up these old things, can you remember it now?
A. No sir.
Q. How old a man are you, Mr. Scott?
A. Seventy.
Q. Just seventy?
A. Yes.
Q. Who are you keeping books for now?
A. Newbere & Brookson.
Q. What's their business?
A. Plumbing.
Q. You never had any credit anywhere else, outside of the Capital National Bank, did you?
1115 A. I never borrowed money anywhere else, if that's what you mean.
Q. Never could borrow money anywhere else, except in little dribs could you?
A. I never tried; I suppose I could if I had tried; my credit is good in Lincoln.
Q. Do you pretend to say that your credit was ever good in Lincoln?
A. My credit was always good in Lincoln; I always pay my bills.
Q. Where have you lived since, 1887?
A. Lived in Lincoln the most of the time.
Q. Where have you lived when you were not there?
A. Just on the outskirts when I wasn't right in the city.
A. Out in the country somewhere?
A. Out east of Lincoln three or four miles.
Q. Did you live alone?
A. No, I was out there keeping books for Tabitha Home for ten years.
Q. Tabitha Home for ten years,—that's a charitable institution, isn't it?
A. Yes.
Q. Were you working for wages, or an inmate of the institution?
A. I was working for wages.
Q. How much wages did you get there?
A. I got ten dollars a month and my board.
Q. Mr. Scott, did you have a speaking acquaintance with Mr. Thompson while you were in the bank there?
A. Speaking acquaintance,—I used to speak to him sometimes.
1116 Q. Ever have a conversation with him?
A. No, not any particular conversation.

Q. You say Mr. Thompson was sometimes there—did he make his headquarters there in '86 and '87?

A. I couldn't say he made his headquarters there. He wasn't there often enough for that.

Q. Did he go in back of the counter where the bookkeepers did their work?

A. No, I don't think he did,—I don't remember.

Q. Did you ever see him in back there looking over your work or checking you up?

A. He never looked over my work, no.

Q. Did you ever see him looking over anybody's work?

A. I couldn't say I did.

Q. Who were the officers in immediate charge of the bank?

A. Mosher and Outcalt.

Q. Who hired and discharged the clerks and directed them in their work?

A. Mosher.

Q. What day was it that you were up here looking over these books?

A. Up here?

Q. Yes.

A. I forget what day it was; a few weeks ago.

Q. Can you give the month or the year,—this year or last year?

A. It was this year.

Q. Since the first of January?

A. I think it was.

Q. Who paid your expenses for coming up here?

A. I paid them myself.

Q. Paid your expenses, and came up on your own time, did you?

A. Yes sir, came up on my time.

1117 Q. As a gratuity, and got no pay for it?

A. I got paid for my time after I got here.

Q. But not for your expenses?

A. My time and expenses, yes sir.

Q. Who paid you for it.

A. Mr. Jones.

Q. How many days were you here?

A. One.

Q. What was the total sum you received?

A. Five dollars and my expenses.

Q. How long have you been here on this trip?

A. I just got here this noon.

Q. Who paid your expenses this time?

A. I paid them myself, so far.

Q. You have received no pay so far.

A. I have received no pay so far.

Q. Any promise of any pay?

A. No, I am not promised any.

Q. Who requested you to come here?

A. Mr. Jones.

Q. When did you get acquainted with Mr. Jones?

A. I got acquainted with him when he used to do business with the bank first.

Q. Well when did you see him with reference to this particular matter here?

A. I saw him one day up in Lincoln.

Q. Where?

A. On the street; I met him and we got to talking about the old Capital National Bank; I didn't know there was anything on here,—I thought it was all settled and done for long ago.

Q. Did you just casually meet him on the street?

A. He told me something I didn't believe, and he said he
1118 had the books and could show me, and I said I would like to see them books, I have never seen them since the bank closed, and he said if you will come up I will show you.

Q. And then you came up.

A. Then I came up.

Q. What help did Mr. Jones give you in fixing the date of this supposed meeting with Mosher and Outcalt in the back of the bank?

A. He didn't give me any help.

Q. Not the first bit?

A. No.

Q. Did he tell you the date that Mr. Thompson sold his stock or anything of that kind?

A. No.

Q. Never a word about that?

A. No.

Q. It just rolled out of you and you remembered after these twenty years that that was in September, 1891?

A. Yes.

Q. You remembered that just right easy?

A. I remember things further back than that.

Q. You remember the date and everything.

A. No I don't remember the date; I remember it was the early part of September, but what day I don't know.

Q. What business were you engaged in in 1891?

A. The laundry business.

Q. Who else,—did you get to see *in to see* who was in the bank at that time?

A. I saw some of them; I couldn't see them all, but I didn't go into the private room.

Q. Was Mr. Charles Yates there?

A. I didn't say he was there; I think he was there, I am not sure.

1119 Q. I*n* understood you to say that Mr. Yates was there, and Mr. Walsh.

A. No, I said Mr. Walsh and Mr. A. P. S. Stuart, and Outcalt, Mosher and D. E. Thompson, I believe. There were others there; I didn't see Mr. Yates; I don't know whether he was there or not; I didn't see him, he might have been there.

Q. What do you think about it,—couldn't you remember him as well as you could the others?

A. Well I didn't see him. I just told you those that I saw when they opened the door.

Q. Was there any counter or partition between the back entrance and the front entrance?

A. Yes sir, there was a partition across there.

Q. And you looked over the partition?

A. Well it was a ground glass partition,—the top was ground glass and the bottom frame.

Q. Were those people assembled out in the lobby, or in the President's room?

A. They were in the back room; the president's room was in the front.

Q. I don't get your proposition as to where they were.

A. They were in the private room in the back there.

Q. A private room in the back?

A. Yes.

Q. How does it come that you remembered that they were in the front room when you first said it?

A. I didn't say anything about them being in the front room; I said I was let in at the side door by Mr. Outcalt, and this room was on the south side of the building,—south end of the bank; the bank faced north.

Q. Did you go right into the bunch of them yourself?

A. No, I didn't.

1120 Q. How close were you to them?

A. I went at the side door, and then there is,—there was a partition along there, and then across the end there's another partition, and there's a private room there and back of that is a vault where they kept the safety deposit boxes in.

Q. Where were those people?

A. They were in the room this side of the vault.

Q. They weren't in the vault?

A. No, not in the vault.

Q. And were they inside of the railing back where the employes of the bank were?

A. I told you there's a frame partition with glass on top, and a door that goes into that private room; I couldn't see who was in there until they opened the door; there was more in there than I saw; I wasn't any further from the door than I am to you.

Q. And you could see right through?

A. The door was open.

Q. And everybody could see you just the same?

A. I don't know whether they saw me or not; I didn't pay any attention.

Q. But they could see you?

A. They could have, I guess.

Q. Who were you with while you were in the room there; who were you talking to while you were in the bank room there on that occasion?

A. I talked with Mosher.

Q. Anybody else?

A. No.

Q. When Outcalt let you in how long an interval was it until Mosher came to see you?

A. Why Outcalt called him out?

Q. Immediately?

A. Yes.

1121 Q. How long were you in there?

A. I wasn't in the bank I shouldn't think over two or three minutes all together.

Q. How near to the entrance door were you?

A. The side door?

Q. Yes.

A. Why I was close to it.

Q. You said it was after banking hours? What hour was it?

A. I don't know just what hour it was; it was near six o'clock I think.

Q. You didn't make a payment to Mosher that night did you?

A. No.

Q. And you have no way on earth of fixing the date?

A. No sir, I don't remember just what the day was.

Q. What made you think it was a Directors' meeting then?

A. Because I heard them talking about something about it when I went in; they were talking pretty loud; they seemed to be quarreling about something or other, and I supposed it was a Directors' meeting from the number of directors that was there; that's why I didn't stay any longer.

Q. You were afraid you might hear something if you stayed?

A. Well I just spoke to Mosher and had a little conversation with him and left.

Q. What was your conversation with him?

A. He asked me if I could raise him some more money, and I told him I couldn't.

Q. Then what did he say?

A. He didn't say anything.

Q. What did you say further?

A. I didn't say anything, I went away.

Q. That's the entire conversation between you and Mosher?

A. Yes sir.

1122 Q. And that's the entire conversation you had with anybody while you were in there?

A. That's all the conversation I had, yes sir; I didn't go in to see anybody else; I went in to see Mosher, and as soon as I saw him I came out.

Q. Are you getting any additional funds for this testimony in respect to overhearing this conversation by Mr. Thompson there in the bank?

A. Am I paid?

Q. Yes; do you get pay from Mr. Jones or anybody else for that?

A. No.

Q. You have had no personal dealings with Dr. Hamer or Mr. Yates, or Mr. Thompson, the defendants in this case, at any time, have you?

A. No sir.

Q. And never have had?

A. Never had any dealings with any of them as I know of.

Q. Did you hear Mr. Thompson make any mention of what it was that he thought was rotten?

A. He just said he thought the thing was rotten all through and he would get out of it.

Q. What was it he referred to,—you didn't catch what he referred to did you?

A. No.

Q. And you don't know to this day what he referred to?

A. No, I don't; I supposed it was about the bank.

Q. You didn't hear him say anything more than that?

A. No sir; I wasn't in there only as I told you, just about two or three minutes.

Q. He was rolling it *rou*ght out boisterously, was he?

A. He was angry about something.

1123 Q. You don't pretend to know what it was?

A. No sir, I don't.

Q. Well now, Mr. Scott, this little room in the back part of the bank, was that a little room used for entry to the safety deposit boxes?

A. Yes sir.

Q. Used for and by the customers of the bank?

A. Yes.

Q. Were you ever in that bank at any other time, when you gathered that there was a directors' meeting in progress?

A. No sir.

Q. All the time you were there did you ever see the directors meet in that room at any other time?

A. No sir.

Q. Were you about the bank long enough to know at what point in the bank the directors, when they had meetings, always assembled?

A. I don't know that they had any meetings, or where they assembled.

Q. But you do know you never saw them assembled in that room before?

A. I never saw them assembled in any room; I never saw them before.

Q. Did they have a room up in front that was more spacious and a better room for that purpose?

A. They had a room in front to-, yes sir.

Q. When you saw Professor Stuart, and Dr. Hamer, and Mr. Holmes and the officers of the bank,—you saw them come in and go about the bank frequently you say,—now what room did they enter,—the front room or the back room?

A. Sometimes one and sometimes the other.

1124 Q. Sometimes they had occasion to enter the vaults in their interviews with the officers, Mosher and Outcalt?

A. Well Outcalt was in the cashier's cage most of the time, and Mosher was in front there in the president's room.

Q. You never saw these directors go into the president's room I suppose.

A. Oh,—that is, I never seen them hold a meeting there; I have seen them go in and out there.

Q. And you never saw them hold a meeting in that bank until six years after you had severed your relationship with the bank?

A Yes sir,—four years.

Q. Yes about four years. Have you any data from which you could refresh your recollection and say when it was that your mortgage that you refer to was foreclosed against you?

A. When the mortgage was foreclosed?

Q. Yes, the mortgage on the laundry.

A. It was sometime in 1891; I don't remember just what time it was.

Q. Then it was about two years,—from one to two years before the failure of the bank, as a matter of fact?

A. No,—it was somewhere in 1893 or '4 I said.

Q. But when I asked you again you said 1891.

A. Well it was '91——

Q. You are correcting it now because you found that this answer was inconsistent with the other?

A. Well I don't remember; that was a long time ago and of course I couldn't remember everything; I am getting old now.

Q. Do you know what the description of your lots were?

A. Which lots?

Q. The lots that you mortgaged to the Capital National Bank—the "O" street lots?

A. The "O" street lots; it was block,—a block in Kinney's
1125 "O" street addition; I don't know the number of the lots, except the one I sold to Crandall and one I sold to the city; I don't know what the numbers were that I sold,—I don't remember.

Q. I understood you a while ago to say that you deeded it all in 1887,—just at the time you quit the bank?

A. I deed- it all to the bank before any of them was sold.

Q. And when an*t* of them were sold the purchase price was paid to the bank?

A. Yes sir, it was paid to the bank.

Q. You were very much in Mr. Mosher's confidence while you were in the bank there?

A. Well we used to be good friends, yes; we both had stock in the ball game, and used to go out to the ball game pretty often.

Q. Your team won the pennant one year?

A. Yes.

Q. You mentioned some of the directors of that bank who were officers,—do you know any of them who are alive now?

A. I don't know,—some of them are dead, and some of them are living I think.

Q. Was Mr. Yates a director?

A. Yes sir, he was one of the directors.

Q. Was Mr. Thompson?

A. Yes.
Q. Was Mr. Hamer?
A. Yes.
Q. And Mr. Holmes?
A. W. W. Holmes, yes sir.
Q. Did you know Mr. Charles E. Yates?
A. I don't know what his initials are.
Q. C. E. Yates.
A. He was Superintendent of the telegraphs of the B. & M.
1126 Q. You knew him?
A. Yes sir.
Q. Did you ever talk to him about your defalcation in that bank?
A. No.
Q. Or with Mr. D. E. Thompson?
A. No.
Q. You never talked to anybody but Outcalt and Mosher?
A. Talked about what?
Q. Did you talk to Outcalt about your defalcation in 1887?
A. No.
Q. You still can't recall that?
A. No.
Q. Did you ever talk to Mosher about it?
A. No.
Q. Did you ever check Mosher up on any of his paper in that bank, while you were bookkeeper?
A. Check him up?
Q. Yes.
A. I called his attention to one thing there once.
Q. What was that?
A. I saw a report in the paper of the statement of the bank I noticed he got the deposit account fifty thousand dollars more than it was on my books, and I asked him about it.
Q. Did he explain it to you?
A. Yes.
Q. Showed you what made up the difference?
A. He told me he didn't want to be underneath the State Bank, he said they increased their deposits, and so he put that fifty thousand on his so it would show they had a bigger deposit than the State.
Q. Did you ever check him up on his notes?
A. No.
1127 Q. Do you recall of carrying around in your pocket some notes that Mr. Mosher had torn up, the pieces of which you had assembled and pasted together?
A. I never had no notes of Mosher's.
Q. Notes that he had destroyed?
A. No sir.
Q. Did you in the presence of W. A. Sellick, or in the presence of N. C. Abbott, or A. W. Lane, in the office of Abbott, Sellick & Lane in the Burr Block, in 1887, in Lincoln, Nebraska, have an

interview with Richard C. Outcalt, then the cashier of the Capital National Bank, and now deceased, touching an alleged shortage of yourself with the Capital National Bank, in which Mr. Outcalt told you that if you didn't straighten it up that he would send you to the penitentiary, and at which conversation you presented to him the torn bits of a note that apparently had been assembled by yourself and pasted together and say to Mr. Outcalt, "I don't think you will send me to the penitentiary,—you can see this, and if you send me there I will have company", or words to that effect?

A. I never said anything of the kind to Mr. Outcalt at no time.

Q. Did any such an occurrence at any time take place in the Office of Abbott, Sellick & Lane, in Lincoln, Nebraska?

A. Not that I know of.

Q. Do you remember of having co-nselled with Abbott, Sellick & Lane or any member of that firm?

A. Not on those things.

Q. You were counselling them were you not, about that time, about something?

A. They were my attorneys, and used to do my business when I had any.

Q. Did this conversation take place in the presence of Richard C. Outcalt that I am challenging your attention, to, and
1128 did it happen to be in their office?

A. I don't remember it.

Q. You don't remember it?

A. No.

Q. Do you dent that such an occurrence did take place absolutely?

A. I do.

By the COURT:

Q. Were you ever short in your accounts at the bank while you were bookkeeper, or were you ever accused of dishonesty by any officers of the bank while you served in that capacity?

A. No sir.

Q. What was the fair market value of the laundry property which you say you mortgaged to the bank for ten thousand dollars, and which was foreclosed,—sold upon foreclosure?

A. Well there was a whole block of lots on "O" street; I was offered twenty five thousand dollars for it one time and refused it. And there is the laundry building,—brick and stone 40 x 80,—the stone part 20 x 80 and two stories high, and about five thousand dollars' worth of laundry machinery in there.

Q. What did you pay for the laundry when you first bought it?

A. When I first bought it, I bought a half interest in it and paid $500, and then I bought my partner out, and I went to Chicago,—that's why I borrowed money from Mosher—to buy about $5,000 worth of new machinery. The hotels in Lincoln used to have their own laundry and I bought new machinery so as to do that kind of work, and then I went around to the hotels and got them to give me their work because I could do it cheaper than they could run their own laundry.

1129 Q. You said you bought a half interest for $500?

A. Yes sir, it was a little bit of a place between 11th and 12th on "O" street, and then the lease run out and I had to get another building and I bought that property on "O" street, and moved the laundry there, and then I went to Chicago and bought new machinery.

Q. What did you pay for half interest in the laundry in the first instance?

A. $500.

Q. How did it come to be worth a sufficient amount to justify a loan of $10,000?

A. It wasn't on the laundry alone; it was on the whole of them lots and the three lots out in South Park; it was 18 lots.

Q. How much of your paper was finally left unpaid, while the bank was in the hands of the Receiver?

A. Those two $6,500 notes; they was to run five years.

Q. You claim to have paid those by this mortgage?

A. Yes sir.

By Mr. THOMAS:

Q. When you bought the half interest in that block, how much were you to pay for that?

A. I paid $5,000 for the first half; $500 down which I paid and I was to pay $500 each year for the balance until it was paid, and then afterwards I bought the other half interest,—it was an undivided interest and I paid $5,500 for that, and I paid $500 down, and was to pay $500 every six months for the balance. Well then Mosher and I was talking it over one day and I said I had a chance to sell one of those lots to the city, but they wanted a clear title for it, and he agreed to loan me the money to pay those notes off. I wrote to the party and asked them if they would accept the
1130 money for the notes, instead of letting them run the five years, and they wouldn't accept the money unless I paid the whole of the interest, and I finally paid the whole of the interest and the balance of the money to clear the lots.

Q. And what buildings were there on them when you bought the lots?

A. This old building that used to be an old soap works, and it was full of soap vats and it cost me about $5,100 to fit it up for the laundry; I had to take them old soap vats out, and remodel the entire building; it had been vacant for years, and I bought it and moved the laundry down there; I couldn't rent a building in Lincoln at that time, and I had to buy or sell the laundry machinery at a sacrifice, so I bought that building and remodeled it and moved it down there, and I borrowed the money from Mosher for all those things.

Q. You say you went to Chicago and bought this machinery, about $5,000 worth? When was this?

A. I think it was in October, 1887,—October or November, I don't remember just exactly, and I bought all new machinery and then I went around to the hotels and I says "How much does it cost

you to run your laundry", and they says what do you want to know for? "Well," I says "maybe I can save you some money" and Imhoff was one I talked to, and he said he would figure it up and see and let me know, and so I went around again and he said it cost him about $300 a month to run his laundry and I told him if he would give it to me I would do it for $200 a month, and he could send any amount of it he wanted to; and I went to the Windsor hotel, and went to the Tremont, and I went to every hotel in town and got every hotel in town, and to the Lincoln, and I had to buy the Lincoln machinery because they wouldn't give me the work unless I would buy the machinery, and he made me pay just what
1131 he gave for the machinery when it was new, and I threw it in the scrap pile after I bought it.

Q. Then in 1887 this deed was taken in whose name?

A. Well Mr. Thompson let me have the B & M car work and I used to do their work, and he afterwards came to me and asked me if I could get out the Beatrice work, and I says "I can get it back to you the same evening if you will get it up to me in the morning".——

Q. Now the deed, Mr. Scott, in whose name was the deed taken after Mosher loaned you the money to pay off the notes and get this title clear, and you sold this lot to the city, and so forth, in whose name was the deed taken at that time?

A. It was taken I believe in Outcalt's name,—I don't remember, either Mosher's or Outcalt's.

Q. Well then was it afterwards deeded back to your wife or to you?

A. It was deeded back to me and my wife at the time I give him those two $6,500 notes, and paid him a little over $5,000 in money; I was owing him a little over $18,000 at that time, and I give him these two $6,500 notes to run five years, and I paid him the difference in cash.

Q. Do you know what the lots that were sold to the city and this other gentleman, what they brought?

A. The city paid me $2,500; I sold them the lot at about half what it was considered worth at that time, because I had no fire protection down there, and I wanted them to come down there with the city engine house.

Q. And did they afterwards put a city engine house on that lot?

A. Yes sir, and it is there yet, and that was applied on the notes, and then I sold the other lot to Crandall for $4,500 cash and some trade, and that cash was paid into the bank to apply on the notes to-.

1132 Q. Now were you on friendly terms with Mosher after you went out of the bank?

A. Yes sir, we was always on good terms.

Q. Was that when you did your borrowing?

A. Yes sir.

Q. When was it you were interested in the same ball team,—was that after you went out of the bank?

A. No, that was while I was in the bank. Mosher was really

the owner of the team although he didn't figure as such, and he asked me if I would take some stock in it and I told him Yes, and I took some; we used to go out to the games together; sometimes I would ride out in his carriage, and sometimes he would ride out in mine; it was one day we was driving out there that he told me how he come to go into the banking business.

Q. Was that while you were in the laundry business?

A. No, I didn't have anything to do with the laundry business then,—that was before. I didn't get interested in the laundry business until '86.

Q. Now where did you first see Mr. Jones?

A. I saw him up in Lincoln,—met him on the street.

Q. And what was the conversation there with Mr. Jones?

A. I hadn't seen him since I left the bank and I met him on the street, and we got to talking and he told me about this,—we got to talking about the Capital National Bank at the time I met him; I didn't know that he had anything to do with it or had any case; I thought the Capital National Bank business was all settled and done with; I didn't want to be mixed up in it, and he made some statements there and I wouldn't credit them. "Well" he says, "*i* have got the books up here" he says, "and I can prove it". I
1133 didn't believe it. Well, he says, if you will come down to Seward, he says, I will show you the books. I says All right, I will come down, I would like to see them books, I haven't seen them since I have been out of the bank, and I came up here and he showed me and verified what he had said.

Q. At that time had you ever said anything to him about this meeting of the directors in September, 1891?

A. No, I hadn't said anything to him about it.

Q. How did you come to tell him about it?

A. I told him about it afterwards when I came out here; when I saw the books I told him about that, and then I didn't know that I was going to be called as a witness; they served papers on me while I was here, or I wouldn't have to come.

Q. Well was there anything that Mr. Jones or anybody else ever said or suggested to you about that meeting of the directors in September, 1891?

A. No.

Q. Did Mr. Jones or anyone else suggest that to you?

A. No sir.

Q. How did it happen to come up, were you simply narrating your history from the time you came to Lincoln?

A. We was having a general conversation about the bank, and I told him some things about that; if I had known there was any case coming up, why I wouldn't have told him, that's all there is to it; I didn't want to be drawn into it.

Q. What I was getting at was how you happened to tell those things?

A. Oh, just in general conversation; we got to talking about the old Capital National Bank matters, and I thought it was all finished

and wound up. I didn't know there was any case down here; I didn't know until I came down here,—until they served papers on me while I was down here.

1134 By Mr. Rose:

Q. Just to straighten you on your indebtedness. Did you give this mortgage before you sold your lot for a fire station and your lot to Crandall?

A. Yes sir, I think I did; the first mortgage.

Q. I thought you only gave one mortgage?

A. I gave two or three mortgages there.

Q. Well when you- indebtedness was $18,000.

A. At that time, that's the time I gave them the last mortgage,—that was in 1891.

Q. You gave them a mortgage then of how much?

A. He had a previous mortgage to that which he released at that time, or rather he had a warranty deed, and he deeded the property back to my wife and me and then I gave him a mortgage for ten thousand dollars; he said they had to have some money and I said I couldn't raise any money; I says "I can't raise money these hard times," and he said,——

Q. I don't care anything about those details. You say that when you gave the two $6,500 notes your indebtedness to the bank was $18,000 or upwards, is that right?

Q. Yes sir.

Q. After that you sold the lot to the city, did you?

A. No sir, before that.

Q. How much did you get from the city?

A. Twenty five hundred dollars.

Q. And from Crandall?

A. Forty five hundred dollars.

Q. That's seven thousand dollars.

A. Yes.

Q. Then had your previous indebtedness been as high as twenty-three thousand dollars, or such a matter as that?

A. I don't know what it was, because I don't remember.

1135 Q. It must have been.

A. No, I borrowed money after that from them;—you see I borrowed money to buy those lots,—to clear the title.

Q. Yes, but you borrowed that at the time they took the deed. They took the deed as security, I understood, for that. That's correct, isn't it?

A. I borrowed that before the lots were sold to the city because I had to clear the title before I could sell to the city and Crandall.

Q. Then after having borrowed that money you paid the proceeds of those two lots, seven thousand dollars to the bank?

A. Yes sir.

Q. And you still had $18,000 left, on which you paid $5,000?

A. Yes sir, I paid a little over five thousand at the time I gave the notes for $6,500 each.

Q. Now do you remember the transaction;—can you remember the details of thos- changes?

A. How do you mean?

Q. Do you remember the number of mortgages you gave, the dates and the number of payments you made on them?

Q. I gave the mortgage then for ten thousand at the time I give the notes, two $6,500 notes; they were to run five years.

Q. Now Mr. Scott, you have testified that you paid the bank seven thousand dollars as the proceeds of the sale of two lots; that you also paid five thousand dollars to reduce your indebtedness of eighteen thousand dollars and that you had still left thirteen thousand and upwards in two notes to the bank?

A. Yes, sir.

Q. That would make the aggregate of your indebtedness run up to twenty five thousand dollars. Did you ever owe that much to the bank at one time?

1136 A. I don't know just how much I did owe them; I had given a number of notes; I had notes at the bank there that I had paid for over thirty thousand dollars: I think you have got some of those notes,—(to counsel for plaintiffs.)

Mr. ROSE: That is all.

By Mr. THOMAS:

Q. That sale to Mr. Crandall and to the city, how many years was that before these two $6,500 notes were given?

A. Oh that was sometime before,—a year or two before that was given.

Q. And was that Crandall lot all paid in money, or part of it in trade?

A. He paid $4,500 in cash and I got some trade in with it; I got some equities in some farms down in Kansas which I afterwards traded away, but the cash went into the bank; it was paid into the bank; that was the agreement when I give the warranty deed, that any lot I sold;—I was to sell any lot and fix my own price and the money was to be paid into the bank to apply on what I owed the bank.

Witness excused.

1137 H. T. JONES, recalled:

Direct examination.

By Mr. THOMAS:

Q. Mr. Jones, how long have you lived in Seward, Nebraska?

A. Since, July, 1873.

Q. During that time were you connected with the Jones National Bank, the plaintiff in one of these cases that is being tried at this time?

A. I was.

Q. During what time were you connected with the bank, and in what capacity?

A. The bank commenced business in November, 1884; I was cashier from the organization of the bank until 1896; at that time I was elected President and was president of the bank until November, 1908.

Q. And while you were cashier of the bank who was president?

A. Claudius Jones, my father.

Q. And who had active charge of the bank?

A. In reality I had from the time the bank was organized to the time that I sold out.

Q. And during that period did the Jones National Bank do business, or keep a deposit with the Capital National Bank of Lincoln?

A. Part of the time it did.

Q. You may state when it began doing business with the Capital National Bank?

A. In June, 1885, and continued to do business from that time up to the suspension of the Capital National Bank, January 21, 1893.

Q. Do you know how much money the Jones National Bank had on deposit with the Capital National Bank, which was unpaid and that the Capital National Bank was owing to the Jones National at the time of the failure of the Capital National?

A. I do.

1138 Q. You may state what that amount was.

A. In the way of an explanation I would like to put it this way; on January 21, 1893 when the bank closed, the bank books of the Jones National Bank showed out balance to be $12,529.23, but the books of the Capital National showed it to be $17,529.23. This difference of $5,000 came about in this way—on January 15th, 1893 I requested the Capital National bank to remit the Chemical National Bank of New York, for the credit of the Jones National Bank $5,000. They reported to me on the following day, which was the 16th, that they had so remitted, but they never did.

Q. Is Exhibit X-1054 the card you speak of as having contained a report of the remittance to New York?

A. It is.

Q. When did you say that was received?

A. January 16th, 1893.

Q. And what does that indicate; what do the notations on the card mean?

A. The card states that they have remitted New York, $5000.

Q. And was that the regular method that the bank pursued, to notify your bank of transactions of that character?

A. It is and was.

Mr. THOMAS: We offer in evidence, Exhibit No. X-1054.

Received without objection.

C. W. Mosher President. H. J. Walsh, Vice-President.
R. C. Outcalt, Cashier.

Capital National Bank.

LINCOLN, Neb., 1/16, 1893.

Yours of — Received, with Enclosures as Stated.

Credited.	Entered for collection.		We remit:
		New York	$5000
Exhibit	Ex. 1054	Chicago	$.....
"X-1054	O. P. H.	Omaha	$.....
		Currency	$.....
		Silver	$.....

This Bank, in receiving collections elsewhere than in Lincoln, Acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully,

R. C. OUTCALT, *Cashier.*

[Admitted to:] Jones Nat. Bank, Seward, Neb.

1139 Q. And upon receipt of that card did you send any money to the Capital National Bank?

A. Thereabouts. I did; on the 19th day of January I sent them $5,000 in gold, and they were kind enough to receipt for it the day before they closed the doors.

Q. And have you that receipt—is Exhibit No. X-1055 the receipt from them acknowledging the receipt of the $5,000 in gold?

A. It is.

Q. Was that received by you or your bank at about the time it purports to be dated?

A. It was.

Q. And was that the common method and custom of notifying your bank of such transactions?

A. It was.

Mr. THOMAS: We offer in evidence Exhibit X-1055.

Received without objection.

C. W. Mosher, President. H. J. Walsh, Vice President.
R. C. Outcalt, Cashier.

Capital National Bank.

LINCOLN, Neb., 1/19, 1893.

Yours of 1/19—Received, with enclosures as stated

Credited.		Entered for collection.	We remit:
		New York,	$.....
Exhibit	Gold	Chicago	$.....
5000		Omaha	$.....
X-1055	Ex. 1055	Currency	$.....
	O. P. H.	Silver	$.....

This Bank, in receiving collections elsewhere than in Lincoln, acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully,

R. C. OUTCALT, *Cashier.*

[Addressed as follows:] Jones Nat. Bank, Seward, Neb.

1140 Q. Do you remember of the time that the Capital National Bank failed and went into the hands of a receiver?

A. I do.

Q. I presume you filed your claim on behalf of the bank?

A. I did.

Q. And can you tell us now the amount of money that the Capital National Bank was indebted to the Jones National Bank on the 21st day of January, 1893, the day it closed its doors?

A. I was forced to accept the amount as shown by their books, in place of ours in that way, and duplicate receiver's receipt for the amount $17,529.23, Receivership No. 1009.

Q. Is that the amount that the Jones National Bank had on deposit with the Capital National bank at the date of the latter's failure?

A. According to the books of the Capital National Bank. According to the books of the Jones National it was $5,000 less than that.

Q. That was on account of their failure to remit to New York as you have testified?

A. Yes, sir.

Q. Then what did they actually owe your bank?

A. The amount of the Receiver's receipt, the way they forced me to accept it.

Q. Were there any dividends paid on that, Mr. Jones?

A There were three.

Q. Can you give the date of those dividends and the amount?

A. I can.

Q. You may state.

A. September, 1893, ten per cent; May, 1894, five per cent; July, 1901, two per cent.

Q. Was that the dividend that was paid through the Receivership proceedings—that was paid you by the Receiver of the
1141 Capital National Bank?

A. Yes, sir.

Q. Have you received any other or further payments from the Receivership than those three dividends?

A. No, sir.

Q. Now, Mr. Jones, before you made any deposits in that bank, and after you had begun doing business with the Capital National Bank, did you see any statements of its condition, that is, of its assets and liabilities?

Mr. Rose: Each of the defendants objects as too remote; incompetent, irrelevant and immaterial, and not a matter that is pleaded.

Objection overruled.

Each of the defendants excepts.

A. I received statements before, and all the time during the period in which we had an account in the Capital National Bank, up to the time it suspended.

Mr. Rose: Each of the defendants move to strike out the answer as not responsive.

Motion overruled.

Each of the defendants excepts.

Q. Now you speak of seeing statements—now where did you see statements of the Capital National Bank's condition—in the newspapers or where?

Mr. Rose: Each of the defendants object- as immaterial.

Objection overruled.

Each if the defendants excepts.

A. I saw them in newspapers and what I term printed slips and on Capital National Bank business cards.

Q. In what newspapers did you see statements of its financial condition?

A. The Nebraska State Journal and the Lincoln Daily Call.

Q. You may state how often those statements appeared in the newspapers.

A. About five times a year.

1142 Q. And during the time that your bank did business with the Capital National Bank did you see all of the statements that came out, as they were called for by the Comptroller of the Currency?

A. I did.

Q. Now what was the custom and practice of the Capital National Bank with reference to sending out statements of its condition to its customers?

Mr. Rose: Each of the defendants objects as incompetent and immaterial, and the witness not qualified to answer.

Objection overruled.

Each of the defendants excepts.

A. The Jones National Bank always received statements from the Capital National Bank immediately upon the publication of a statement.

Q. And in what form did those reach the bank, and through what medium?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial under the issues.

Objection overruled.

Each of the defendants excepts.

A. We received them from the bank in two forms; one is what I call on a printed slip; what I mean by that is, as the form would appear in the newspaper that same form would be printed on slips of paper, like the one I hold in my hand. The one I refer to on a business card was of the same date but in a more condense- form and usually the statement would bear the name of all the directors of the bank; on the opposite side of this card——

Mr. Rose: Each of the defendants object- to this as not the
1143 best evidence.

Objection overruled.

Each of the defendants excepts.

A. —appeared a cut of the bank building, the name of the bank, the amount of capital stock, surplus and the names of the officers.

Q. Now the slips you refer to, in what form were they printed?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; no foundation laid and not within the issues.

Objection overruled.

Each of the defendants excepts.

A. They were printed in the form exactly as published in the newspapers.

Q. And the cards you say were in a more condense- form?

A. Yes, sir, by that I mean on the card under the head of cash would be included the actual cash, cash items and the amounts in their correspondent banks subject to check or draft by the bank, and on the opposite side under the head of deposits would appear all the deposits including the individual deposits subject to check, the time certificates of deposit, the demand certificates of deposit and the country bank deposits.

Q. Now what did you do with those statements when they reached your bank, Mr. Jones?

A. I would always examine them, and see the condition of the bank—that is a rule not only with the Capital National Bank, but with all banks with which we done business; it was the only method

that the bank has of ascertaining the exact condition of the banks with which it is doing business.

1144 Q. And did you preserve those cards and slips for any length of time?

A. Yes, sir.

Q. Have you any of them now?

A. I have not.

Q. What became of them, Mr. Jones?

A. At the time that we removed our office from the old location to the Tissue block, the older ones, or most all of them were destroyed. We saved a certain amount of them—didn't know but what we would use them when this case was tried before, and I have never seen any of them since.

Q. Have you made search for them?

A. I have.

Q. Made diligent search?

A. Yes, sir, I tried my best to find them.

Q. Did you succeed in finding any of them?

A. I did not.

Q. You say you saw all of the statements that were published, which were five a year, from the time your bank commenced doing business with the Capital National Bank. Now what did those slips, and published statements and cards indicate with reference to the condition of the Capital National Bank, as to whether it was solvent or otherwise, or whether it was prosperous or otherwise?

Mr. Rose: Each of the defendants object to that as incompetent, irrelevant and immaterial, and certainly not a matter of expert testimony without giving us reference to the card or anything of that sort.

Objection sustained.

Plaintiffs except.

1145 Q. Now what did the reports and statements that you have referred to show with reference to the assets and liabilities of the Capital National Bank?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not foundation laid; not the best evidence, and not within the issues.

Objection overruled.

Each of the defendants excepts.

A. Every statement showed the bank to be not only solvent but in a good flourishing condition.

Mr. Rose: Each of the defendants move to strike out the answer as not responsive to the interrogatory, and as giving a mere conclusion and not any fact, and as incompetent, irrelevant and immaterial.

Motion sustained.

Plaintiffs except.

Q. How was the condition of the bank indicated?
A. You mean the form of the statement?
Q. Yes, sir.
A. On one side was the resources, and on the other side was the liabilities.
Q. And what was contained, in a general way, among the list of resources?
Mr. ROSE: Each of the defendants object as to any question as to what was contained in it in a general way as incompetent, irrelevant and immaterial; no foundation laid and not within the issues.
Objection overruled.
Each of the defendants excepts.

1146 A. It showed the amount of the capital stock,——
Q. I mean among the resources.
A. It showed the loans and discounts, and the cash and cash items, and how the capital stock and deposits of the bank were invested.
Q. What did it show on the other side, which is labelled liabilities?

Mr. ROSE: Each of the defendants objects as not the best evidence, incompetent, irrelevant and immaterial; no foundation laid, and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. It showed the amount of the capital stock, the surplus, the undivided profits and the amount of deposits.
Q. And what did those reports show with reference to the capital stock from the time that the capital stock became $300,000?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid; not the best evidence and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. It always showed the sum of $300,000.
Q. Did it show that the capital stock was impaired or otherwise?

Mr. ROSE: Each of the defendants object as incompetent, irrelevant and immaterial, leading, not the best evidence; no foundation laid and not within the issues, and calling for a conclusion of the witness.
Objection overruled.
Each of the defendants excepts.

1147 A. It showed that it was not impaired.

Mr. ROSE: Each of the defendants move to strike out the answer as incompetent, irrelevant and immaterial; a mere conclusion; the statement of the capital being $300,000 is the only fact set forth.
Motion overruled.
Each of the defendants excepts.

Q. Did these reports indicate that the bank had a surplus?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; calling for a conclusion of the witness, and not for any fact; not the best evidence; no foundation laid and not within the issues.

Objection overruled.

Each of the defendants excepts.

A. Yes sir, every statement showed a surplus, and a certain amount of undivided profits.

Q. I hand you Exhibit No. X-977, and will ask you to state if during the time you did business with the Capital Bank you saw a notice, of which this is a copy in that form or in a condensed form?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, and not within the issues.

Objection overruled.

Each of the defendants excepts.

A. I saw it in that form and also in a condensed form; the condensed form I refer to was a card statement.

Mr. Rose: Each of the defendants move to strike out the answer as not responsive to the interrogatory, incompetent, ir-
1148 relevant and immaterial.

Motion overruled.

Each of the defendants excepts.

Q. I call your attention to Exhibit No. X-978, and will ask you if shortly after that purports to have been published you saw a statement similar to this in the form in which it is published, or in a condensed form on a card?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; a mere repetition and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. I did.

Q. I call your attention to Exhibit No. X-979, and will ask you if you saw a notice, or this notice in this form in the newspapers about the time it was published?

Mr. Rose: Each of the defendants objects as a mere repetition; incompetent, irrelevant and immaterial and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. I did.

Q. Did you see it in any other form?

Mr. Rose: Each of the defendants objects to that as incompetent, because the question itself is contradictory; it necessarily couldn't be this exhibit and be in any other form, or it couldn't be this exhibit.

Objection overruled.
Each of the defendants excepts.

1149 A. I did.

Q. Did you see the statement of the bank for the same day that this purports to be, and giving the assets and liabilities as they are here, but in a different or condensed form?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid.
Objection overruled.
Each of the defendants excepts.

A. I did; the condensed form which I refer to is the business card or statement.

Q. How did it compare, as to showing the assets and liabilities, with the published form?

Mr. ROSE: Each of the defendants objects as no foundation laid; calling for a mere conclusion of the witness without furnishing any basis to us for comparing it and verifying it, and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. As to the total amount of resources and liabilities they agreed, but as I have said heretofore, in the card form it was more condensed; all the cash items were entered under the head of cash,—that would include the amount they had on deposit with their several correspondents subject to check or draft,—they treated that as cash.

Q. I call your attention to Exhibit No. X-980 and will ask you if at about the time that was published in the newspapers you saw that statement or a copy of it?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial under the issues, and not the best evidence.
Objection overruled.
1150 Each of the defendants excepts.

A. I did.

Q. And did you see it in any different form,—that is a statement purporting to give the condition of the Capital National Bank at the same date?

Mr. ROSE: Each of the defendants object as incompetent, irrelevant and immaterial; not the best evidence and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. I saw it both in the printed slip form and in the business card form, as well as the newspaper.

Q. I call your attention to Exhibits Nos. X-892, X-893, X-894, X-985, X-986, X-987 and X-988 and will ask you to state if you saw those statements of the condition of the bank in the same form

in which they appear in these exhibits, and in the newspapers at about the time these reports of the bank's condition were being published?

Mr. Rose: Each of the defendants objects as leading, suggestive, incompetent, irrelevant and immaterial, and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. I did, and will further say that I saw every published report that they made during the time that we were doing business with the bank, and also received the printed slips and the card statements.

Mr. Rose: Each of the defendants move to strike out the answer of the witness, except insofar as it is an answer to the interrogatory.

1151 Motion sustained.
Plaintiffs except.

Q. I will ask you if during the time your bank was doing business with the Capital National Bank you didn't see all of these statements of its condition,—that is five a year?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. I did see them.
Q. Now with reference to these exhibits, X-977 to X-988 except Exhibit No. X-981 which is a card, I will ask you if you received or if you saw the statements of the bank for those same dates but in different forms?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; not within the issues, and assuming a fact not proven.
Objection overruled.
Each of the defendants excepts.

A. I did, I saw them in two forms.
Q. What were they?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; no foundation laid.
Objection overruled.
Each of the defendants excepts.

A. In the newspapers and what I term the printed slip, which is an identical copy using the same form, as it appeared in the published newspapers and of the statement on what I term the business card.

1152 Q. And how did the amount as shown on this business card, or the card that you received compare with the amounts

as shown by this slip as you call it and with the reports as they appeared in the paper?

Mr. ROSE: Each of the defendants objects as calling for a conclusion of the witness; giving a comparison without giving the figures; not the best evidence and no foundation laid.
Objection overruled.
Each of the defendants excepts.

A. The total amount of resources and liabilities always agreed; had there been a disagreement it would have shown that there was something wrong.

Mr. ROSE: Each of the defendants move- to strike out the last portion of the answer as to what a disagreement would have shown as merely argumentative and voluntary and not responsive to the interrogatory.
Motion sustained.
Plaintiffs except.

Q. Did the newspapers published at Lincoln, the Lincoln Journal and the Call during the time the Capital National Bank was in existence and doing business contain any cards or advertisements of the Capital National Bank?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial, and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. They did.
Q. Did you see them in the newspapers as they came to you?

1153 Mr. ROSE: Each of the defendants object- as incompetent, irrelevant and immaterial, and not within the issues.
Objection overruled.
Each of the defendants excepts.

A. I saw many of the published advertisements in both the State Journal and the Lincoln Call.
Q. You read them in those papers?

Mr. ROSE: Each of the defendants object- as incompetent, irrelevant and immaterial.
Objection overruled.
Each of the defendants excepts.

A. I did.
Q. And were those papers of general circulation here in Seward and the state of Nebraska?

Mr. ROSE: Each of the defendants objects as immaterial.
Objection overruled.
Each of the defendants excepts.

A. They were.

Q. Have you the papers now in which you saw those notices as they came out?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant, immaterial, and not the best evidence.

Objection overruled.

Each of the defendants excepts.

A. No sir, I did not preserve a file of the papers.

Q. And do you remember what those cards contained?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial whether he does or not.

Objection sustained.

Plaintiffs except.

1154 Mr. THOMAS: We offer to prove by this witness that he saw and read the cards and advertisements of the Capital National Bank, which showed its resources and liabilities and was contained in the daily papers, from the time the Jones National Bank commenced doing business with this bank in 1886, and continued until its close in January, 1893, those being other than required by the Comptroller of the Currency; that those notices and advertisements contained the name of the bank, and its authorized capital and surplus, and financial condition generally, and also the name of each of its directors; that those papers are not in his possession; that they were not preserved, and that he is unable to find them and have not been in his possession for upwards of eighteen years, and are not in existence now.

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; not within the issues; not the best evidence, and no foundation laid.

Objection sustained.

Plaintiffs except.

Q. Now the cards and slips that you referred to, came to you I believe you said through the mails?

A. Yes, sir.

Q. In an envelope directed to the Jones National Bank, and from the Capital National Bank?

Mr. ROSE: Each of the defendants objects as incompetent and immaterial and the witness not qualified to answer.

1155 Objection overruled.

Each of the defendants excepts.

A. They did.

Q. Now, Mr. Jones, did you have any knowledge of the financial condition of the Capital National Bank,—its solvency or otherwise, other than what you obtained by reading these statements of its condition that you received?

A. Not in detail. The other would simply be from talks that I had at various times with the officers of the bank, and that of course would be in a general way.

Q. Well did you have any talks with any of the officers or directors of the bank with reference to its condition?

A. I did.

Q. About when?

A. The nearest I can place the dates would be about the latter part of September, or the forepart of October, 1890.

Q. Where did the conversations take place?

A. In the president's room of the Capital National Bank of Lincoln.

Q. What was the occasions of your going down there at that time?

A. I received a letter from the Capital National Bank,—what I would term kind of a prospectus letter in regard to the Capital National Bank and the city of Lincoln stating——

1156 Q. What did it relate to? You needn't give the contents.

A. The letter was an invitation to me to call at the bank at a certain date relative to purchasing some stock in the Capital National Bank.

Q. Was that the occasion of your visit to Lincoln at this particular time, about September 1890?

A. It was, and my only business at that time.

Q. And did you go to the bank building,—its office and headquarters?

A. Yes, sir.

Q. And who was there while you were in the bank?

A. What officers, you mean?

Q. Yes sir, or persons.

A. The officers were C. W. Mosher and R. C. Outcalt, D. E. Thompson and A. P. S. Stuart at the first meeting.

Q. Did you have any conversation there with these parties, or in the presence of them?

A. I did.

Q. At that time?

A. I did.

Q. What was that conversation?

1157 A. The talk principally was in regard that they were going to increase the capital stock of the Capital National Bank to take effect January 1st, 1891, from $300,000 to one million dollars, and that they asked me to buy $20,000 worth if this stock; it was in that conversation that the statement was made relative to the bank.

Q. What were the statements?

A. Those statements of course in the natural course of our conversation came up in various ways; what I mean by that is, the plea for increasing the capital stock as they explained to me was this, that the business was increasing so rapidly, and their customers with which they were doing business were increasing so that to do the business that they thought they ought to do it was necessary that they increase the capital stock; and they referred to another reason for it; some of their customers, such as jobbers and grain men at certain seasons of the year, they stated, needed more money than the law would allow them to loan under their present capital, and they considered them good loans, and that was another reason

for them increasing the capital stock, so that they could accommodate their customers and make larger loans.

Q. Well was there anything said about the condition of the Capital National Bank?

1158 A. Yes sir, there was one remark they used there several times, and that was that the Capital National Bank was the best bank in the state of Nebraska, and they was going to make it the first million dollar bank in the state, and they had a lot of their statements there,—I think probably every statement the bank had ever made, for the purpose of showing how the business of the bank had increased, and the amount of dividends that they had paid and showed that they had never paid less than a 12% dividend, and they explained to me that it was going to be no trouble for them to sell this stock, and they had arranged that the present stockholders was going to be limited in regard to the purchasing of the new stock to the amount of stock which they held in the corporation, the balance they were going to sell to other people, and they preferred to scatter that stock out to their customers, the country banks who kept accounts with the Capital National Bank. They further explained that they thought it would make a stronger bank and they were going to increase the number of directors, and it would be so arranged that a certain number of these directors should always be elected from the holders of stock who lived outside of the city, and furthermore that R. E. Moore was to be Vice president of the bank.

Q. Was that all the conversation you remember on that first trip?

A. Well that is about the essence of it; I am not attempting to give the conversation word for word; you can see that that would be impossible.

1159 Q. When was the second trip you made there on a similar errand?

A. About ten days later.

Q. Who did you meet at the bank that day?

A. I met Outcalt, and Mosher, Walsh and Yates.

Q. And did you have any conversation at that time?

A. I did.

Q. With whom?

A. With those four parties.

Q. Can you give us the substance of that conversation?

A. Yes sir, I can.

Q. You may state.

A. The substance of the conversation was simply this, that I had decided not to purchase any stock, and on their part they were talking trying to induce me to change my mind and make the purchase.

Q. Now Mr. Jones, with reference to these various statements that you saw concerning the condition of the Capital National Bank, you may state whether or not you believed them to be true.

1160 A. I certainly believed them to be true or I would have withdrawn every dollar I had in the bank out.

Q. What reliance, if any, did you place upon those statements in depositing the money of the bank there and doing business with them, and allowing it to remain there from day to day?

A. I placed full reliance and credit in the statements; it is the only method that a bank has of knowing the condition of the bank with which it is doing business.

Q. If you had known of any of the discrepancies between the report and the actual condition of the bank, or of any of the fictitious entries to which you have testified as an expert, or any of the irregularities, what would you have done as an officer of the Jones National Bank?

A. I would have withdrawn every dollar of the money.

Mr. THOMAS: That is all.

* * * * * * *

1161 Q. At that examination were you asked this question, referring to your means of information of the condition of the Capital National Bank:—"Had you any other means of information than the statements?" and to that question did you answer "No, sir, no other means of information as to the standing of the bank whatever, any more than the names signed to the statements lend to a statement."?

A. I did, and I answer the question the same way now.

Q. You didn't when you testified before recall any conversation had with any of the directors at any time during the existence of the bank, did you?

A. I did.

Q. In your testimony?

A. I wasn't asked that.

Q. You didn't testify to any fact of that sort, did you?

A. I wasn't asked.

Q. Well did you so testify?

A. No sir.

Q. You had prepared your case as you have this one.

A. I stated I haven't prepared either one of the cases for trial.

Q. You made no claim in your testimony at the other trial that you had any previous personal acquaintance with Mr. Thompson, did you, in your testimony before?

A. I have no recollection of that question being asked me; the testimony will show for itself.

Q. I have asked you to tell me.

A. I have no recollection.

Q. You think you may have and you may not have done so?

A. I know I have been acquainted with Mr. Thompson for years in a business way.

Q. Now Mr. Jones, let me ask you this question. If it is not a fact that the first time you were ever introduced to Mr.

1162 Thompson to speak to him in your life was sometime subsequent to the former trial of these cases in 1902, when you were introduced to him by Mr. Edward Bignell at Lincoln?

A. No sir.

Q. Will you affirm now that Mr. Thompson, ever, in the course of your life spoke to you or gave you any indication of recognition until subsequent to the trial of these cases in 1902?

A. I will say that that is not the fact.

Q. Well what intercourse had you with him before that time, outside of what you have detailed?

A. The first one, I remember very distinctly was over some cattle. I had cashed a sight draft drawn on a gentleman that lived in Iowa and I sent the draft direct to the bank and instructed them if it wasn't collected to wire at my expense. The cattle were on the road and Mr. Norval and I went to Lincoln and went to Mr. Thompson and stated the facts to him and asked him to set the cattle out, and he refused to do it at first; we then applied to Mr. Marquette and the cattle were set out of the train.

Q. When was that?

A. That was several years prior to the failure of the bank.

Q. Did you personally speak to Mr. Thompson about it?

A. Mr. Norval was the attorney and he went with me for that purpose.

Q. He was the man who did the talking?

A. Yes, sir.

Q. Do you remember what year that was?

A. I don't remember exactly; it was in the latter part of the 80's, but I remember that very distinctly because I was interested to the extent of quite an amount of money.

Q. Did you ever have any other transaction with him?

A. No sir, that's the nearest it ever came to a business transaction.

1163 Q. Did you say anything to him about the Capital National Bank when you went to see him about the cattle?

A. No sir, we were on an entirely different errand at that time; we didn't have time.

Q. I just asked you if you had.

A. No sir.

Q. Do you recall any other time that you ever ran across him in anyway so that he spoke to you or gave you any recognition, or showed any indication that he was acquainted with you?

A. Yes, sir. I have met him on the street many a time and we generally always bowed or made some sign of recognition as we passed.

Q. On the streets of what city?

A. Lincoln.

Q. Did he ever stop and talk to you?

A. We never had any extended—the most extended conversation we ever had was that time I stated a while ago, when they wanted me to buy $20,000 worth of stock.

Q. Did he ever speak your name when you passed?

A. Yes sir.

Q. What would he call you, Harry Jones—or what?

A. Well I don't know about that.

Q. Did he ever stop and talk to you?

A. We have passed the time of day numbers of times, just like I have with you, on the street, and I couldn't tell what was said.

Q. Now did you do any more than pass the time of day, except at this one interview in September, '90?

A. Well there was considerable said when we had those two car load- of stock set out.

Q. Well but Mr. Norval did the talking for you then?

1164 A. The principal part of the talking, yes, sir.

Q. Well now outside of that was there anything, ever any intercourse between you other than passing the time of day?

A. Not as I remember of anything in particular other than what I have stated.

Q. Now what time in September were you in the bank?

A. The latter part of September.

Q. About how far in September?

A. I should say from the 20th on down.

Q. Where is the letter that asked you to come in on that deal?

A. I don't know.

Q. Did you ever get such a letter?

A. Yes, sir, and I seen you with one of them one time to-,—you had a letter of that kind in the Gurner case.

Q. I am talking about a letter asking you to come in on the deal?

A. That is the same kind of a letter; I went down with Mr. Jurgensen of Staplehurst on the same train for the same purpose and he had one. Do you remember that letter you showed to me?

Q. Oh, no, I don't have any recollection of that, and it wouldn't be material if I did, because I didn't deposit your money in the bank. Now you stick to the text. You said you had a letter requesting you to come into the bank on a certain day. Now did you ever have such a letter?

A. I did.

Q. Was it a printed circular?

A. It was printed and typewritten combined.

Q. You never preserved it?

A. I did.

Q. Where is it then?

A. I don't know what became of the letter when the case was tried before; I didn't think it was material.

1165 Q. Who talked to you about making the Capital National Bank the biggest bank in the state, or the first million dollar bank in the state; what particular person said that?

A. It was talked between us.

Q. No, now, which person said that,—do you remember?

A. I don't.

Q. You couldn't identify the person that made the statement?

A. I know that those words were used several times,—the Capital National Bank is the best bank in the state, and we are going to make it the first million dollar bank in the state.

Q. But you have no recollection at all as to who said that?

A. I think more than one said that—I wouldn't be surprised but what that remark was used by all of them; I know we all talked

about the condition of the bank, and they had the statements there to show the increase in the business of the bank.

Q. You have stated all that once, but I was asking you who made the principal solicitation,—who was it solicited you to buy the stock?

A. I think Mr. Mosher done more talking than any one person; they all participated.

Q. What time of day was it you went in there, do you remember that?

A. I do.

Q. What time was it?

A. It was before the noon hour; I remember our train got in somewhere between 10 and 11 o'clock, and Mr. Jurgensen and I went direct to the bank.

Q. How long were you in there?

A. Up until the time that we went to dinner.

Q. Now you said you went back again on the same errand, did you?

A. Yes, sir.

1166 Q. You went clear back to Lincoln to tell them you were not going to subscribe?

A. No, I waited until I was going down on some other business, and then took that occasion to attend to both of them.

Q. Is that the way you did the first time,—did you have a specific appointment by letter for a specific time to meet anybody at the Capital National Bank?

A. I had a letter from the Capital National Bank requesting me if convenient to call at a certain day and I did.

Q. You didn't keep that letter in your files?

A. It was kept until these cases were started.

Q. Why was it not kept then?

A. Well, sir, I can't explain how some of those things kind of got scattered around and worn out and lost. I told you at the Gurnea trial, and you promised you would try and get me one,—you didn't want to let me have the one you had.

Q. Did you ever have them with Receiver McDonald at any place?

A. Not as I remember of, unless they got among the batch of notes.

Q. Do you suppose they went along with some of those missing statements?

A. Oh, no, I am quite sure of that, because we didn't leave any of our stuff down there, unless it was done by accident.

Q. I didn't know but what you might have brought some of that stuff home with you and lost it too.

A. Well it might have but I don't think such is the fact.

Q. I wish you would tell me what Mr. Thompson said to you in any conversation there at the Capital National Bank, and repeat his words, as near as you can tell.

1167 A. I have tried to state the substance of that conversation.

Q. I ask you what Mr. Thompson said, and asked you if you could identify any of the conversation.

A. I stated the substance of our talk at that meeting as near as I could remember.

Q. I understand that, but can you recall what Mr. Thompson did say to you?

A. No, not particular, only he took part in this conversation.

Q. That is as much as you can give of what he said is it?

A. I wouldn't attempt to single out the talk of just what anyone said, but they seemed to be all acting together, and their object was to try to interest me to buy some of that stock in their million dollar bank as they termed it.

Q. You didn't subscribe?

A. I did not.

Q. That probably was the reason they dropped the undertaking. Now you don't ascribe any of these statements personally and definitely to Mr. Thompson, do you?

A. I do. I think this way, if I am talking with four men about a certain subject and they're all interested, and they all take their part in the conversation and nothing is said to the contrary, I naturally have to treat it the same as if each person had made the same statement to me.

Q. And that is the only way you could definitely connect Mr. Thompson with any statement now?

A. Oh, no. Mr. Thompson done his share of the talking.

Q. What part of the conversation did he take up?

A. The entire conversation was to show the great progress that the Capital National Bank had made; how good a bank it was and how good a dividend payer it had been, and it was thought best in their judgment, in order to continue their business and 1168 take care of their customers to increase the capital stock, and they was going to sell, as I said before, a certain amount of this stock out through the country banks, and the country banks were to be represented on that board.

Q. Did Mr. Thompson say that he had any purpose to do that?

A. He seemed to be interested just the same as the others were; they were all acting together: all officers of the bank.

Q. Who else was present on that occasion?

A. There was Mosher, Outcalt, Thompson and Stuart.

Q. You recall that very definitely do you?

A. Yes, sir, because it was along a line of business that I was interested in, and was doing business with them, and I was pleased to know that they were getting along as they stated, even though I didn't purchase stock in it.

Q. Now you didn't have a very long interview the second time did you?

A. No, sir.

Q. You just went in and told them you had concluded you wouldn't subscribe, and they said they would like to see you take some of their stock, did they?

A. After I finished my business I sat down and I told them I

had decided not to make the purchase, and they proceeded in their way to get me to change my mind and to make the purchase.

Q. Who proceeded in their way?

A. The parties that I named.

Q. All of them,—who were there the second time?

A. Mosher, and Outcalt and Yates and Walsh.

Q. You knew Yates well at that time, did you?

A. Not as well as I did the others.

Q. Did you know him at all?

A. Yes, sir.

Q. Yates was a booster for the big bank, too, was he?

1169 A. They seemed to be all along that line; there wasn't any of them throwing cold water; they were all trying to sell the stock.

Q. I suppose during these years from 1889 to 1893 you read the State Journal every day; you seen it every day?

A. No, I would hate to say that.

Q. Were you a regular subscriber during all that period of years to both papers?

A. I was not.

Q. Were you a regular subscriber during any portion of that term to either paper?

A. I was at all times to one or both.

Q. Well for what period of that time were you a subscriber to both the Call and the Journal?

A. I have taken the Journal as far back almost as I can remember, and I took the Call after it started for some little time; that was our evening paper out here.

Q. How long did you take the Call?

A. I wouldn't attempt to say.

Q. Did you just buy it casually when you would buy it at the news stand?

A. No, sir.

Q. Or were you on the mailing list?

A. Here we always get them through our local man; our news stand here.

Q. You depended on the news stand to get your Call, did you?

A. I have on all my daily papers; I take it from the news-stand here; that has been my habit.

Q. You were anxious always to see the condition of the Capital National Bank?

A. No more so than any other of our correspondents.

Q. You kept tab on all of them.

A. Yes, sir.

1170 Q. Now you went into the credits that had been allowed and paid to you. Did you give all the sums that you have been paid, or collected on account of this claim?

A. I was only asked in regard to the amount I have received from the Receiver of the Capital National Bank.

Q. Did that include all that you had received?

A. No sir, it did not.

Q. What other sums did you receive?

A. As to the exact amount I couldn't say. The other was money derived from a judgment which was obtained on Mr. A. P. S. Stuart and some of his property sold through the court. The court records will disclose that, but there has been no money received for many years, in fact for sometime prior to the time this case was tried before, May or June, 1902.

Q. Didn't you after the trial in May or June, 1902, receive from Edwin T. Peters on account, who was interested in the estate of the widow of A. P. S. Stuart a large sum of money?

A. In reply to that I will say that there was some money received; I won't say from this person you speak of, but probably from the same source; it was a small amount of money, and just as to the date I am not certain; I think the records will disclose the date of the payment.

Q. Was there as much as $20,000 paid at one time in the office of Mr. McMurtry of Lincoln?

A. No sir, there has not been that much paid of the entire bunch on these claims.

Q. Of what was paid to McMurtry what share did you get?

A. I don't know.

Q. What share did the whole bunch of you get?

A. I don't know exactly what you are referring to; I never received a dollar from McMurtry as far as I know.

1171 Q. At one time there was paid to you in McMurtry's office by this Mr. Peters the sum of $20,000 wasn't there?

A. Paid to me?

Q. Yes sir.

A. No sir.

Q. What sum was paid?

A. I have no recollection of any being paid.

Q. What sum was paid to you on account of the Stuart estate?

A. I couldn't say; I believe the records of this court will show the amount of all moneys received.

Q. After the trial of this case in 1902, Martha Stuart died, didn't she?

A. I don't remember.

Q. And you presented a claim against her estate,—that is these different plaintiffs,—not you personally.

A. I have no recollection of that; that might have been done by counsel for those parties, but I have no*t* recollection or definite knowledge of it.

Q. You acted in a measure through attorney L. C. Burr in some respects in regard to that?

A. No sir.

Q. And conferred with McMurtry?

A. McMurtry has tried a number of times to do something which I couldn't tell what he was trying to do, and it went so far that I told him I didn't care to discuss the matter with him.

Q. You gave McMurtry a Quit Claim deed to some property to use in your behalf didn't you?

A. I would say no. Now then what I meant by that Mr. Rose is I never had any business dealings with Mr. McMurtry. I remember distinctly of Mr. McMurtry coming and stating that he
1172 knew of some property which could be got at and his proposition was that he wanted to make,—he wanted us parties interested in this suit to lend our name to him, and he would collect some money and give us half.

Q. Well now you loaned your name, didn't you?

A. No sir. The only thing that is in my mind at all is in regard to the homestead of Martha E. Stuart. It seems that they wanted—well I don't know, they wanted to do something and offered a small amount of money, it seems to me, if that judgment against the homestead could be released, or something of that kind, but I had nothing whatever to do with it, because he was a gentleman that I didn't care to deal with, and I refused to have any transaction with him and told him he must do it through the attorneys.

Q. You remember the administrator of Martha E. Stuart——

A. What was his name?

Q. Peters, Edwin T.

A. Yes, sir.

Q. Don't you remember of placing a quit claim deed in Mr. McMurtry's hands?

A. To what property?

Q. To all property which had been previously purchased?

A. My memory in regard to what Mr. McMurtry wanted to do is not clear for the reason he was a man I had no faith in; I put him down as a crook and refused to have any dealings with him, and told him he must talk to the attorneys.

Q. Don't you remember the delivery of a deed?

A. I never delivered a deed to Mr. McMurtry; if there was a deed of that kind given it must have passed through the hands of the attorneys.

Q. Which attorneys?

A. Mr. Thomas, or Norval Brothers, or Mr. Burr.

1173 Q. Which one?

A. I coudn't say.

Q. Did you keep any record of the amount of money you got?

A. Every dollar that I know of that I ever received is on record in this court. That part of the business has been left to the attorneys. The money we received on execution I never had anything to do with; it was done through the attorneys.

Q. Well did you share in one collection that was made by McMurtry of upwards of $20,000?

A. I never did; I never received a dollar from McMurtry.

Q. Did you share in the collection made, supposedly on behalf of these plaintiffs in the proceeds of a further collection made in order to get the claim of these plaintiffs withdrawn from the estate of Martha Stuart in Lancaster county, the payment made for that purpose being $2,000?

A. The only money I have ever received from any source on account of this Capital National Bank case has been through our attorneys.

Q. You couldn't answer that any further?

A. I have no recollection of anything of that kind, Mr. Rose.

Q. But you do recall that some money was derived from that source, but you don't remember the amount?

A. I know there was something in regard to the homestead of Mrs. Stuart, but just what was done with that I have no definite recollection, because I didn't do it; whatever was done was done by counsel.

Q. Were not you personally present in the office of James H. McMurtry in the front basement of the Burr block when Edward T. Peters paid over there for the use of the plaintiffs the sum of $2,000?

A. I haven't any recollection of anything of that kind.

1174 Q. Being the second payment he had made on account of this?

A. Please state to whom the money was paid.

Q. Well it was paid in your presence to you or McMurtry.

A. McMurtry wasn't with us; he was with the Lincoln gang.

Q. I was taking your former statement that he wanted you to lend him your names.

A. But I said I refused to have any business dealings with Mr. McMurtry, and I told him so.

Q. But contrary to that statement is it not true that you were personally present in McMurtry's office in Lincoln when $2,000 was paid over on account of this?

A. No sir; there is nothing to that.

Q. And you never saw Edward T. Peters pay a cent on this?

A. No sir.

Q. To you or McMurtry or anybody else?

A. I don't know what he may have done with anybody else.

Q. I say you never saw it?

A. No sir.

Q. And you never shared in the $2,000 payment or the $20,000 payment?

A. I received every dollar that the attorneys in this case have brought to me.

Q. What attorneys have brought anything to you?

A. I haven't said anybody has.

Q. Do you say that nobody has?

A. I will say that I am willing to stand by——

Q. I want to know what you personally know about it.

A. I have received no money on account of this case from anybody, only through the attorneys in the case.

Q. What you received from the attorneys don't you know you got?

A. No sir.

1175 Q. Aren't you trustee for all these funds and the custodian and don't you hold the real estate that you have gobbled in from the Stuart estate,—from the Stuart executions?

A. Of how much?

Q. Of whatever it is, don't you hold the land in trust?

A. Yes sir; it is forty acres of land.

Q. Then you have conveyed large tracts of land of great value, haven't you, and didn't you get the money for the conveyances.

A. Now what you would call a large amount of money maybe I wouldn't, or what you may call a large body of land I wouldn't.

(Adjournment taken until Feb. 10, 1911, at 9 o'clock a. m.)

February 10, 1911—9 a. m.

Cross-examination of Mr. JONES continued by Mr. ROSE:

Q. Mr. Jones, of course as a banker and accustomed to scrutinize the official bank reports to ascertain the bank's pecuniary responsibility, you wouldn't trust a bank on a statement of a year ago, or wouldn't have at this time trusted a bank on a statement of a year ago, if a subsequent report showed that its condition had changed?

A. In my experience in banking and business——

Q. Just answer that question direct.

A. I can't answer that question in that way.

Q. All right if you can't answer it. You say you scrutinized each new report at the time it came out?

A. Always.

Q. And if I understand you correctly the import of your testimony was that if whenever you saw any one of these reports in which you found any indication that the bank's condition

1176 was questionable, you would immediately have withdrawn your entire deposits while you had an opportunity?

A. I certainly would.

Q. So that the last statement that came out each time would be the inducement each time for you to leave your deposit there?

A. To a certain extent, yes sir.

Q. And even though you saw indications in the last reports that the pecuniary condition of the bank was questionable, would you have left your money then on the faith of a previous report that showed up good?

A. I think not.

Mr. ROSE: I think that is all. Mr. Bishop may want to cross examine you on some matter; he appears for other clients.

Mr. BISHOP: I think I have no cross examination.

Redirect examination.

By Mr. THOMAS:

Q. Mr. Jones, are reports of banks that are doing a constant business, changed from time to time?

A. Yes sir, the statement does, some.

Q. There is nothing unusual in showing a different statement from one report to another in the regular course of business.

A. It would be impossible for a bank to make the same statement on two consecutive days.

Q. That is if it did any business.

A. That's understood.

Q. Now referring to this conversation you had at the Capital National bank in 1890, with reference to this million dollar proposed bank, you spoke of Mr. Jurgensen. Was he present at the time of this conversation in the bank?

A. He was; we went in on the train together.

Q. Who was Mr. Jurgensen?

1177 A. President of the Bank of Staplehurst.

Q. Was he president of the Bank of Staplehurst at that time?

A. That is my present recollection.

Q. And is he still living?

A. He is not.

Witness excused.

Mr. ROSE: I will want to recall Mr. Walter T. Scott for further cross examination. I served a subpœna on him last night.

Mr. THOMAS: He will be here; he is still in town.

* * * * * * *

1178 Mr. FRITZ BECKORD, called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. THOMAS:

Q. State your name to the reporter.

A. Fritz Beckord.

Q. Where do you live?

A. Utica, Nebraska, Seward county.

Q. How long have you lived there?

A. Been there since the town started, in '75 or '76, somewhere's around there.—or '77, somewhere's around there; I came there at the time the first house was built.

Q. And while you have lived there have you been in any way connected with the Utica Bank, one of the plaintiffs in this suit?

A. Yes.

Q. And from what time?

A. From 1887, I believe.—January 1st,—or somewhere's around the first part of January, 1887.

Q. Was that at the time the bank was organized, or had it been going previously?

A. A fellow by the name of Walter Brant, and Ed —— organized it then, and I went into the bank then,—called it the Utica Bank.

Q. At that time did you become President?
A. Yes, sir.
Q. And continued president ever since?
A. Continued ever since.
Q. After you became president of the Utica Bank, did it have any deposits in the Capital National Bank?
A. Yes. It had deposits in the Capital National Bank at the time I took president of it and went in and invoiced everything
1179 and checked the books over and I took it then.
Q. Did you make any inquiry or investigation as to your depositories, that is where you kept your money, what banks you dealt with in Lincoln?
A. Yes, sir.
Q. What investigation or inquiry did you make?
A. Well I asked our Cashier—I says "How is this bank standing"? Well he showed me statements of the condition of the bank and then I inquired from time to time into it to see the way it showed; from the statements it showed they was still improving business and all that, and so we continued doing business with it until it failed.
Q. That is you continued to keep money in the Capital National Bank from that time on until it failed.
A. Yes, sir.
Q. Now did you see any notice of the condition of the Capital National Bank that were advertised in the newspapers from time to time?
A. Yes sir, I did.
Q. What ones did you see?
A. I seen in the State Journal and Evening Call; then there is a German paper printed down there; I kept that, a weekly called the Lincoln Frie Presse.
Q. Is that a paper printed in the German language?
A. Yes sir; I keep that and read it, and I compared with them papers,—the statements comes out about five times a year and when I compared them one compared just the same as another.
Q. Are you German?
1180 A. Yes sir.
Q. Born in Germany?
A. Yes sir.
Q. And during the time that your bank did business with the Capital National Bank did you see all their published statements that came out?
A. Yes sir, I guess I seen them all, and I was there in the bank more or less all the time, and at the time the mail came in, and the cards was piled up; a good many times they sent out in the paper, and then they sent a special card of the condition of the bank, and so this bank was doing all right—improving always, so we kept on doing business with it.
Q. What cards do you refer to?
A. Oh they're kind of business card, and it says on there——

Q. Did you save any of those cards, or have you any of them now?

A. I haven't any of them now; they kept them for years and then they was filed away and then they was destroyed.

Q. Have you looked for them?

A. Yes sir, I looked for them.

Q. And tried to find them?

A. Tried to find them.

Q. And have been unable to find them?

A. Couldn't find any.

1181 Q. Now you may tell us what those cards contained,—explain what was on them.

A. Well there was on one side there was resources and on the other liabilities, and below them the directors under there and sometimes the president.

Q. What names would appear there, Mr. Beckord?

A. Well there was Yates and Thompson and Hamer and Phillips and—well I don't know I couldn't think of any more names.

Q. Was Mr. Stuart's name on them?

A. Stuart's name was on them to-, that's right.

Q. Did Mosher's and Outcalt's name appear on the statement?

A. They appeared on them, yes; Mosher and Outcalt appeared on it.

Q. What did those statements show—what did they state generally?

A. Well they show the liabilities; it first showed the capital stock on one side,——

Q. How much?

A. $300,000, and then the surplus and then the amount of

1182 deposits, and on the other side it showed the loans, and what money they had on hand,—it was kind of statement, this card did; it was in condensed form, only they ain't so big as published in the newspaper.

Q. Explain to the court the difference, if any, between what was on this card and the way it was in the newspaper?

A. I can explain it here,—here is one of the cards we just got a couple of days ago,——

A. —that was about in the same condition,—here it says Loans,——

A. —Well it is just the same like this,—there is the loans and there is the United States bonds,—there is bonds, and there is banking house, and there is the liabilities, and there is the capital and surplus, circulation and deposits on both of them cards just like this one.

Q. But the figures were not the same?

A. No, I mean them cards was just the same. The amount of figures on them was just the same like the statement showed;

1183 we compared the statement in the paper and then compared them cards together and they are just always the same.

Q. You say the bank kept them for a year or so?

A. Yes, sir.

Q. And was that the custom of your bank all the time you have been connected with it?

A. Yes, sir.

Q. And did that with all of your other banks?

A. Yes sir, we did that with all the banks.

Q. And were you acquainted with the directors of the Capital National Bank, any of them?

A. I know them by sight and seen some of them; I wouldn't know all of them.

Q. Did you know them by reputation?

A. Yes, sir.

Q. What was the reputation of the directors as men of financial standing?

A. They said and claimed to be and the way they represented they was all good honest business men and financially doing well.

Q. Now Mr. Beckord, what reliance if any did you place on those statements that you received?

A. All the reliance I put on it; they showed,—just simply everything showed right and they was perfectly responsible, and that was the reason we kept our money there; kept them for
1184 our correspondent.

Q. Did you have any knowledge as to the insolvency of the bank, or that it was not in a good financial condition at any time?

A. No I did not, if I did I wouldn't have left any money there.

Q. Now Mr. Beckord, do you remember of ever having heard anything concerning a projected plan to make a million dollar bank of the Capital National Bank?

A. Yes, sir.

Q. About when was that?

A. Well I couldn't tell the year; I come into the bank one morning and Mr. Brant was opening the mail and he showed me kind of a letter, and I looked it over and I says "Well them fellows is doing pretty well."

Q. Have you got that letter?

A. I read the letter over and it simply invited us to take some stock in that bank there, to increase the capital and I told Mr. Brant,——

Q. Just state what the letter said.

1185 Q. Have you been able to find that letter?

A. No.

Q. Have you looked for it?

A. I have looked for it.

Q. And have you made diligent search for it and couldn't find it?

A. Yes sir.

Q. Tell us your recollection then of the contents of the letter?

A. Well it went on that they—as near as I can tell—that they were going to increase their capital to a million dollars; they was going to make out of it a million dollar bank in order to make it the biggest bank in the state, then they invited us correspondent

banks,—they wanted us to take some stock in order to increase that capital.

Q. Was there anything in the letter with reference to your coming to Lincoln?

A. I couldn't say whether there was or not; it might;—it has been so long. All I know I told Brant,——

1186 Mr. BISHOP: We object to what he told Brant.

A. —so I didn't pay no more attention to it; I thought I had my hands full at home, so I didn't pay no more attention to it.

Q. Did you go to Lincoln to see them about it?

A. Perhaps it was a month or so afterward I went down and talked to Mosher and Outcalt about it.

A. Well I told them the way I was fixed and all that and I didn't believe I would take any stock in the concern, or in the bank.

Q. You may state, Mr. Beckord, how much money the Utica Bank had on deposit with the Capital National Bank at the time of the latter's failure.

A. We had the time it failed, January 21, was $7497.17. I believe that is the correct amount; I took it from the books and I believe that's right.

Q. Was that the amount that the Capital National Bank was owing the Utica Bank at the time the Capital National Bank failed?

1187 A. Yes sir.

Q. And what dividends, if any, have you received on that amount from the Receiver of the Capital National Bank?

A. We received once ten percent, and once five per cent and then two percent; I believe it was 17% all together.

Q. Can you give the dates of those dividends?

A. No I couldn't.

Q. Have you your Receiver's certificate with you?

A. No, I haven't; I looked for that after we moved and couldn't find it.

Q. You say the banking house has been moved?

A. Yes, the bank building,—the office has been moved.

Q. Can you tell from your books what is the date of the first dividend?

(Witness examines book.)

A. September 2, 1893, $749.71.

Q. That is the first dividend?

A. That's the first dividend.

Q. That is the 10% dividend?

A. The 10% dividend.

Q. And what is the date of the second?

A. Well it is here the 28th, it shows $374.85.

Q. That's the five per cent dividend?

A. Yes sir.

Q. Mr. Beckord, I forgot to ask you, did you ever get from the Capital National Bank a statement of its condition on a sort of a

printed slip, which was the same as that contained in the newspaper?

1188 A. Yes, sir.

Q. Explain what they were.

A. Well it was just in the same form like printed in the paper, only they was just printed on a piece of paper,—in the same condition that was in the paper, just exactly.

Q. Have you got any of those slips?

A. I haven't got any of them; I have been hunting for some of them; I have got something similar like it; there's something like it, (exhibiting paper).

Q. Did you get slips of that character to which you have just testified each time a report was called for and published of the condition of the bank?

A. Part of the time we got a slip and part of the time they sent some of those cards.

Mr. THOMAS: That is all.

1189 Cross-examination.

By Mr. BISHOP:

Q. Mr. Beckord, you were not a banker when you went into that concern at Utica, were you?

A. No.

Q. What business had you been in?

A. Lumber business.

Q. Never had any experience in banking?

A. No.

Q. It was a bank when you went into it?

A. Yes, sir.

Q. Had been doing business for sometime?

A. Yes sir.

Q. And had a deposit at that time with the Capital National Bank at Lincoln?

A. Yes, sir.

Q. And you continued the deposit in the same bank?

A. Yes.

Q. Did you make any investigation as to what interest the other banks in Lincoln were paying for deposits?

A. Yes sir.

Q. You did?

A. Yes.

Q. Could you do better on interest with the Capital National Bank than with the others?

A. No. The interest simply was very small what we got; simply what our correspondent banks——

Q. You say you saw the published statements in the newspapers?

A. Yes sir.

Q. They were all alike, you say they corresponded?

A. Yes sir, they corresponded.

1190 Q. You watched the newspapers for those reports?

A. Yes sir.

Q. Did you rely on those reports?

A. I relied on them reports and on those cards what I said.

Q. Which contained the same information?

A. Contained the same information.

Q. And one of them was a newspaper printed copy of the same thing you saw in the newspaper?

A. The same exactly; only in the German paper it was printed in the German letters.

Q. But exactly the same information?

A. Just exactly the same.

Q. That was all the information you had to rely on?

A. To rely on, yes sir.

Q. And that is what you did rely on?

A. Their reports and their cards.

Q. Well I say that printed stuff.

A. Yes sir.

Q. And nothing else?

A. No.

Q. You were a witness here in this case when it was tried in 1902, weren't you?

A. Yes, sir.

Q. And you testified them?

A. Yes, sir.

Q. Were you asked "Did you have any other information except what you saw in the papers?" and you answered "No, I haven't"?

A. In the papers and them cards I said.

Q. That answer that you made was true?

A. I guess that was true.

Q. Do you know how much the Utica Bank had in the Capital National Bank at the time you took hold of it?

1191 A. You see I have got a book here, (Witness refers to book) No, I can't tell you, on account of I haven't got them books here.

Q. Did your bank borrow from the Capital National Bank?

A. I don't know if we have borrowed any money of them or not; it has been so long of course I couldn't tell.

Q. Did your account with the Capital National Bank consist of an active account; one that was added to and diminishing constantly?

A. Added to and taken off,—for instance we get a draft and stuff, we send that in to them, and we issued drafts against them, and they forward our money to the eastern corresponding banks.

Q. It was an active account all the time?

A. Just one account; we got every month a statement of them how it stood.

Mr. BISHOP: That is all.

Redirect examination.

By Mr. THOMAS:

Q. In answer to one question,—I don't know if you understood it, you said that you saw the statements in the newspapers and they were all alike.

A. I mean they were all alike, for instance, you go to work and say they issued a statement,—a report the first month,—well what I mean, I seen that their accounts, in the German paper, and then I seen it in the Journal or Call, or on the card or slip and I compared — together and they was all the same amount and the same items.

Q. Did you mean the reports for the different times,—the three or four or five during the year,—would they be all alike?

1192 A. No, they would vary; what I understood by it, they was all alike; I compared them with four different sources from where they come from,—some in the papers and some in the cards and some in the slips.

Mr. THOMAS: That is all.

Recross-examination.

By Mr. BISHOP:

Q. Mr. Beckord, during the time you say you saw those statements, in the newspaper generally I think, what paper did you take as a regular subscriber?

A. As regular subscriber I had German paper, it was a weekly,—and then the Journal we keep that all the time in the bank there.

Q. Did you take the Journal as a regular subscriber there in the bank, every day?

A. That was there for several years; we had the daily in the bank there all the time.

Q. Did you have the Call?

A. We wasn't regular subscriber. I believe he subscribed once for it for six months or a year on account it come out in the evening.

Q. When was that?

A. That was somewhere around between the '80's and 90's, I couldn't tell the year.

Q. When were you a subscriber to the Freie Presse, the German paper; when did you begin?

A. It must have been in '84 or '85.

Q. How long did you take it?

A. Oh I took it up until Major Clutch died; he was the editor of the paper.

1193 Q. Well when was that?

A. Well he must be dead ten or twelve years; I couldn't tell how long; I know we had that paper for a long, long time.

Q. Don't you know that he died as long ago as twenty years?

A. No, he ain't dead twenty years.

Q. And you say that what you saw in the German paper corresponded with what you saw in the English paper?

A. In the English paper.

Mr. BISHOP: That is all.

By Mr. THOMAS:

Q. Did you take another paper that was published at Lincoln, called the Staats-Zeitung?
A. Yes.

Witness excused.

1194 Mr. E. JACOBS, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. THOMAS:

Q. Where do you reside, Mr. Jacobs?
A. Staplehurst.
Q. How long have you lived there?
A. Since 1881.
Q. Are you a native of this country, or are you foreign born?
A. Born in Germany.
Q. How long have you been in this country?
A. Since 1872.
Q. During the time that you have lived at Staplehurst, have you been associated or connected with the Bank of Staplehurst, one of the plaintiffs in this action?
A. Yes sir.
Q. When did your association with that institution begin?
A. In February 1886; I think it is just 25 years ago today.
Q. And in what capacity have you been connected with that bank?
A. I was in there as cashier,—I don't know the exact year, I think it was 1884 I was cashier until Mr. Jurgensen died.
Q. You mean 1894?
A. '94, that's right.
Q. You mean you were cashier from 1886——
A. —from 1886 until 1894.
Q. You were cashier until 1894, and since then you have been president?
A. Yes sir.

1195 Q. And while you were cashier, who was president of the bank?
A. Lars Jurgensen.
Q. He died in 1904?
A. Yes, sir.
Q. During this period from 1886 to January 1893, was the Bank of Staplehurst a depositor with the Capital National Bank of Lincoln?
A. All the time, yes sir.
Q. And who was in active charge, or did most of the active work in the bank?
A. I did most of it.

Q. And what was the nature of your business with the Capital National Bank and the extent of it, and the character of the business you did with the Capital National Bank,—that is were they your Lincoln correspondent?

A. It was the Lincoln correspondent.

Q. And what was the character of the business you did with them?

A. Sent the drafts there and drew on them.

Q. Did you have any other correspondent at Lincoln?

A. No sir.

Q. Do you know how much money the Bank of Staplehurst had on deposit with the Capital National Bank, or which the Capital National Bank was indebted to your bank at the time of the failure of the Capital National Bank, January 21, 1893?

A. I do know, yes sir.

Q. Have you got your books here?

A. No, they're over in your office, I guess. Something over $14,000.

1196 Q. If you know the amount you may state.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

A. $14,264.33.

Q. What payments have you received on that from the Receiver of the Capital National Bank?

A. Seventeen per cent.

Q. And do you know the dates that you received the dividends?

A. I don't remember the dates.

Q. Now at the time that you took charge of the bank and up until the time the Capital National Bank closed in January 1893, did you see any statements of its financial condition from time to time?

A. Yes, sir.

Q. And where did you see those statements?

A. I have seen them in the Journal.

Q. The Nebraska State Journal?

A. Yes, sir.

Q. Any other place?

A. I think it was the Call.

Q. Of Lincoln, a paper published at Lincoln?

A. Yes, sir.

Q. And any other papers?

A. I kept the German paper but there was only cards in there in a condensed form.

Q. In the German paper?

A. Yes sir, just the Capital stock, and then the——

1197 Q. How many statements of its financial condition did the Capital National Bank publish each year?

A. Five.

Q. You may state whether or not you saw all of them, while you

were cashier of the Bank of Staplehurst, and doing business with the Capital National Bank.

A. I have seen them all as near as I remember.

Q. Now did you receive them in any other form?

A. I seen them in a condensed form in the shape of a business card.

Q. Where did you see those?

1198–1203 A. They were sent to the bank about as regular as the statement came out.

Q. What did you do with those cards as they were received?

A. I saved quite a number of them as they came in,—the latest ones.

Q. Have you looked for any of those cards, since this case has been set for trial?

A. Yes, sir.

Q. And have you been able to find any?

A. Not this time; it was at the former trial I handed them to you and Biggs.

Q. Have you any of them in your bank at Staplehurst?

A. No sir.

Q. And have you looked for some more cards?

A. I have but I thought it was no use because I hunted up everything at that time of the former trial and handed them to you and Biggs. You got them at that time.

Q. That was before the other trial; Mr. Biggs died I think in 1899.

Witness temporarily excused.

* * * * * * *

1204 E. JACOBS recalled.

Direct examination continued.

By Mr. THOMAS:

Q. Now Mr. Jacobs do you recall having heard anything of the plan or scheme that the directors of the Capital National Bank had to increase it to a million dollar bank?

A. I remember that they have been writing; I remember letters came that they wanted to increase their stock.

Q. In what way?

—. ——.

Q. Have you got that letter?

A. No sir.

Q. Have you been able to find it?

A. No.

Q. Have you made search for it?

A. Yes.

Q. Have you searched for it diligently,—have you tried to find the letter?

A. I tried to find it, yes.

Q. Have you looked where you keep letters of that character, and where this would likely be if in existence?
A. Yes sir, I looked where I thought it might be.
Q. And at any time since receiving that letter have any of your bank files, or records been destroyed in any way?
A. Yes sir.
1205 Q. When and how?
A. When our bank was broke into and burglarized; pretty near the whole vault was blowed up at that time; I don't remember now what year that was.
Q. After the Spanish war?
A. Yes sir, it was after the Philippine war.
Q. Give us the contents of that letter.
Q. Give us the substance of it as near as you can.
A. The substance was that they meant to increase their capital stock, and sell it to their correspondents, if they could.
Q. Do you know to what amount they were going to increase it?
1206 A. I don't remember.
Q. And did any representative of your bank go down to Lincoln to see them?
A. Yes sir.
Q. Who was it?
A. Mr. Jurgenson.
Q. Who was Mr. Jurgenson?
A. President of the bank.
Q. Was he president of the bank at that time?
A. Yes sir.
Q. Now is there any instance that recalls that to your mind that causes you to remember it?
A. Yes sir.
Q. You may state the circumstances.
A. Well he came,——
Q. Who do you mean?
A. —with a big plug hat on what he had taken from the old country; he dressed up in his wedding suit; that is mostly why I remember it, because I made fun of him that time.
Q. You mean Mr. Jurgenson?
A. Yes sir.
1207 Q. Now Mr. Jacobs, these card statements that you have testified to and that you were not able to find, tell the court in substance what they contained, and especially with reference to the statements that were contained in the newspapers.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; no foundation laid; not within the issues, nor binding upon anyone of the defendants.
Objection overruled.
Each of the defendants excepts.

A. They were in a more condensed form, in the shape of a business card, where the deposits were all in one,—you might say it

corresponded with the published reports only it was more in a condensed form.

Q. And what else appeared on the card?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid; not the best evidence, and not binding upon any one of these defendants.

Objection overruled.

Each of the defendants excepts.

A. The capital stock, the surplus, the undivided profits.

Q. And do you remember the Capital stock as shown to be on those cards?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; no foundation laid; not within the issues, nor binding upon anyone of the defendants.

Objection overruled.

Each of the defendants excepts.

1208 A. The Capital stock was $300,000.

Q. And did those cards purport to state the financial condition of the bank at the particular date for which the statements in the newspapers purported to give?

Mr. Rose: Each of the defendants objects as calling for a conclusion of the witness on a matter not produced in court, or open to the inspection of the defendants or their counsel; no foundation laid; incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

A. Yes, sir.

Q. Now were there any names on the cards?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, not within the issues; not the best evidence; no foundation laid, and not binding upon the defendants.

Objection overruled.

Each of the defendants excepts.

A. Yes, sir.

Q. State what they were and how they appeared on the card.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not within the issues; not the best evidence; no foundation laid and not binding upon the defendants, and the witness not qualified.

Objection overruled.

Each of the defendants excepts.

A. Mosher and Outcalt and Walsh as officers; D. E. Thompson, Hamer and Yates and several others as directors.

1209 Q. Was Stuart's name on them.

A. Stuart's name was on there to.

Q. And Phillips?

Mr. Rose: That's leading.

A. And Phillips. I can't remember all the names.

Q. Can you give us the form of the card, just about what it said, what it purported to state?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not within the issues; not the best evidence; no foundation laid, and not binding upon the defendants, and the witness not qualified.

Objection overruled.

Each of the defendants excepts.

A. Well it was in kind of a business card form, the names on one side and the statement of the bank on the other side.

Exhibit "ai" identified.

Mr. Rose: Now we object to this form of making suggestions to the witness.

Q. I have your Exhibit "ai" identified by the reporter and will ask you to examine that and state to the court if the statement to which you have referred bore any resemblance to the exhibit which I hand you, in form or wording?

A. I don't think it was just in that form though.

Q. In what way did it differ?

Mr. Rose: May I ask the court to inspect the document that they have and see what they use as a suggestion.

1210 (Counsel hands the card to the court.)

The Court: I don't see where the matter will help us any. I think I know what the witness means to say, that is, as I understand his testimony the statement which he claims was lost, was an ordinary business card, giving a condensed statement of the condition of the Capital National Bank.

Mr. Rose: Each of the defendants objects as wholly immaterial, incompetent, and irrelevant; leading and suggestive.

Objection overruled.

Each of the defendants excepts.

Q. What I wanted to get at was whether the card itself stated in words that it was the condition of the bank at the close of a certain date, which date agreed with the date of the published statement.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not within the issues; not the best evidence; no foundation laid, and not binding upon the defendants, and the witness not qualified.

Objection overruled.

Each of the defendants excepts.

A. Yes, sir.

Mr. Thomas: We offer in evidence Exhibit "ai."

Mr. Rose: No objection.

EXHIBIT ai.

United States National Bank of Omaha, Nebraska.

United States Depository.

Statement Close of Business Jan. 7th, 1911.

Resources.

Loans	$6,496,273 67
United States Bonds (Par)	600,000 00
Other Bonds	789,390 00
Bank Building	300,000 00
Cash and Exchange	3,314,002 94
	$11,499,666.61

Liabilities.

Capital Stock	$300,000.00
Surplus and Profits	764,496.05
Reserved for Taxes	11,242 47
Circulation	450,000 00
Deposits	9,673,028 09
	$11,499,666.61

Officers: M. T. Barlow, President; G. W. Wattles, Vice-Pres.; V. B. Caldwell, Vice-Pres.; W. E. Rhoades, Cashier; G. E. Haverstick, Ass't Cashier; R. P. Morsman, Ass't Cashier; J. C. McClure, Ass't Cashier; C. F. Brinkman, Ass't Mgr. Credit Dept.

Directors: M. T. Barlow, A. D. Brandies, S. S. Caldwell, V. B. Caldwell, E. A. Duff, Thos. A. Fry, C. W. Lyman, Euclid Martin, A. Millard, E. M. Morsman, A. L. Reed, W. E. Rhodes, B. F. Smith, W. A. Smith, G. W. Wattles, C. E. Yost.

1211 Q. Now Mr. Jacobs, can you tell the court what reliance if any you placed upon those statements that you refer to that you saw in the papers, or those cards that were sent you?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; no sufficient foundation laid to entitle any of this evidence to be given, and not binding upon the defendants.

Objection overruled.

Each of the defendants excepts.

A. It showed the standing of the bank.

Q. The question is what reliance did you place upon those statements?

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; no sufficient foundation laid to entitle any of this evidence to be given, and not binding upon the defendants.

Objection overruled.
Each of the defendants excepts.

A. I took full reliance on them that they showed the exact condition of the bank.

Q. State whether or not you believed them to be true.

Mr. Rose: Each of the defendants objects as no foundation laid for such testimony, particularly so far as the cards are concerned, because the form or matter of the card is not in evidence, irrelevant and incompetent.
Objection overruled.
Each of the defendants excepts.

A. I believed them to be true.

Q. And would the bank of Staplehurst have made these
1212 deposits in the Capital National Bank from time to time, or permitted them to remain there at any time had they known that these reports or statements were untrue?

Mr. Rose: Each of the defendants objects to that as assuming facts not proven; incompetent; irrelevant and immaterial, and calling for a mere conclusion.
Objection overruled.
Each of the defendants excepts.

A. No, sir, I would have them out the next day.

Mr. Thomas: That is all.

Cross-examination.

By Mr. Rose:

Q. You got some additional funds on account of that claim aside from what you got from the Comptroller of the Currency didn't you?
A. I think there was some, wasn't there?
Q. Do you remember how much you did get?
A. No, sir, I don't.
Q. Did you get any,—Mr. Jones is your business agent to receive any collections as the result of this law suit?
A. Yes, sir.
Q. And what dividends or any sums you got, you got through him?
A. No, I got them through Mr. Thomas.
Q. And did you get any payment on account of this Capital National Bank claim since the last trial,—since we tried this case in 1902?

A. No, I think not; I don't remember.

1213 Q. Did you have any report from Mr. Jones of his having made any collections?
A. No sir.
Q. Never told you anything about getting any money at Lincoln after the last trial?
A. No sir, I have had no report from him yet.

Q. How heavy a stockholder was Mr. Jurgenson in that bank up to the time of his death?

A. He had a half interest.

Q. How much did you have?

A. I had the other half.

Q. Who controlled the deposits, the president or the cashier,—who directed where your exchange accounts should be kept?

A. Well he was there part of the time; I done the book work myself mostly.

Q. The question was who controlled the making of your deposits, or who selected the correspondent banks, you or Mr. Jurgenson?

A. Both did; he done it part of the time.

Q. You didn't open the account with the Capital National Bank, did you?

A. Yes, sir.

Q. Personally,—you selected it when you started to do business with the Capital National Bank, you were the one that directed that, were you?

A. We done that both together, I suppose.

Q. You worked on the books?

A. Yes, sir.

Q. How old a man are you now?

A. Fifty four.

Q. What was the total amount of deposits that your bank sent to the Capital National Bank from 1886 down to the time the bank failed?

1214 A. At the time it failed?

Q. No, no; the total amount that you sent at all times, from the time you opened your account until the bank suspended?

A. I couldn't state that.

Q. Several hundred thousand dollars, or $100,000?

A. All together?

Q. Yes, all together.

A. I don't know, I couldn't state that at all.

Q. Well give it approximately.

A. Couldn't do that either.

Q. What was your average balance with that bank then?

A. I couldn't say.

Q. Approximately, your average daily balance?

A. I couldn't tell you.

Q. You got statements every month which showed what your average daily balance was, didn't you?

A. Yes, sir.

Q. And a statement of interest credited based on the average daily balance?

A. I have got that here,—the monthly balance that is here someplace.

Q. Was that a changing account,—made up of deposits and withdrawals?

A. Yes, sir.

Q. You aimed to keep enough there to take care of your exchange, did you?

A. Yes, sir.

Q. And to anticipate all the calls you would have for exchange, and you made those deposits mostly by forwarding your own exchange items,—you forwarded your drafts and foreign checks to the Capital National Bank, didn't you?

A. Yes, sir.

1215 Q. And ordinarily that would be the source of your deposits?

A. Yes sir.

Q. And they credited them to you and distributed them to the banks on which they were drawn for collection and payment?

A. Yes, sir.

Q. Well you deposited many times,—in the course of that period many times the amount that your final balance was?

A. Yes sir.

Q. And drew out many times what your final balance was?

A. Yes, sir.

Q. You had perhaps daily transactions with the bank?

A. Yes, sir.

Q. Now you say if any statements you saw had not in your opinion reflected a prosperous condition of the bank you would have withdrawn your entire deposit the next day?

A. Yes, sir.

Q. You wouldn't have then paid any attention to what the condition of the bank showed the year before that, or any previous report; if a new report showed bad you wouldn't have left your money in there because the statement of a previous period showed it good, would you?

A. I have not seen any that showed it bad; they were changed up and down, the same as all banks does.

Q. You have assumed here that if a statement had not reflected a prosperous condition of the Capital National Bank you would have pulled your money out the very next day while you could get it; that's correct isn't it?

A. Yes, sir.

Q. And of course that's the motive that actuates men ordinarily in business transactions, too, isn't it, and you would have done that under those circumstances, even though any of the previous

1216 reports might have shown that it was prosperous at a previous period, you would have done that just the same, wouldn't you?

A. I don't quite understand it yet.

Q. In respect to what you would have done about pulling your money out of the bank the next day after you became advised by a statement that it was not in a prosperous condition, you would have done that unequivocally wouldn't you,—you would have taken your money out if you saw a statement showing that the bank wasn't prosperous. That is true, isn't it?

A. I didn't state that; I stated that if the statement showed the

true condition of the bank, I would have drawed it out the next day.

Q. I understood you to say that if the statement had showed the bank not in a prosperous condition you would have drawn your money out the next day.

A. I don't think I stated that.

Q. Wouldn't you have done that?

A. I stated it this way——

Q. No, no. Now as a matter of fact, if you had known any one of the reports was untrue, you would have pulled your money out would you, the next day?

A. If I knew they were untrue?

Q. Yes sir.

A. Yes sir.

Q. And you would have done that, even though the previous report was true, wouldn't you?

A. Well how would I know that.

Q. If you knew the last report was untrue, you wouldn't leave your money in there because you thought a report made a year ago might have been true, would you?

1217 A. Well that is a odd question. How can I tell that. I wouldn't rely upon any bank that lied in its reports if I knew it.

Q. You wouldn't rely upon any bank that didn't reflect a proper condition in its report, would you?

A. Not if I knew it, no sir.

Q. And you were keeping your money in there at the last because every statement that came to you seemed to show a good condition?

A. I believed the reports to be true.

Q. And you also believed them to show the bank in a good condition.

A. Yes sir.

Q. And if the last report that came to you hadn't shown the bank in apparent good condition you then would have drawn your money out, wouldn't you?

A. Well it is like I stated. If I had knowed the condition if they had stated the condition the bank was in I would have drawed it out, yes sir.

Q. That is if the report had been true, and it had reflected the fact that the bank had had large losses and wasn't prospering you would have drawn your money out?

A. If the last report had come out with its true condition I would have drawed my money out.

Q. And you wouldn't have paid any attention to any previous condition of the bank?

A. No sir.

Q. You were interested in what the bank's condition was at the present month.

A. Yes, sir.

Q. And you didn't care what the bank's condition was at any time previous to that.

1218 A. No, that wouldn't be any business policy at all.

Q. What German papers did you get?

A. Had the Staats Zeitung, and part of the time the Freie Presse.

By Mr. THOMAS:

Q. Were any of those statements of the bank's condition contained in any of those German papers?

A. Just once in a while; I just seen a couple of them in there.

Q. You were asked about your interest in the Bank of Staplehurst at the time these deposits were being made in the Capital National Bank. How much stock did you have in the Staplehurst bank?

A. $3,000.

Q. The Capital Stock of the bank was $6,000?

A. Yes. No,—it was only $5,000 I believe at that time yet. I don't remember now, we changed it.

Q. And did you do all the work in the bank?

A. Nearly all. Jurgenson was there part of the time. You know he was in the grain business to.

Q. Mr. Jurgenson didn't do any bookkeeping?

A. Not very much, no; off and on he did.

By Mr. ROSE:

Q. Did you know Mr. D. E. Thompson, personally?

A. No sir.

Q. Did you know Mr. Charles E. Yates personally ?

A. No sir.

Q. Or Dr. E. P. Hamer, of Lincoln?

A. No sir.

Q. You never had any personal conversations with either of them about any subject whatever?

1219 A. No sir.

By Mr. THOMAS:

Q. Did you know them by reputation?

A. Yes sir.

Q. And what was their standing and reputation as business men and financiers?

A. They were reported as good business men, especially the directors and officers of the bank.

Q. Did you know of them by reputation,—that is, the directors?

A. Yes sir.

Q. You knew of Mr. Thompson?

A. Yes sir.

Q. And Mr. Yates?

A. Yes sir.

Q. And of Mr. Hamer?

A. Yes sir.

By Mr. ROSE:

Q. At that time Mosher and Outcalt bore splendid reputations as bankers over the country?
A. Yes, sir.

Witness excused.

* * * * * * *

1220 Mr. FRITZ BECKORD re-called for further cross-examination.

By Mr. BISHOP:

Q. Did you know Mr. Yates the defendant, Charles E. Yates?
A. I know and seen him a part of the time,—and seen him and know him part of the time and then not know him again.
Q. Simply knew him by sight?
A. Yes sir, by sight.
Q. Did you know Dr. Hamer?
A. I have seen him by sight.
Q. Did you have any personal acquaintance with either one of them?
A. No sir.
Q. Never had any conversation or any talk with either of them?
A. No sir.

1221 Mr. THOMAS BAILEY called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. THOMAS:

Q. Where do you reside, Mr. Bailey?
A. Pleasant Dale, Seward county, Nebraska.
Q. How long have you resided at Pleasant Dale?
A. I came there in,—I think it was in the summer of '69.
Q. And that has been your residence ever since?
A. Yes sir.
Q. What has been your occupation during that time?
A. Farming.
Q. Have you been engaged in grain buying any?
A. Some.
Q. And during the years prior to January, 1893, how frequently were you in Lincoln?
A. Oh, every day or two,—most all the time but Sunday.
Q. Go down on the morning train and back in the evening?
A. Yes, sir.
Q. Then you were not yourself, practically engaged in farming?
A. Most of the time I saw that it was done all right.
Q. Did you know of the Capital National Bank of Lincoln?
A. Yes, sir.

Q. And knew of that institution while it was in existence at Lincoln, Nebraska, and doing business there?
A. Yes sir.
Q. And did you know the officers and directors of that bank personally, or by reputation?
A. I knowed some of them personally, and some by reputation?
1222 Q. What ones did you know personally?
A. I knowed Mr. A. P. S. Stuart; I knowed Richard Outcalt since he first came to Lincoln; I knowed Mosher; I knowed Mr. Thompson here by sight, I never had any acquaintance with him and I knew Mr. Hamer and Mr. Yates by sight. I knew Mr. Walsh very well.
Q. Now during the year 1892, did you do any business with the Capital National Bank?
A. Yes, sir.
Q. What was the nature of that business?
A. Well sir, I put some money in there.
Q. About when?
A. I will have to refer to my statement here in regard to that; it is so long since,—I can remember the time I put it in there, but I can't remember the date. (Witness refers to paper.) This will kind of refresh my memory probably. This is a Receiver's certificate of the Capital National Bank of Lincoln Nebraska.

Mr. BISHOP: The defendants object to him stating what that paper is.

Q. Just tell us when you deposited your money and how much.
A. October 11th, 1892 I deposited.
A. I deposited $10,000 October 11th, 1892.
Q. Give us the next item.
A. I deposited a certificate of deposit from the First National Bank,——
Q. When was the next item?
1223 A. I have got to look at this to remember the dates. (Witness refers to paper.) It was December 28th, 1892.
Q. How much?
A. I deposited $2,000.
Q. And did you make any further deposits after that?
A. I don't think I did.
Q. Did you make any withdrawals of any part of that?
A. Yes sir, I withdrew $500, I think it was on the Thursday or Friday that the bank closed on Saturday night.
Q. Is that all you withdrew from those deposits?
A. That's all I withdrew that I remember of.
Q. Have you received from the Receiver any dividends on thos deposits?
A. Yes, sir.
Q. State the percent of dividends and when paid.
A. I have drawed out all together seventeen per cent. September

7th, 1893 I was paid 10%; April 25th, 1894 5% and July, 1901, 2%.

Q. Is that all?

A. That's all I got from the Receiver of the Capital National Bank to the best of my recollection.

Q. Now Mr. Bailey, prior to the time that you made this deposit in the Capital National Bank, did you have any information as to its condition,—that is its financial condition?

A. Yes, sir.

Q. Where did you get that information?

A. I got it prior to the time that I deposited this money; I used to take the newspapers in Lincoln, the Lincoln Call, and the Semi-Weekly Journal part of the time. I used to read the papers every day in fact.

1224 Q. Had you finished your answer?

A. No sir. I went into the bank with Mr. Richards, who was an old friend of mine that used to keep a bank there at the corner of "O" and 10th, and then he built a block down on——

Q. First I want to ask you about the newspapers that you saw. What did you see in them with reference to the condition of the bank?

A. Why I read the statements, and I knew most of the directors in the bank, and the officers, and I knew them by reputation, and some of them personally, and knew them as good business men.

Q. Did you see the statements of the condition of the Capital National Bank that were published in the newspapers, which you have testified to?

A. Yes sir, I saw the statements and I read them; I was a reader of the papers every day.

Q. What information did you get from those statements?

1225 A. Well that is all the information I could get in regard to any of the banks, what their printed statements was in the papers, and on the cards that the officials of the bank there when I went in,——

Q. At the time you made your first deposit of $10,000 you may state where you went to make the deposit?

A. I went in the Capital National Bank.

Q. And what occurred after you went into the bank?

A. Well sir, there was one of the clerks there in the bank gave me a card with the statement of the standing of the Capital National Bank of Lincoln, Nebraska, which I had seen several of them previous to this time, and I saw it was what I supposed was a good statement,——

Q. What did the statement disclose, the one that you saw, and what impression did it have upon your mind, and how did it affect your transaction with the bank that day?

1226 Q. You say they handed you a card. What did that card contain, Mr. Bailey?

Q. You say they handed you a card, Mr. Bailey?

A. Yes, sir.

Q. Have you that card?

A. No, sir.

Q. What did you do with it?

A. Well sir, I don't remember; I think I had it here at the time of the last trial and I haven't seen it since; I supposed that would be the last of it,—the last I would need it any more.

Q. But since you have been here attending the trial for a week or two, have you made search for it?

A. No sir, I haven't made any search for it.

Q. Have you got it at home?

A. No sir, I know I haven't; I looked for it,—I looked for several things and couldn't find them.

Q. When did you see it last?

A. I think it was about the time the last suit was tried here in—I think it was in 1902.

Q. Have you seen it since then?

A. No sir.

Q. Have you looked for it since then, or been able to find it?

1227 A. No sir, I haven't been able to find it.

Mr. BISHOP: Have you looked for it,—you haven't looked for it have you?

A. No sir I haven't looked for it.

Q. Where did you leave it at the time of that trial?

A. I think I left it here; we had them all together, the old papers,—we had them down here at the old courthouse, to the best of my recollection.

Q. Who did you leave the card with?

A. I don't know that.

Q. Have you seen it since that trial?

A. No sir.

Q. Have you—is it at your home?

A. No sir, I haven't got it at home.

Q. Is it in your possession?

A. No sir.

Q. Do you know where it is?

A. I don't know where it is.

Q. Would you have any idea where to look for it?

A. No sir.

Q. You may tell the court what that card contained,—the one that was handed to you when you went into the bank that day.

1228 A. It contained a statement of the bank; the name of the officers and directors of the bank.

Q. Did you look it over?

A. Yes, sir.

Q. Now, Mr. Bailey, did you believe that report to be true or otherwise?

A. Of course I thought it was true.

Q. Would you have made that deposit in the bank or either of them if you had known that that report was not a true and correct report of the condition of the bank?

A. I certainly would not.

Q. What did that card contain as to the capital stock of the bank?

1229–1237 A. It contained the amount of capital stock to be $300,000.

Q. And did it contain anything else that you remember of?

A. It read about the liabilities and the resources and had the names of the directors and the officials on it.

Q. What names of directors appeared on the card,—what ones do you remember?

A. R. C. Outcalt, Mosher, A. P. S. Stuart, Mr. Hamer, Yates and D. E. Thompson.

Q. Was Mr. Phillips' name on them?

A. Yes, I believe Mr. Phillips was on; I knew Mr. Phillips personally; I think his name was on.

Mr. THOMAS: That is all.

Cross-examination.

By Mr. BISHOP:

Q. Mr. Bailey, you say you had certificates of deposit from the First National Bank which you put into the Capital National Bank?

A. I did; I had some; I had one for $10,000.

Q. That amount you had taken out of the First National Bank?

A. Not at that time I hadn't, but I did right after I went in the bank and inquired about it.

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1238–1242 WALTER T. SCOTT re-called for further cross examination.

* * * * * * *

1243 Re-direct examination.

By Mr. THOMAS:

Q. Mr. Scott, were you here in November of the last year?

A. Yes, sir.

Q. The latter part of November?

A. Sometime in November, I don't remember what day it was, but I registered at the hotel I guess you could get the date there.

Q. Is that the time you signed this subpœna, or paper I handed you?

A. I think it was.

Q. You spoke of having some notes. What notes are those?

A. Why it is some that I paid to the Capital National Bank along in '90 and '91,—sometime after I embezzled as he tries to make out. I think if I had embezzled anything I couldn't have borrowed money as I did for three or four years afterwards from that bank; and then, as I understand it a man to embezzle money must also handle the money; I never handled a dollar of the bank's money any time I was in there; I had nothing to do with the cash at all.

Q. Did you handle the notes or securities of the bank?

A. No sir. All I handled was the individual deposit account. I kept the whole of the individual deposit accounts. I had nothing whatever to do with any securities of the bank, or money of the bank, or anything that could be converted into money.

Q. You may hand me those notes you have just put in your pocket.

1244 A. I have actually been accused of sharing in the boodle of the bank when it was busted. I was out of the bank five years and kept my own accounts there; I never got a dollar out of it.

Q. Were you ever employed as an expert accountant in the trial of any cases in court, which involves the books of the Capital National Bank?

A. No sir.

Q. Or any other bank?

A. I was employed once as an expert on the books of the Antelope county bank.

Q. Who employed you in the case?

A. A man named Smith.

Q. Who was the attorney in the case?

A. I don't recollect now who was the attorney.

Q. Did you ever do any work of that character for Mr. Rose, of counsel in this case,—counsel who examined you?

A. I don't remember of it,—Mr. Rose, I think I did do some work for you once didn't I,—it was either you or Mr. Love.

Mr. ROSE: You never did any work for me.

Q. I now hand you Exhibits "Ak" to "Aq" and will ask you what those exhibits are?

A. They are notes given for money I borrowed of the bank. I think you will find everyone has got "D" on; they were endorsed by Mosher and discounted and you will find each and every one of them either paid, or taken up and renewed the day they were due. I never let any of my paper at the bank run over due.

Q. Do each of these notes bear your signature?

A. They bear my signature, and only my signature because they were secured by the mortgage I give on my property.

1245–1263 Q. Were those notes all discounted by the Capital National bank?

A. They were all discounted; you can see the "D" on them now, and if you will look on the back you will see Mosher endorsed them.

Mr. THOMAS: That's all.

Re-cross examination.

By Mr. ROSE:

Q. Now in respect to this answer by way of argument;—you suggested that an embezzler wouldn't be able to borrow from same bank Suppose he had his hooks on the president of the bank?

A. My hooks,—what do you mean?

Q. By carrying the paper that the president had forged somebody's name to and taken out of the bank,—you might go to him and shake him down for a loan?

A. If I had any such paper that I could have used in the bank, I think I could have stuck him for a pretty good sum of money to keep quiet couldn't I. I wouldn't have had to owe him anything.

Witness excused.

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1264 Mr. BISHOP: The defendants offer in evidence the testimony of Mr. R. Dorgan, taken at the former trial, and found at page 1121 of that Bill of Exceptions.

Direct examination read by Mr. Bishop as follows:

Mr. R. DORGAN, called as a witness on behalf of the defendants and being first duly sworn, testified as follows:

Direct Examination by Mr. DEWEESE:

Q. Where do you live?

A. Lincoln, Nebraska.

Q. Where did you live in the fall of 1891 and 1892?

A. Lincoln, Nebraska.

Q. State whether or not you did any business for the Capital National Bank during those years?

A. I did.

Q. You may state whether that business had any relation to the loaning of money by E. W. Mosher, who then lived at York, in York county?

A. Yes sir.

Q. Explain what Mr. E. W. Mosher, what his business was with reference to the Capital National Bank at that time?

A. He was loaning money on real estate.

Q. For whom?

A. For the Capital National Bank.

Q. And do you know whether the money that he thus loaned was sent to him from the Capital National Bank?

A. Yes sir.

1265 Q. Did you have anything to do with that business, and in checking up his work, and doing anything for the Capital National Bank?

A. Yes sir.

Q. What was it, just explain to the jury what that was.

A. I viewed the land, and passed on the paper, and made reports on certain loans.

Q. Do you know what arrangements existed between the bank and E. W. Mosher with reference to how the money, that he handled and loaned was to be accounted for,—what evidence the bank had of that?

A. Yes, sir.

Q. You may just explain what you know about it.

A. He got the money in advance of the loan,—five, six or ten thousand dollars at a time, and gave his note for the money.

Q. Do you know what security,—do you know anything about the security of what endorsement was required on those notes?

(Question withdrawn.)

Q. Just explain that whole arrangement, if you know about it,—just what you know about it,—so we will know what was done.

A. Wallie Mosher,—C. W. Mosher guaranteed the paper, Ed's paper.

Q. To the bank?

A. To the bank.

Q. What was done with the paper, that was taken, when loans were made at York, by and through Mr. Mosher?

A. Why it went to the bank.

Q. To the Capital National Bank?

A. Yes, sir.

1266 Q. I will ask you whether those notes you speak of executed by Edwin W. Mosher, were his personal indebtedness, or was for money that he obtained for loaning as the agent of the Capital National Bank, there in York, if you know?

A. Yes, sir.

Q. You may explain how that was.

A. I didn't understand the question.

Q. (repeated). I will ask you whether these notes you speak of executed by Edwin Mosher, were his personal indebtedness, or was for money that he obtained for loaning as the agent of the Capital National Bank there in York.

A. This money was advanced for loaning on real estate in York county, and Hamilton county, and those counties close to York.

Q. Well you may state for whom that money was loaned.

A. It was loaned for the Capital National Bank.

Q. I will ask you to state whether you know if in that business some real estate had been acquired?

1267 A. Yes, sir.

Q. What did you have to do with reference to that real estate if anything?

A. Well I was looking after collections in a general way for the bank.

Q. The question is, if you had anything to do with this real estate, in listing it, or checking it over, or finding out in any way what it was, or what amount it was.

A. Yes, sir.

Q. What did you do?

A. Well when they would have to take a piece of land in, I would go out and look at it, and see what it was worth and inquire about it, and look at the soil and location, and view the land.

Q. State about how much of this land there was?

A. There was a lot of it, I would say about forty or fifty quarter sections.

Q. Located in what counties?

A. Well the most of it was in York county, some of it in Hamilton, and some of it,—I don't know, in Kearney or Buffalo, some of those western counties. I couldn't remember all the counties, they had so much land.

Q. Do you know what was done with that land?

A. Yes, sir.

Q. State to the jury what became of it?

A. It was turned over to the bank.

1268 Q. By deeds?

A. I should say, Yes, sir.

Q. About when was that do you know, prior to the failure of the bank, or after?

A. A short time before the failure of the bank.

(The Cross Examination of this witness is offered later by the Plaintiffs, and may be found at page 1472 hereof.)

1269 Mr. BISHOP: The defendants offer to read in evidence the testimony of George Sanford given at the former trial of this case, and found beginning on page 307 of that Bill of Exceptions. Direct examination read by Mr. BISHOP as follows:

Mr. GEORGE SANFORD called on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination by Mr. DEWEESE:

Q. What is your full name?

A. George Sanford.

Q. Where do you live?

A. Council Bluffs, Iowa.

Q. Did you ever do any business for the Capital National Bank of Lincoln?

A. Yes sir.

Q. About when was that?

A. In 1892 and 1893.

Q. I will ask you whether it was with reference to loans that had been made by E. W. Mosher at York?

A. Yes sir, it was.

Q. What was the business that you did, explain to the jury.

A. I was employed by the bank to go to York and look up their interests there. I collected as much as I could and converted the property into cash.

Q. And did you go to York?

A. Yes sir.

Q. And what was it that you did?

A. I acted as collector. Looked up their property and converted it into cash.

1270 Q. What was the nature of their property?

A. Well it consisted of Bills receivable, real estate and other personal property.

Q. How did this real estate accumulate, and who had made these loans that you speak of?

A. The real estate was accumulated through loans made at York by Edwin W. Mosher.

Q. For the bank?

A. Yes sir, for the bank.

Q. What was the general character of these bills, and notes that you found there, who in a general way had made them?

A. The farmers.

Q. Farmers in the community there?

A. Yes sir.

Q. Was it confined to York county alone?

A. No sir, not altogether in York county, there were several counties.

Q. Did you investigate these notes, and the farmers who owed them and see about settling or collecting or securing them?

(No answer shown)

Q. Tell the jury just what you did, who it was you were dealing with, who were the people that had given these notes, so far as you can remember, what was the character of the loans, what kind of security it was, and all about it.

1271 A. The loans in York county were principally loans to farmers and cattle feeders. Outside of York county I should judge they were accumulated through real estate loans principally although there were some loans made outside of York county that were not secured by real estate.

Q. State whether you made an inventory of the whole business?

A. I made an inventory in the fall of '92, about the first of January, of the assets that they were interested in at that office of York.

Q. What did you do with the inventory?

A. I sent it to the Capital National Bank at Lincoln.

Q. You may state more definitely how this real estate had been accumulated or acquired, and in whose name did you find it from the papers that came into your possession there in your work?

A. When I first went to York this real estate was in the name of Edwin W. Mosher, and it had been accumulated through mortgages given Edwin W. Mosher, and in some instances had been deeded to him in settlement.

Q. Now then what was done by you in your work there for the bank in reference to that real estate, and to the notes and mortgages of all characters that you found there?

A. In regard to the notes and mortgages I proceeded to collect them as fast as possible, and remit the proceeds to the Capital

1272 National Bank. And the real estate I looked after it, platted it; put a price on it, and put it on the market.

Q. What was done with reference to deeding that real estate?

A. The real estate was deeded to the Capital National Bank through Mosher and Outcalt;—first deeded to Mosher and Outcalt and they deeded it to the bank.

Q. And that that had been in the name of Edwin W. Mosher?

A. That was deeded to Mosher and Outcalt and then to the bank. Deeded to Mosher and Outcalt by Edwin W. Mosher and wife.

Q. State to the jury about how many quarter sections of land there were of that land.

A. About fifty quarters.

Q. Fifty quarter sections?

A. About fifty quarter sections.

Q. State whether there was any personal property that had been acquired in that loaning business through E. W. Mosher?

A. There was no personal property except the office fixtures and the property on the horse ranch, which was turned over to the bank.

Q. The horses were turned over to the bank and the ranch to-?

A. Yes sir, and sold by the Receiver.

Q. Do you know how much the horses sold for?

A. Yes, about.

Q. State the amount.

1273 A. About $10,000.

Q. What character of horses were they?

The Plaintiffs object as calling for a conclusion of witness. Objection overruled. Plaintiffs excepts.

A. Standard bred horses, stallions and brood mares, and some colts.

Q. Where was the ranch located, do you know?

A. About two and a half miles northeast of York.

Q. Did it have any particular name?

A. No. I believe he did have a name for it, but I have forgotten.

Q. Did you make any inventory of the value of this stuff, both the real estate and the chattels and notes that were turned over to the bank under your employment?

A. Yes sir.

Q. I will ask you whether, while you were in the employ of the bank there looking after that business, you sold or caused to be sold any of the lands that you speak of for the bank?

A. Yes sir.

Q. And what did you do with the proceeds?

A. I think I only sold one piece, and we only got the matter in shape so that we could dispose of that about the first of January 1893. This piece was sold to C. W. Cowan of York, and in fixing up the title, the matter ran along until the Receiver took hold of the bank, and he wanted the sanction of the Receiver to that sale, although the deeds had been deposited, and the result of it was that I never really disposed of it; they were disposed of by the Receiver of the Capital National Bank.

1274 Q. Was that the Douglas farm?

A. No, that was the Daniels farm.

Q. Did you personally know, or have anything to do with the disposition the Receiver made of the balance of the lands?

A. I never knew, no sir. I left York about that time.

Q. You quit the business when the Receiver commenced?

A. Yes sir; shortly after. I was there possibly a month after he took charge. This personal property had to have attention and there was no one to take charge of it and look after it. I was relieved as soon as he could get around to it.

Q. What did you do with it?

A. With the personal property?

Q. Yes, with what remained after the Receiver commenced.

A. I turned everything over to the Receiver.

Q. I will ask you to state in your investigations of this property there that had been handled by E. W. Mosher for the bank, you found some judgments that had been obtained on paper?

A. Yes, sir.

Q. What became of these judgments?

A. I don't think I ever settled up any of them.

Q. What was done with them, was there any assignment of them or anything of that kind, or in whose name were they taken?

A. I couldn't answer that question intelligently.

Q. How many of those judgments were there?

A. I couldn't say.

Q. Do you know whether they went to the bank or not, whether they were turned over?

A. Over to the Capital National Bank or not?

Q. Yes sir.

1275 A. No, I don't really.

Q. I will ask you to state whether you listed them, and reported them to the Receiver*m* or to the bank?

A. I didn't invoice them because I considered them worthless.

Q. The judgments?

A. Yes sir.

Q. Were there any foreclosures?

A. None pending.

Q. State whether, in reference to your work for the bank, in reference to this property, what you did if anything in regard to the payment of taxes, and the expenses of taking care of the property, and who furnished the money to do that?

A. After the first two months that I was there, I took charge of the property; paid all taxes, and paid the expenses of the horse farm; paid all the help, and made out monthly statements and sent that statement to the Capital National Bank the first of each month. I paid this money out of collections, and when I didn't have a sufficient amount on hand out of the collections I drew on the bank for the money to pay the expenses.

Q. Capital National Bank?

A. Yes, sir.

Q. I will ask you whether you handled any of the notes that had been accumulated in the making of these loans?

1276 A. Yes sir, I handled all that were in the York office.

Q. State whether you handled any that were sent to you by the Capital National Bank, that had been endorsed over to them?

A. Yes sir, I did.

Q. Were they all endorsed over?

A. Yes sir. I wouldn't say all. Some of that paper was taken on Capital National Bank paper direct, and some of it was taken on Mosher's paper and endorsed over to them.

Q. Do you remember the farmer by the name of Tighe, and the amount of the judgment that was obtained against him?

A. I don't remember, no sir. I think he had left the country when I went up there.

Q. Do you remember the judgments against Greene?

A. I remember something about it. I don't remember the amount though.

Q. Do you remember whether that was secured by a loan on real estate and afterwards paid to the Receiver?

A. I couldn't say.

(The Cross Examination of this witness is offered and read in evidence on behalf of the Plaintiffs, later. See page 1469 hereof.)

1277 Mr. D. E. THOMPSON produced as a witness on behalf of the defendants, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. ROSE:

Q. You are defendant in this case?

A. Yes, sir.

Q. Where is your place of residence?

A. At this time, in Mexico City.

Q. Where have you heretofore resided?

A. In Lincoln, this state.

Q. Were you one of the directors of the Capital National Bank?

A. I was.

Q. For what period of time approximately?

A. I went in there as director when the bank was organized and I was there until it was finished: from '84 until 1893.

Q. Did you serve in that capacity as a gratuity, or did you receive compensation?

A. I served without any sort of compensation.

Q. Did you hold any other office in the bank except that of director, during any part of that time?

A. No sir, I did not.

Q. Were you ever an employee, director, officer, stockholder, or otherwise connected with the Marsh National Bank, or with Marsh Brothers Mosher & Company?

A. No sir, I was not.

Q. The date of your connection then dated with the first existence of the Capital National Bank, after the bank had been changed to the Capital National Bank?

1278 A. Commencing with the Capital National Bank.

Q. How much stock did you at first acquire in the Capital National Bank, when it started with a capital of $200,000?

A. My first holdings—the holdings I acquired at that time were $14,000, face value.

Q. Did you pay for your stock to the bank?

A. I did; paid in cash.

Q. And at what rate did you purchase your stock?

A. I paid for that stock a premium of nine points; 109 on the dollar for it.

Q. When the stock was increased, in 1886, to $300,000, did you take any portion of the increase?

A. I did.

Q. How much?

A. I took $11,000 of it.

Q. Did you pay for that stock?

A. I did, I paid cash for it.

Q. How much did you pay for it?

A. I think I paid for that a premium of fifteen points; $1.15 for each one dollar in value.

Q. Do you remember what other persons went into the directory of this bank originally, that is those who had not been previously connected with it, at the time you did?

A. Well I doubt if I could name more than a few of them.

Q. Name those that you remember.

A. W. W. Holmes, Professor Stuart, H. J. Walsh.

1279 Q. Wasn't he merely Vice-President—didn't he have the title of Vice President as an honorary title without belonging to the directory—without being a director?

A. Well Walsh wasn't a director in the bank; he was vice president of it without belonging to the directory; at this moment I don't remember who the others were.

Q. You knew them at the time?

A. Oh, yes, they were all men that I knew.

Q. At the time you became connected with this bank you may state what knowledge or information you had of the affairs——

A. May I answer further as to the——

Q. Yes, certainly.

A. Mr. Yates was also one that went in at that time.

Q. Mr. Moore soon after?

A. I think Moore came in soon afterwards; not at that time, but soon afterwards as I remember it.

Q. Now at the time you became connected with the Capital National Bank, what was your knowledge as to the bank's assets other than the capital which the new stockholders had contributed?

A. I had no personal knowledge; there was a committee appointed at that time——

Mr. NORVAL: Now we object to that as not responsive.

Q. State what, if any, means were employed to endeavor to ascer-

tain the condition of the bank at the time you went in and put your money in as a stockholder?

A. There was a committee appointed to check over and take over the assets of the old bank.

Q. Do you remember who that committee was?

A. That committee consisted of W. W. Holmes, Professor A. P. S. Stuart and Mosher, as I remember.

1280 Q. Do you remember now whether you received a report of that committee?

A. Yes, I think that committee made a report.

Q. Oral or otherwise?

A. I think it was an oral report.

Q. What is your best recollection as to what was reported?

Mr. THOMAS: That is objected to as hearsay and immaterial.

A.—no, hold on, I think that was a written report, and it said in effect——

Mr. NORVAL: We object to the contents.

Q. Well you may just state whether—what if any item of assets was discussed there, as being doubtful assets, if any?

A. The question of an asset of the old bank was under consideration—an asset, or a claim probably it would be called, against Donnell, Lawson & Simpson of New York, who had been the correspondents, I think, of the Capital National Bank——

Q. Or Marsh National Bank?

A. Marsh National Bank, I should say, was discussed at the time of the first meeting.

Q. Well you may state what was said about it.

A. Mosher said that was a matter that didn't properly belong to the new bank; that the New York bank had failed a short time before, and that he and Outcalt would take care of it.

1281 Q. Now was there any other asset reported of a questionable character, or that was rejected?

A. No, sir, I think not.

Q. Just state what was your knowledge and information, if any, as to whether the Donnell, Lawson & Simpson account was cared for by Mosher and Outcalt?

A. Well I have no personal knowledge except the report of the committee from time to time of the condition of the bank.

A. I have no personal knowledge of what became of it.

Q. And what if any report was made to you either by Mosher or Outcalt, or that committee?

A. Well it was reported that it was taken out of the bank.

Q. And did you have any knowledge to the contrary at any time?

A. I never did.

Q. Well what was your belief as to whether or not it had been taken out?

A. Well, I believed that it had been.

Q. Now what, if any knowledge did you have as to whether that bank had previously sustained losses on account of the paper of Marsh Brothers and their associated, subsidiary or connected companies?

A. I had no knowledge whatever of it.

Q. What if any knowledge did you have about the bank having sustained any losses previously on account of the item of stocks and bonds?

1282 A. I had no knowledge of their sustaining losses on anything.

Q. Or on account of the item of exchange?

A. I had no knowledge.

Q. I want to ask you, Mr. Thompson, if you had had any knowledge that that bank was without any capital, whether you would have put your money in there and subscribed to the stock?

A. I certainly never would have done it.

Q. Did you know at that time who had been the managing officers of the Marsh National Bank?

A. Well I knew simply as I would know anything that I hadn't had any acquaintance with at all; I never had had any holding with the bank.

Q. Had you ever been a customer or depositor of that bank previously in any form?

A. No, sir.

Q. Had you any extended previous acquaintance with either Mosher or Outcalt?

A. No, I hadn't.

Q. At that time had you known enough of their reputation, to know what standing they had as business men in the community?

A. Well their standing was good.

Q. Did you have any acquaintance,—Yes or No.

A. Yes, sir.

1283 Q. Well what within your knowledge was the standing and reputation of those men for business character and integrity?

A. It was first class.

Q. Now when the new bank organized, did you attend the meetings of the directors, the regular meetings?

A. You mean at the time of the organization, or at other times?

Q. Yes sir, at that time, and afterwards.

A. I attended at the time of the organization, that is the changing into the Capital National Bank.

Q. Did you elect officers then?

A. Yes, sir.

Q. What officers did you select?

A. Mosher was president and Outcalt was cashier, and Mr. Walsh was the Vice president. I think those three were all.

Q. Did you appoint any committees of the board for any purpose?

A. Oh well,—if you consider then as officers of the bank. At that time and for the purpose of taking over the assets of the old

bank into the new, there was a committee appointed which was a standing committee and served as an Executive committee until others took their places.

Q. What was that committee, the executive committee?

A. That committee was Professor Stuart, W. W. Holmes and C. W. Mosher.

Q. Were you at that time personally acquainted with Prof. Stuart and W. W. Holmes?

1284 A. Well I had known Mr. Holmes a long time, and Prof. Stuart some little time.

Q. Were you acquainted with their standing for business character and integrity at that time?

A. Yes s' I was.

Q. What was their reputation in that respect?

A. Well no men had better than they had.

Q. It was good then?

A. First class.

Q. Do you know what the business of these men were at that time and had been previously; if so state.

A. Well, Holmes had for all the years I had known him, had been handling money—loaning money; he was a wealthy man. Prof. Stuart had been doing the same thing during the time I had known him, which was a few years. Prof. Stuart, I think, had, before coming to Lincoln, been a Professor in some university; I believe he had been.

Q. Were you at all acquainted with their pecuniary standing and resources?

A. Well by reputation only. I had no actual knowledge of how much money they possessed.

Q. What was their pecuniary reputation and standing?

A. Their reputation was that they were very wealthy.

Q And were you acquainted with their general habits of life?

A. Perfectly good.

Q. Frugal and steady?

A. Perfectly right in every respect.

Q. Now upon what officers, if any, did you delegate the

1285 power of immediately directing and conducting the bank's business?

A. It seems to me the active officers of the bank were—first of course was the election of the directory, and then the active officers of the bank, and then this executive committee.

Q. Who were the active officers who had charge and control of the institution?

A. The active officers were Mosher as president and Outcalt as cashier.

Q. You may state whether it was intended that they should devote their entire time to the business of the bank, or not?

A. Why it was so understood at the time; that was the arrangement.

Q. Now in actual practice in the conduct of the affairs of this

bank from the time it entered business under the name of the Capital National Bank, who, to your knowledge, immediately and directly conducted and administered the bank business of the institution?

A. Mosher as president, and Outcalt as Cashier, and for several years Professor Stuart and W. W. Holmes as executive committee, and later Dr. Hamer followed Mr. Holmes; some little time
1286 after the death of Mr. Holmes, he succeeded him.

Q. How much of your personal time did you devote, if any, to the affairs of the bank and the administration of the bank?

A. None at all, except to attend meetings when I was in town. I was much of the time away from Lincoln, but when I was there I gave time enough to attend their annual meetings.

Q. What personal effort on your part did you make to ascertain the condition of the bank?

A. Well all the effort that could be made by canvassing the situation with the directors and executive committee who were a member of the directory at the time of the meetings.

Q. Did you ever have any other source of inquiry?

A. No sir.

Q. The bank examiners or the officers?

A. I will qualify that. The bank examiners were both men—one following the other—that I knew very well, and I always asked them the situation as applied to the bank after they had made examinations whenever I would meet them.

Q. State whether or not at any time you called for, either called for or received reports of the condition of the bank by the president or the cashier?

A. Well at the meetings they were always called for and always received.

Q. Now in respect to the matter of dividends. Were you present at any time when the board of directors ordered dividends declared?

A. I was.

Q. And at such times did you have any records of the condition of the bank and its net earnings?

A. We always had them.

1287 Q. Now you may state whether at any time when you were present and took part in the proceedings, when dividends were declared, there was any period of time when the reports of the officers to you did not show that there was a net profit exceeding the amount of the dividends?

A. You ask if we ever declared a dividend——

Q. When there wasn't a showing of a net profit exceeding the amount of that dividend?

A. No sir,—never.

Q. And enough to put the requisite sum to surplus?

A. Always enough to put what was required to surplus and had something over.

Q. At the time you acted in respect to declaring dividends what was your opinion and belief as to the truth of the showing?

A. There was always a statement made by the officers of the

bank and laid on the desk where the directors met showing the gross and net earnings of the bank for the period that had passed since the meeting before.

Q. The question was what belief or reliance you had upon the truth of that personally?

A. Why it was considered and thought to be absolutely truthful.

Q. So far as you thought yourself?

A. I had no question about it; thought it was a truthful statement, of course.

Q. You may state whether from your inquiries of the bank examiners you ever, from that source, obtained any information that would lead you to infer that the bank was not pecuniarily solvent?

1288 A. No. On the contrary the information I always got from them was always good.

Q. What was your personal belief from the time the bank was organized until it suspended as to the personal character and integrity of C. W. Mosher, and his skill as a banker?

A. My opinion was the same as the opinion of the people of the town.

Q. Just state what it was.

A. I thought he was perfectly correct.

Q. What was your belief as to his pecuniary standing up to the time of the suspension of the bank?

A. I believed him to be a wealthy man.

Q. What was your personal belief and opinion touching the integrity and honesty and skill of R. C. Outcalt as an officer of the bank, and his skill as a banker?

A. My belief in him was the same as it was in Mosher.

Q. Just state,—how did you regard him?

1289 A. I regarded him as an upright and capable officer, and a man of a good deal of wealth.

Q. And until the failure of the bank how were the two men regarded generally in the community in which they did business?

A. As business men,—as bankers?

Q. Yes.

A. Very highly.

Q. And how, personally, did you regard the standing of your fellow directors in the bank, other than the president and cashier?

A. Well, very highly. I thought I was the cheapest one of the bunch.

Q. Now I suppose you have attested some of the official reports of the institution, as director, have you?

A. I never refused to attest any of them for meetings I attended.

Q. Or if sent to you outside of any meetings?

A. I don't think I ever attested any for meetings that were held when I was not present.

Q. But they didn't have to have a meeting for a report. I mean attesting a report that is sent on to the Comptroller.

A. I beg your pardon. No, the reports to the Comptroller are not made at meetings, of course.

Q. Did you attest any of those?

A. Yes, always when I was asked to do it, at times when I was in town.

Q. Now what, if any, precaution did you take to ascertain the correctness or integrity of the reports before you attested them?

A. Well I don't think ever I attested a report without asking the cashier,—or asking Mosher.—I think Mosher always brought them to me for attestation—this is right, is it, and the answer was Yes and I attested it.

1290 Q. Did you ever attest any that did not appear to have been previously sworn to as correct by either the president or the cashier of the bank?

A. No they were always sworn to before being brought to me.

Q. What would be your honest belief in the correctness of the statement if sworn to by these men?

A. I believed them to be correct.

Q. Did you believe so at that time?

A. I certainly did.

Q. Now did you ever look over, or check over any of the books of that bank?

A. No, I never did.

Q. Did you ever go back in the work room where the clerks and servants of the bank were working on the books and look over them there?

A. No.

Q. Did you ever examine the archives and securities of the bank for any purpose?

A. I never did. That was left to the executive committee, always.

Q. Did you appoint anyone to do that duty, or participate in the appointment?

A. The directors appointed the executive committee, whose duty it was to do that.

Q. Mr. Thompson, what were your educational qualifications as a bookkeeper and accountant? Just give enough of your early history,—your early life,—enough of the circumstances of your early life before entering into active life to indicate what opportunities and qualifications you had in that line.

1291 A. Well does the court want the story of my life?

COURT: Not in detail.

Q. Enough to show your circumstances and how you entered business and how you were equipped for bookkeeping and accounting, when you entered the activities of life.

A. Well sir, my father and mother both died before I was nine years old; until that time my home was in the country where there were no schools, or school privileges except the country schools. That was a mile and three quarters from where I lived. After they died—my mother died when I was seven, and my father when I was nine—I went to town to live with an uncle and from that

time until I was thirteen years old I went to school. My education, so far as it applies to anything possible for me to have gotten out of an educational institution of any kind, was before I was thirteen years old.

Q. Then where did you go,—in what service did you go in the independent activities of life?

A. From the time I was thirteen until I was seventeen I learned a trade, and when I was seventeen I commenced to work for this Burlington road.

Q. In what capacity?

A. My first work for the Burlington road was trucking there in the Lincoln freight house: after that I was brakeman on a freight train between Plattsmouth and Lincoln: after that I was baggageman: all that came within a year, and at 18 I was a conductor; from 18 to 21 I was a conductor here on the Burlington road. The Superintendent who was here at that time went to the Atchison, Topeka & Santa Fe at that time and took me with him. After that I came back here and ran a freight train for two or three months when I was made train master, and after something less than a year I was made Superintendent of this Burlington railroad,—division superintendent.

1292 Q. Now in all that period of time did you ever perform any work on books?

A. No,—never.

Q. Did you ever keep a set of books in your life?

A. No; that would be impossible for me.

Q. Could you go through the Certificate of Deposit account, or the Deposit Ledger of that bank personally and find head or tail of any account, or check it up—could you do it?

A. I could not.

Q. Could you at any time during your term of office as director?

A. Well, never at any time during my life could I have done a thing of that sort.

Q. Was that fact, to your knowledge, known to your fellow directors in that bank?

A. Well, I don't know that I could say that; I don't know what their knowledge of me was.

Q. You never made any pretense of ability to do that?

A. No sir.

Q. And you wouldn't have taken, if tendered, any office in the directory—could you have taken any committee office in the directory that would have required that sort of work to perform your duties?

A. It never occurred to me until this moment, but there was a time when that thing was suggested, that they put me on one of these committees, and I said "It is impossible, gentlemen, I couldn't do that sort of thing; I have no knowledge of that sort of work".

Q. You have had some business experience outside of your connection with this bank?

A. Yes; I have been very active all my life.

1293 Q. Been the directing head of a number of important concerns?

A. Yes, sir.

Q. And in your private, or in your other enterprises that you ran as the directing and executive head what has been your custom in regard to delegating the duties of accounting to others?

A. All business enterprises that I have been interested in I have always gotten somebody in the office who I thought was capable and honest, and of necessity have been compelled to let him, whoever he was, conduct the office.

Q. And did you trust these officers of the Capital National Bank any more fully than you did your own employes, or the employes of the concerns that you directed?

A. Well, I never have had a trust misplaced before, and I have had lots of experience with men in responsible places.

Q. Did you entrust these men any more fully than you have entrusted other men?

A. In exactly the same way.

Q. In what different particular did you perform the duties of director in this bank than you acted when you were running other and independent business?

A. No difference whatever.

Q. Now you can also state how your own time was employed actively during the period of time that you were a director
1294 of the Capital National Bank?

A. That only?

Q. Yes, during the period that you were a director, what other calls were there on your time?

A. Well, from the time I went in the Capital National Bank until 1890 I was superintendent of this Burlington road here, this northwestern part of it,—1100 miles.

Q. What portion of it did you construct?

A. From Seward on northwest here nearly to Edgmont, South Dakota. After '90 when I left the road,—I left the road near the end of December and I was a month, about, in Mexico, and came back here at the end of January, and immediately after that I went to Europe, coming back several months afterwards, and on my return I took charge of the Lincoln Gas & Electric Light Company, and the Farmers' & Merchants' Insurance Company. That I had been an officer in since its organization, and I also at the same time owned a lot of hotels scattered around over the state and in South Dakota.

Q. About how many?

A. I think at that time I had nine. I had had as high as thirteen,—that is, a half interest in them.

Q. Any connection of any sort with any other bank?

A. Yes; I was president of the Aurora State Bank.

Q. President from its organization?

A. Yes, sir.

Q. And during all the time that you were a director in the Capital National Bank?

A. No sir. That bank wasn't organized until, I would think, 1888—about that time.

Q. But from that time until the suspension of the bank?

A. Yes, sir.

Q. Did your duties as superintendent of the railroad require any long continued absences from Lincoln?

1295 A. Well, very many of them,—both long and continued.

Q. Have any conditions of health required any long or continued absence?

A. Well, I had very bad health for a good many years, so bad that in 1885 I was advised to go to Carsbad in Bohemia, which I did, and in 1888 I had to go again, and in 1890 I had to go again; in 1890 was after I left the service of the road.

Q. Were they extended absences?

A. Several months each of them.

Q. In the work of the construction of the line to the northwest, were there any emergencies that required your continued absence for a long period of time?

A. Well there are always emergencies in the construction of a railroad; there may be storms, wash-outs or blockades; there may be material blockades; there are always many things coming up in the construction of a long line of railroad that are emergencies, and usually very serious ones.

Q. Were those facts known to your fellow directors?

A. Oh, yes, they all understood that.

Q. And the periods of your absence known to your fellow directors?

A. I never reported to them when I left town; nor when I came back.

Q. It was a matter of general publicity?

A. Yes, general publicity.

Q. Were any of the companies controlled by you depositors of the Capital National Bank at the date of its suspension?

A. Yes sir, they all were.

Q. There has been mention made here by the accountants of an account of R. C. Outcalt, Treasurer. Do you know personally what account that was?

A. Yes sir, I do.

1296 Q. What account was it?

A. Outcalt was treasurer of the Gas Company.

Q. Was that account in the Capital National Bank the Gas Company's account?

A. It was.

Q. Who controlled it,—who controlled that account with authority to make deposits and withdrawals from it?

A. Well, I controlled the account absolutely; the making of deposits in that way was because Outcalt was interested in that bank, and he was interested in the Gas Company, but he was an inactive treasurer; had no authority to check against the account and never did check against it.

Q. Did he ever, to your knowledge, make any withdrawals from that account?

A. No, he never did; never could have done it under any right he had there.

Q. Did you ever at any time authorize, direct or permit the deposit to that account of the Gas company of any funds that were not bona fide deposits for the amount for which the Gas company took credit?

A. No, I never did.

Q. Did the Gas company ever become the beneficiary of any entry in that account that was not a legitimate deposit entry?

A. No, it never did.

Q. You have, I guess, heard reference to an item of credit mentioned by the bookkeepers in this case, have you?

A. Yes, sir.

Q. Was that April 30th, 1891?

A. Yes sir, April 30th, 1891 I think—I believe that is the time.

Q. Was the Gas company at that time a beneficiary of any portion of withdrawal made on account of a certificate of deposit

1297 in Mosher's name and carried in Mosher's name?

A. No sir, it was not.

Q. Who handled the funds of the bank at that time under your direction,—who kept the account for the Gas company under your direction?

A. Mr. J. K. Honeywell, as secretary.

Q. Is he alive?

A. Yes, sir.

Q. So far as you know are the books and records of that company kept by Mr. Honeywell still in existence?

A. I think they are.

Q. In fact you know they are,—pertaining to that transaction?

A. Yes sir, I know they are.

Q. Would you have personal knowledge of the particular transaction, outside of reference to the books kept by Mr. Honeywell?

A. Well I would have personal knowledge of the transactions involving a great many deposits to the credit of the Gas company during that year, because it was during the time of our reconstruction there.

Q. Reconstruction of the electric and gas plant both, wasn't it?

A. Yes sir. We borrowed a great deal of money that year,—that is, I did for that purpose, about $176,000.

Q. Did you borrow any of that money for that purpose from the Capital National Bank?

A. No sir, the Gas company was never a borrower from the Capital National Bank.

Q. Did the officers of the bank at that time procure some of your notes for that purpose?

A. Some of the notes I took care of myself, through going

1298 east and arranging for them; one of $75,000, or two aggregating that with the Pennsylvania Mutual Life Insurance Company of Philadelphia, and a good many others were arranged for through negotiations of the bank, that is, Mosher as president of the bank probably.

Q. And in those cases at that time, the month of April, 1891, what was the course that the notes negotiated by Mosher or given to him for negotiation took?

A. Well the notes would be made by myself at the Gas office and the usual entries made there that are necessary to keep records of them, and taken to the bank to be sent for collection, and when the collection was received we were given credit for it,—the proceeds of the note and advised of the credit.

Q. In the usual course of business. Then when you got the advice of credit——

A. Then it was entered in the books there in the usual way. That was all by Mr. Honeywell, but that was the process.

Q. You have had some one go through the record to ascertain the course, so that you have refreshed your memory?

A. Of this one entry in question you mean?

Q. Yes, related transactions.

A. Yes,—I remember perfectly well because those notes of $176,000 that were put out that year, they were Gas company notes, and I think they all bore my personal endorsement, because others were like the Penn. Mutual. When I went down there to try to negotiate money to commence my work there,—the outcome of it was that they would let me have the money if I would endorse the notes personally. I wouldn't say that all of them were endorsed by me after that, but I think they were; that $75,000 did, and I presume they all bore my personal endorsement.

1299 Q. Now do you know what was the source of the credit of the $10,000 entry to the credit of R. C. Outcalt, treasurer on May 1st, 1891?

A. Yes, sir.

Q. What was it?

A. It was a credit from the Cadiz, Ohio National Bank for a note that was sent there through the Capital National Bank.

Q. Was it a Gas company note that you refer to?

A. A Gas company note, yes sir, and it appears in the Gas company's records at this time.

Q. And you expect to be able to produce those?

A. Yes sir, I expect that Mr. Honeywell will produce the whole history of it.

Q. Did that company have a credit balance in the bank at the time it failed?

A. The Gas company?

Q. Yes sir.

A. It did.

Q. Placed there at your direction?

A. The account,—well, I might perhaps better say how the account was put there. Now, by my direction would mean this: Mosher was largely interested in the Gas company, and he was largely interested in the insurance company, and Mosher was the inactive treasurer of the Insurance company, and Outcalt was of the Gas company, because in our organizations it is necessary to have those two offices filled, but it was with the understanding that they

had no control of the accounts, but were appointed for matters of convenience to complete the organization, and Outcalt was the treasurer of the Gas company but the credits were controlled by me, because when I took charge of these companies that was the arrangement that I should have absolute control of it, and neither Mosher nor Outcalt had anything to do with the management of them while I was in charge of them.

1300 Q. Did they have anything to do with the deposit or withdrawal of funds?

A. That is part of my answer that they had nothing to do with the deposit or withdrawal of funds, but as a matter of right because of their interest, they were kept in their bank, but I could have taken them out at any time I wanted to do it without consulting them.

Q. Did the Farmers & Merchants Insurance Company have a balance there?

A. It did.

Q. What was the other bank with which you were connected?

A. The Aurora State Bank.

Q. Did it have a balance there?

A. It did.

Q. Can you give, as near as you can remember, the aggregate of funds which you controlled that were held in that bank at the time of its suspension?

A. Well there was actually in the bank at the time of its suspension something over $22,000, but a few days before the bank suspended I had given some checks,—three I think,—to a savings bank there to get the interest,—because you could get good interest on deposits there,—and the bank failed just a few days after I had given these checks and taken my credit and my pass book for the amounts of them, and when I came back from Terre Haute, where I was when the bank failed, $6,000 had not been withdrawn from the Capital National Bank; they had deposited the checks and taken credit, and because I felt that it was the right thing for me to do I paid that $6,000 again. I says that the bank failed so soon after I had given the checks that I would pay it again. $3,000 was paid to the Union Savings Bank, and $3,000 to the Lincoln Savings Bank, I think it was.

Q. Was it the Industrial Savings Bank?

1301 A. I don't think it was Stull's bank,—so it made the aggregate loss to institutions that I had absolute dictation over as to where those funds should go, if I wanted to exercise it, of between twenty-eight and twenty-nine thousand dollars.

Q. What was your belief in the solvency and stability of that bank up to the very time of its suspension?

A. Well I had no question of the solvency of the bank. I don't suppose a man could have been more astonished over anything than I was to receive a telegram from Mr. Mullen that the bank had failed. I received it while in Terre Haute.

Q. Now what knowledge, at any time, did you have, if any, that

there were any false statements or false entries in any report to the Comptroller made by that bank, which bore your own attestation?

A. I had no knowledge that there were any false statements in any of them.

Q. How long had you been in Terre Haute before you got word of the failure of the bank?

A. I can't tell exactly as to that; I couldn't even tell the day I left Lincoln or the day I got back, but I think I got back Tuesday after the bank failed.

Q. Did you come home on account of the information you received?

A. Yes, sir.

Q. And then returned again on your visit to Terre Haute?

A. Yes, sir.

Q. What was the first intimation you obtained from any source, of any alleged wrong doings, or criminal misconduct of the affairs of that bank?

A. The first knowledge I had of any criminal conduct was after I got home from Terre Haute.

1302 Q. State the source of it, without any explanation,—who told you?

A. Well Mosher told me first.

Q. Did you talk to Griffith?

A. I met Griffith on the train, and he told me of the condition things were in there, but he didn't talk about criminal actions, and I think that wasn't the subject of any of our conversations.

Q. Now when was the first time that you learned of any criminal misconduct, and what was the source of your information?

A. Well the first time was the night of the day that I arrived home from Terre Haute. I got home,—I don't know just what hour, but I went to Mosher's house that evening, and I said to him "What does this mean, Mosher,—what have you been doing"? and he says "I have done everything a man can do." I says "Do you mean to tell me that what I hear about that bank is true?" He said "Yes". I said "What are you going to do about it?" and he said "I want to get to the penitentiary as quick as I can get there."

Q. Did you have any knowledge of his faithlessness before that?

A. Not a thing in the world. They hadn't even arrested Mosher up until that time. The bank closed on Saturday and didn't open on Monday. I don't think I could have possibly got back before Tuesday from Terre Haute, although I am not certain as to when I arrived. I came from there here immediately, and it is a matter of some 24 hours from there to Lincoln, and I didn't probably get back until Tuesday, and at that time Mosher was in his house at home; they didn't even arrest him then.

Q. Did you have any shares of stock in the bank at the time it failed?

1303 A. I had ten and no more. There was twenty that Mosher was trustee for, for my little girl that was there, but personally I had only ten.

Q. Did you suffer any liability on account of your ten shares of stock?

A. I paid my assessment on it.

Q. Of how much?

A. $1,000.

Q. Now you had been then a heavier stockholder than you were at the last?

A. I at one time had $25,000 face value of the stock.

Q. How long did you keep the bulk of that?

A. Well I had the bulk of it until 1891.—November 1891.

Q. Do you remember the date in November, 1891?

A. The 14th of November, 1891.

Q. From that time on did you have any other bank connection?

A. I was Vice President of the American Exchange Bank there in Lincoln from, I think, the first of January, I believe it was, after that.

Q. Did you make that connection after you sold the stock in Mosher's bank?

A. I think I did.

Q. Had you had any previous connection with the American Exchange Bank?

A. No, I think not; I don't remember just when I went in the American Exchange, but my memory without in any way refer-ing to anything would be that it was the first of January.

Q. Now you may just give the reason for disposing of that stock,—you may state, who did you sell it to?

1304 A. I sold it to Mosher and Outcalt through negotiations with Mosher.

Q. At what rate?

A. At a premium of 25 per cent.

Q. How many shares did you sell?

A. $18,000 face value; $22,500 was what I was to receive for it.

Q. Now you may just state briefly the reasons and circumstances under which you sold that stock to Mosher.

A. The reason for selling the stock to Mosher was this: In coming from Chicago on the evening train,—leaving there in the evening and reached Lincoln the next day. I got on the sleeping car and went to my berth, and sitting in the section just ahead of me was a woman, and on the right side just opposite was Mosher. The woman I recognized was a woman of the town, in Lincoln, and there was nothing said between Mosher and myself all the way home; simply said "How do you do" but there was no more conversation between us, and I went to the porter,—he was a porter that I knew very well and a man that had been on the road a great many years—and I said, "Porter, who are these people here?" I wanted to see if he knew who they were, and he said "I don't know who they are, but" he said "they just had an awful time", and I said "What do you mean?" "Well," he said, "just an awful time between them" and I fancied that she had probably been drinking, from what he said. Anyway Mosher and she were together, and they were going back home. When we got in Lincoln that morning, after we got in there

I telephoned to Mosher that I wanted to see him, and he came over and I said "Mosher, I am going to sell my stock in your bank, and if you want it you can have it, and if not somebody is going to get it." And he said "Why?" I said "There is no use for us to talk about why, you understand perfectly why", I said. "I talked to the porter about your trip to Chicago, and that's all I have got to
1305 say about it, but my stock is for sale". And he said he would buy it and asked me what I wanted for it, and I said "Whatever is right", and he said "Is 1-25 all right?" And he said "Will you take Outcalt's and my notes?" and I said "Yes". "Well" he said "how about security?" I said "You neednt give security unless you want to you can have the stock and give me your notes" and he said he would give gas stock security, and that was the transaction, and it was done as quickly as we are talking about it here now, because I didn't spend any time abusing him; I told him what it was for and he knew what it was for. I wanted him to take all of it, but he said he would take all but $1,000, and I let it go that way and things went on except after that I didn't have very much to do with him. No reason except just a personal reason that was all.

Q. Now had you ever had any grievances against Mosher, or difficulty with him?

A. No, I never had.

Q. Except the instance of his social degradation, in that respect.

A. No there never was a word between us about anything else, so far as I know of, but I had heard of this sort of thing before and that was the culmination of it, and that is the way I finished it.

Q. Did you have any suspicions by that that there was anything wrong in the bank?

A. No, not at all; it was simply that I was mad and disgusted, and took that way of expressing my opinion, and letting him own the most of the stock that I owned that was all. There had never been anything that came to my notice in town there, except someone came to me and spoke to me and they said this was a woman that he had had out to the "pen"; somebody had said that to me, but that didn't call forth my indignation, but there never was any
1306 question as to Mosher's business integrity at all.

Q. And the severance of your connection had no connection with the bank's rating?

A. No sir.

Q. Except that such conduct of that kind might effect it at sometime?

A. Well of course a man ought not to do much of that sort of thing, if he expects to do business.

Q. Even after that you let your $1,000 remain in there, and let them use your name?

A. Yes, sir, I did.

Q. And kept your money there?

A. Yes sir. I say I kept my money there; I had some there, but I had more in the German Exchange Bank after that.

Q. Where did you keep your personal account after that?

A. I kept some in both places, but my account was chiefly in the

American Exchange Bank, because that is where I belonged. I didn't belong to the other place as a matter of fact, except in a smaller way, and the American Exchange was quite a different thing.

Q. Were any of the entries upon the books of that bank ever made under your personal direction?

A. No sir, not one.

Q. Up until the time of the suspension of the bank, did you ever have any knowledge that any false entries were made anywhere in the records or books of accounts there?

A. No information from any source; not even from the bank examiners who I always talked to.

Q. Nor from any teller in the bank, or clerk?

A. No sir.

Q. Nor from any officer or director?

A. No sir.

Q. Nor from any personal observations of your own?

A. No sir, from no source whatever.

1307 Q. Did you have any personal knowledge or information at any time of the extent of the loans made by that bank to the Western Manufacturing Company?

A. I don't think I had any knowledge of them at all; the whole question of the loans and the conduct of that bank was in the hands of others.

Q. Well was that specific question ever called to your attention at all?

A. There in the bank you mean?

Q. Yes, before the bank failed,—did you know that those notes were going through the bank?

A. No.

Q. Did you have any knowledge that the notes of Mosher and Outcalt were in the bank in any considerable sum, or in any sum?

A. No, I had no knowledge of any of those things; they never came to my attention in any way, through any of the meetings of the bank; there never was any report from the executive committee either that criticised any of the conditions in the bank,—that is at none of the meetings at which I was present.

Q. Did you ever authorize the bank's taking paper of Mosher to the extent of $85,000?

A. No sir, I didn't even know of it.

Q. Or of Outcalt to the extent of $75,000?

A. No, sir; I didn't even know of it.

Q. Or in any sum whatever?

A. No,—never.

Q. Did you ever concur in their borrowing from the bank?

A. No sir.

Q. Were you ever given an opportunity,—was the question ever presented to you?

A. No sir,—never in any shape whatever.

1308 Q. Did you have any knowledge of the deposit account of Mosher and Outcalt?

A. I had no knowledge of it whatever.

Q. At any time during the——

A. I had no knowledge of anything back of the room there where the directors and the executive committee met and what came up there for discussion was the only knowledge I had of the condition of the bank.

Q. Did that knowledge include any reference to the individual deposit account of C. W. Mosher?

A. No sir, it did not.

Q. Or of R. C. Outcalt?

A. No sir, never was a subject of discussion there.

Q. Or state treasurer Hill?

A. Never was the subject of discussion.

Q. Was the subject of certificates of deposit, or the certificate of deposit account ever challenged to your attention?

A. No sir.

Q. Did you know anything at all about any false entries in that particular account?

A. No sir.

Q. Or of the certificates of deposit overrunning the books?

A. No sir.

Q. The Griffith that you referred to as Bank Examiner, where did he live?

A. I think he lived in Wahoo; it seems to me he did; in the state somewhere.

Q. What was the other examiner you referred to?

A. Hayden.

Q. Where did he live?

A. He lived in Lincoln there; both men I knew very well,
1309 and knowing them as I did I always took occasion to ask them about the bank up there; it was a privilege that I exercised because of my acquaintance with them, and because I was glad to have their information as to what the situation was there.

Q. There is a copy of a letter purporting to have been signed by you, with other directors of the Capital National Bank, and directed to the Comptroller of the Currency, under date of February 19, 1892 in this record, in which the subject is mentioned of an excessive loan to E. W. Mosher. Was the E. W. Mosher loan transaction a matter that ever was called to your attention?

A. Yes sir,—now, wait—I don't know that that was called to my attention; it was a question of discussion at a directors' meeting there sometime, but I don't know that I was present; I think not however, but I remember what was said about it and done about it very well.

Q. You do remember that?

A. Yes, sir.

Q. Was that at the bank?

A. The meeting?

Q. No, your reference to it; who was your talk with; did you talk with C. W. Mosher about it, or any officers or directors of the bank?

A. My recollection would be that I talked with someone, or some of the executive committee, that is, that they had said something to

me about it, but that is not very definite in my mind of how that was done. I think there was action taken by the directory instructing Mosher what had to be done about it.

Q. Do you know the character of the dealings between E. W. Mosher and the bank?

1310 A. Yes sir, I knew that in a way; that it came to me, but it is a little bit foggy in my mind just now.

Q. (Last question repeated.)

A. I can't tell just now how the question of the dealings with E. W. Mosher and the bank came to my attention. I don't remember, without I was at a meeting where the matter was discussed,—I wouldn't say that I wasn't, but in some way it seems to me it was from Professor Stuart, although I am not sure. But this is the fact as it applied at that time: now, E. W. Mosher and a partner of his—his name I think was Stark—were doing business up in York county, and it appeared that the bank had been sending them money, or sending E. W. Mosher, or probably the firm of Stark and Mosher, if that was it, money to loan up there for the bank, and when it came to the attention of the directors they protested against what was being done and the outcome of it was that Mosher was told that if money was to be sent there, that it could only be sent conditionally; that he was to endorse the notes of E. W. Mosher that would be sent for money that was sent to York county, and they should be endorsed by E. W. Mosher, and those were to stand as the paper covering the amounts remitted to Mosher and Stark, and held with the paper covering the loans that they made to the people in York county, which were also to be sent to the bank and held as collateral to those E. W. Mosher, or Stark & Mosher notes, I am not sure which it was—they were endorsed by E. W. Mosher—until they were paid, and as there was enough money collected on these securities that the money was actually loaned on here in York county—or that district—and remitted to the bank to take up these notes that were given by E. W. Mosher, or Stark & Mosher—whichever way they may have been—then the note should be canceled and the transaction was ended.

1311 Q. What was the purpose of sending——

A. The reason was as given at the time that the rate of interest was more up there and the security was just as good there as any other place, in fact, there was no place where it was better, so the directors consented to the money being used in that manner under the conditions that they fixed, which was the E. W. Mosher note to be endorsed by C. W. Mosher and secured by the paper that was taken for money that was actually loaned up here in York county and vicinity.

Q. Now were you acquainted with the territory in and about York county?

A. Oh I know York county, and every other county in the eastern part of the state as well as I know my name.

Q. Did you regard that as a good locality to make loans of the bank's surplus funds?

A. Yes sir; I don't think a better one could be found anywhere.

Q. And was that your opinion at that time?

A. It was.

Q. In any assent that you gave to that transaction did you act in good faith and for the interests of the bank?

A. Well any part that I took in it was in good faith.

Q. Were those loans really regarded as primary obligations of E. W. Mosher at any time?

A. No, they were not the obligation of E. W. Mosher, except just as I have related.

Q. But he in a sense was the agent of the bank to make those loans?

A. That is the idea.

Q. And the bank should hold the primary paper, paper of the real borrowers?

A. Yes sir, the bank should hold that until the E. W.
1312 Mosher notes were paid off, and when they were paid off the collateral would be released. The idea was about this. I think they let him have a few thousand dollars at a time, say five thousand for illustration, and he would send his note for five thousand dollars, and that was endorsed by C. W. Mosher, after the action of the directors, and the collateral covering the money that was loaned—the money that was sent out there—was sent to secure the note. So the E. W. Mosher note, endorsed by C. W. Mosher would be secured by that collateral; so it would be only E. W. Mosher's note, with the endorsement and the collateral under the arrangements that were made for handling that money.

Q. Did you know of the Small transaction—what was known as the Small transaction?

A. Yes sir, I knew of it. Well that was a matter that was discussed there, and the story of it is this: Small was a banker in the little town of Fairfield, in this state, and he became the debtor of the bank, and he finally got into trouble—failed, I believe, and he turned over to the bank a lot of lands and some horses that he had to secure the bank for money that had been loaned him.

Q. What was your knowledge or information as to whether the bank ever had any loss on that transaction?

A. Well it was said at some of the meetings there—one or more, I don't remember as to that—that there wouldn't be any loss on that; that there was ample security, to cover all that Small had.

Q. Was that your information in respect to that?

A. That was my information of it. I don't think there ever was much loss there, although I don't know what the final outcome of it was I am sure. There was some difficulty out of the land se-
1313 curity; I believe deeds had been given to the bank; the bank had paid mortgages and finally I think it was held that the deeds were only security; couldn't be considered straight deeds, and some process was gone through with in order that the equity, if there was any, should go to Small's other creditors. I think he had plenty of them.

Q. Did you have any knowledge of how the relief fund appro-

priated by the state for the relief of the drouth sufferers in 1891 was handled by the treasurer through the Capital National Bank?

A. No, I had no knowledge or information on the subject at all. I might say——

Q. Did you at any time during the——

A. (continued). —that I was a signer on one of the bonds of Mosher, and had a lot of trouble about it after the failure of the bank, and it was finally decided that the bond that I was security on was not the one that the loss occurred on; there was a loss I believe in the bank of $3,500, or something like that.

Q. You had no knowledge of the details of the handling of this relief fund?

A. No, I didn't know anything about them at all.

Q. When did you first acquire your knowledge of the alleged extent of Mosher and Outcalt's defalcations in this bank?

A. Why since I have been here.

Q. At this trial?

A. I never knew but a mighty small part of what I know now; I wasn't here at the other trial until I came here to testify and then went away. I have never known fully what the outcome of it was in the way of losses; I don't know that I know yet.

Q. You were not here during the trial, so you didn't know the details of these exposures?

A. No sir, I didn't.

1314 Q. When was the first time that you had any knowledge that either of those officers were alleged to have employed forged paper to put through the bank?

A. I never knew that until here; nobody ever told me that; at least, if I ever heard it I have no recollection of it; I think the first time I ever heard of forged paper was here; I may be in error as to that, but that is my recollection of it.

Q. Did you ever — such an intimation as that during the life of the bank?

A. No sir.

Q. Can you fix any more definitely the date that you left Lincoln in 1890 for Mexico?

A. I have the information here that I got by telephone from Lincoln; I couldn't do it from memory.

Q. Can you tell about what date it was?

A. From my memory?

Q. Yes sir.

A. Well I could tell by taking it from this; I would have said along about the 20th of January, but as a matter of fact it was the 14th of December.

Q. The 14th of December, 1900?

A. 1900? No, 1889.

Q. When did you get back from there?

A. I got back from there on January 6th.

Q. 1900?

A. 1901; no, 1900. I went to Mexico December 14th, 1899, and I got back from there on January 6th, 1899. December '89 I went

there, there is no question about that in my mind without any sort of reference, because I left the Burlington road in December 1889.

My salary however did not terminate until the end of Janu-
1315 ary 1890, but when I left the road I took a car that they loaned me and took a lot of my friends and went with Governor Thayer and his party, and went to Mexico. On this trip we left Lincoln on the 14th of December.

Q. What time did you go to Europe in that year?

A. I left for Europe on the 2nd day of February, 1890.

Q. What time did you return from Europe?

A. I returned from Europe on the 9th of August.

Q. Were you present at any meeting during that year,—during June or July of that year of the directors of the Capital National Bank, or were you absent continuously?

A. I was absent continuously; I was in Europe; I was in Cape Norway on the 31st day of May, and I was not here from the 2nd day of February when I went away until I came back in August.

Q. Now there seems to be during that period of time some transactions shown in which your notes passed in or out of the bank. What arrangements did you have with any one to attend to your business? Who was your secretary or man of confidence at that time?

A. Mr. Mullen was, as now.

Q. And all those transactions you wouldn't have personal knowledge of?

A. I couldn't have, being away.

Q. If any were paid during that time who paid them?

A. Well, Mr. Mullen, all these years, in all 25 years has been nearer myself than I have myself; he has had perfect absolute charge of all my private affairs, whether I have been away or whether I have been here all the time. Mr. Mullen has carried for many years from me an absolute power of attorney to do whatever he pleases, no matter what it is; he has never pleased to do anything wrong yet, but he may do like Mosher; he may fail me, but I am not worrying over that any.

1316 Q. Mention has been made during the trial of an alleged scheme or plan in 1890, I think it was, to increase the capital stock of the Capital National Bank to one million dollars. Did you ever know anything about such an enterprise?

A. Yes sir, I knew about it.

Q. Did you ever sign any prospectus or letter for circulation on that subject, or authorize any to go out over your name?

A. I never did.

Q. So far as you know was any circular, prospectus or letter on that subject gotten out over your name?

A. Not with my knowledge, no sir.

Q. Did you ever see a letter or prospectus on that subject over your name, executed by yourself, or by any other person?

A. No sir,—never; there never was anything of that sort.

Q. Did you have a prospectus prepared by anyone?

A. No, I never did.

Q. Did you know of anyone else having one prepared?
A. I think Mosher had.
Q. You saw that did you?
A. Yes sir, I saw it.
Q. Over whose name was that prospectus?
A. Over Mosher's.
Q. Did you ever know that that was circulated by him out over the country banks?
A. I wouldn't know anything of it; I would be able to presume what he had it done for, but I never knew of his doing it.
Q. Did you know that he had actually distributed them?
A. I didn't know of it, but I presume he did.
Q. Were you ever present at any meeting of the stockholders when the subject matter of that enterprise was up for discussion?
1317 A. I was.
Q. Did you have more than one meeting?
A. I think not.
Q. Do you remember any person that was there at that meeting?
A. Well there were—there were quite a lot of people because it was a meeting of the stockholders and not of the directors, it was just a meeting to discuss the scheme that Mosher had figured out.
Q. He was laying it before the stockholders?
A. Putting it before the stockholders, yes sir.
Q. Did you personally favor that enterprise?
A. No sir, I was opposed to it.
Q. Do you know now whether he ever obtained the assent of a majority of the stockholders to the enterprise?
A. I don't think he ever did.
Q. Do you know of any formal record ever being made at any meeting either of the stockholders or of the directors in which authority to carry out Mosher's enterprise in that respect was given or conferred?
A. I don't know of any such authority ever having been given.
Q. Were you ever present when any such authority was given?
A. No sir.
Q. Either by the stockholders, or the board of directors?
A. No sir.
Q. What had been your knowledge as to whether this prospectus prepared and submitted by Mosher had been suppressed or circulated; did you have any knowledge on that subject?
A. No I didn't have any knowledge on that subject at all; I remember of seeing those circulars.
1318 Q. Under whose authority were those,—was that circular or prospectus printed?
A. Mosher's.
Q. Did you have any part in authorizing the printing of any such circular or prospectus?
A. No sir. I opposed his scheme. I think his idea was to work it up and have it come later; that is what he finally did; I am not certain about it, they might have met at some other time, but the

time I was there I didn't agree to it and said so openly and what they did after that I don't know anything about it.

Q. You never participated in any proceeding authorizing it?

A. No sir.

Q. Did you ever solicit any subscriptions from Mr. Jones, Mr. Jurgosen or Fritz Beckerd?

A. No sir.

Q. Or any other person?

A. No, sir, never.

Q. Did you ever ask any man to make any subscription to that enterprise?

A. No, I never did; I never did because I didn't approve of it, and I simply had nothing to do with it.

Q. Were you ever present at a meeting or conversation between Harry T. Jones and C. W. Mosher and others in September 1890 at which the subject matter of the prospectus referred to or the subscriptions for stock pursuant to such a plan was ever discussed, when Mr. Jones was present and in the presence of Mr. Jurgenson?

A. No, I was not.

Q. Did you ever participate in such a conversation with Harry T. Jones, or at which Harry T. Jones was present?

A. I never did.

1319 Q. If that talk took place you were not there as one of the parties?

A. I was not.

Q. Are any of the persons who were at the meeting at which you opposed that enterprise living so far as you know today?

A. I presume that most of the men who were interested there in the bank were present. I think R. E. Moore was there, and he was a prominent figure; I think it was Mosher's scheme to have him become an active officer.

Q. But a number of the persons are now dead?

A. They're nearly all dead; there are a few of them living that were then stockholders in that bank.

Q. Do you remember particularly about R. E. Moore being there?

A. Yes sir, I think Moore was there.

Q. At that time so far as your knowledge and opinion of the bank went, what was your opinion of the condition of the bank?

A. My opinion was that the bank was perfectly right as it was; there wasn't any good reasons for doing that, and some reasons for not doing it.

Q. Were you ever present at any interview in the Capital National Bank at which Harry T. Jones was present, or Mr. Jurgensen, in which an appeal was made to Mr. Jones for increasing the capital stock on the ground that the business was increasing so rapidly and that customers were increasing so that to do the business they thought they ought to do it was necessary that they increase the amount of the capital stock?

A. I never was, and I would remember a meeting of that kind if it occurred.

Q. Were you ever present at a meeting at which Harry T.
1320 Jones was present in the office of the Capital National Bank in September, 1890, or at any other time in which the plea was made to Mr. Jones to increase the stock on the ground that some of the customers of the bank, such as shippers and grain men at certain seasons of the year needed more money than the law would allow them to loan under the present capital stock and which they considered good loans?

A. I never was present at any such a meeting; there never was such a meeting that I was present at.

Q. Were you ever present at a meeting in the Capital National Bank in the month of September, 1890, or at any other time, at which one of the parties to the conversation remarked in Mr. Jones' presence and hearing that the Capital National Bank was the best bank in the state of Nebraska, and that they were going to make it the first million dollar bank in the state?

A. I was not; never heard any such remark from anybody.

Q. Were you ever present with Harry T. Jones at the office of the Capital National Bank in Lincoln, in the month of September, 1890, at which there was exhibited to Harry T. Jones a lot of the statements,—probably every statement that the bank ever made, for the purpose of showing how the business of the bank had increased?

A. I was not.

Q. Were you ever present at the Capital National Bank at any conversation between Harry T. Jones and Mosher and Outcalt and some other officers or directors at which Harry T. Jones was exhibited a sheet showing what amount of dividends had been paid, and that the bank had never paid less than 12% dividends?

A. I never was.

Q. Mr. Thompson, how long have you been acquainted with Harry T. Jones, so as to be able to personally recognize him and know who he is when you see him?

1321 A. The first time I ever met him to know him,—to know who he was was since the trial here 9 years ago this coming summer, I think. I don't think it is over,—I can't tell just how many years, but it was some little time after that I met him to know who he was. I may have met Harry T. Jones, like someone said here yesterday,—like Mr. Jones said he came to my office and asked to have something done about a cattle car, but that didn't fix my attention on Harry Jones. I never had any sort of conversation, nor any sort of relationship in any way, shape or manner.

Q. Unless it was such incidental relationship as has been testified to.

A. That might have been, but I wouldn't have known him if I had seen him, even after I met him. It was a year or so after that I saw him again, and then I only met him and I didn't know him and Mr. Mullen said "Do you know who that is?" and after I got my eyes on him and got my memory working a little I said "Yes, that's H. T. Jones".

Q. When was that?

A. About three years ago.

Q. Is your faculty of recognition ordinarly pretty sharp?
A. I think it is the average; about as good as the average man.
Q. Of course you know him well now?
A. He afterwards came down to Mexico with Bignell and I showed him over one of our mining camps and had him out with me for a couple of days and got to know him reasonably well, but that was my first acquaintance with him, any more than just to speak to him as I told you.
Q. At the last trial did you get to see any of the original documents that came from the office of the Comptroller, to be able to verify your signature on them?
A. No, I did not.
1322 Q. How long were you here during that trial?
A. I think only a day,—about that.
Q. Were you called up when you knew that your testimony could be taken?
A. Yes sir, I came when I was asked to come.
Q. But you didn't stay to attend the trial that time, as you have this time?
A. No sir.
Q. Was Mr. Lynch, the Comptroller's agent here when you came, so far as you learned?
A. He was not.
Q. Did you have access to what purports to be your official oaths?
A. No, I did not.
Q. Or the official statements from the Comptroller's?
A. No, I did not.
Q. Or the letters from the Comptroller's office?
A. No, nothing.
Q. Were you able to see any of those to verify whether they then bore your genuine signature or not?
A. No sir, I didn't see any of them; I was unable to see any of them because they were not here.
Q. Do you have any personal memory of having signed any director's letter to the Comptroller of the Currency, copies of which purport to be exhibited here?
A. No, I have no recollection of doing it; I wouldn't say that I did not do it, but I wouldn't say that I did.
Q. You have had no opportunity to verify them?
A. No sir.
Q. As a matter of fact, eight years ago did you ask us to show you the originals?
A. Yes sir, I did; I asked to see a lot of the originals that I didn't see.
1323 Q. You know what the explanation was why you didn't get to see them, that Mr. Lynch had gone, and they had agreed to substitute copies.
A. Yes, sir.
Q. Did you see Harry T. Jones at that trial?
A. No sir.
Q. Was he in the court room the day you were here?
A. No sir, he wasn't.

Q. Now in respect to your relations and faith in Mosher. You may state what if any obligations he personally was owing you at the time of the bank failure?

A. Mosher and Outcalt owed me this note taken for the stock that I sold him for $22,500. That was all they owed me aside from the little trust that Mosher held for my little girl.

Q. What about some funds that you advanced to a man named Ferguson at Minden?

A. I beg your pardon. I had let a man.—J. W. Ferguson I think his name was, out at Minden have quite a lot of money, ten or twelve thousand dollars—something like that—on Mosher's suggestion and recommendation, because he was a man that was doing some business for Mosher up there, or had been, and that was paid down to twenty five hundred dollars or something like that and Ferguson broke up and quit business and refused to pay, and Mosher guaranteed the payment of that.

Q. And that obligation was outstanding?

A. Yes, sir.

Q. And what was the trust fund in Mosher's care for your little girl?

A. Twenty shares of stock of the bank that I had put in
1324 trust with Mosher that the interest and dividends should go to her until she was eighteen years old; that is what it was.

Q. Now did you know Walter T. Scott?

A. I knew him when I saw him as I did here, if this is Walter T.

Q. Yes, sir. At one time employed as bookkeeper in the bank.

A. I didn't know his initials; I knew him as Scott.

Q. Have you ever had any personal intercourse with him, or conversations of any sort?

A. None whatever.

Q. You were present here when Mr. Scott testified?

A. I was.

Q. What is the fact as to your being at the bank there frequently?

A. I was rarely ever in there; I had plenty to do elsewhere.

Mr. NORVAL: Move to strike out the last part of the answer as not responsive.

Mr. ROSE: All right, let it go out.

Q. What is the fact as to your spending time there at intervals in September, 1890 or in the same month, September of 1891?

A. I always went there when I had any occasion for going, but I never made it a place of resting or loafing, or anything of that sort.

Q. In September 1891 did you have a business office of your own?

A. I did.

Q. Where?

A. It was in the Burr block, a block away from the Capital National Bank.

Q. And that was the offices of what institution?

A. The Lincoln Gas and Electric Light Company, and the Farmers & Merchants Insurance Company.

1325 Q. Did you in the forepart of September, 1891, or at any time in that month, attend a meeting of the stockholders

or directors after banking hours in the little room leading to the customers' safety deposit boxes?

A. Well I never attended a meeting at any time in that room.

Q. Was there any meeting of any sort held at such time and under such circumstances, at which you were present in the month of September, referred to by Mr. Scott, in 1891 in the room specified?

A. No, I never attended a meeting at any time in that room, it would be practically impossible to hold a meeting in that room.

Q. Do you remember the width of that banking room, the Capital National Bank?

A. Well this would be only my judgment, but I think the whole room was about 25 feet,—probably about 22 feet—25 feet less the walls.

Q. Twenty two and a half less the walls or twenty five?

A. Wasn't the lots twenty five feet wide?

Q. I guess the room is obliterated now.

A. Rudge & Guenzel is there now: it is a big establishment now.

Q. You may describe the plan of that room, and show how that room was located, and all the rooms in the bank.

A. Well it is just a little back room here: that will show exactly what the arrangement was, and show what that room was. That little room that was spoken of by Mr. Scott yesterday was the little room there.

Q. Was this diagram made up at your direction by Mr. Mullen?

A. Yes, sir, he made it from a rough sketch I made him.

Exhibit "Ar" identified.

1326 Q. You may state whether Exhibit "ar" is a fairly correct and accurate representation of the banking room of the Capital National Bank as it existed in September, 1891?

A. It is, except getting the entrance on the corner; it is a little different from what it was; it went up this way, the entrance did (witness changes diagram). The entrance on the corner was a diagonal entrance. That is about the situation.

Q. Was it on a street corner?

A. Yes, sir.

Q. What streets did it front on?

A. Corner of Eleventh and "O" streets,—on the southwest corner.

Q. And from what street was the side door?

A. From Eleventh street.

Q. And where was the lobby in the bank, where the public transacted business with the bank?

A. The lobby ran along lengthwise of the building, and the lengthways is along Eleventh street.

Q. Where was the work room?

A. The work room was the room between the front office,—that was Mosher's office and the directors' room, and anything they had use for a room for.

Q. And th lobby was in front?

A. The lobby was on the side.

Q. On the street front?

A. On the Eleventh street front, and the office of the president and

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Bank Cases

EXHIBIT No.

S

Customers Vault

Bank Vault

Work Room

Lounging

Private Room

E

W

N

the office in which the meetings were held faced on "O" street,—was on the front side of the building. The work room was back of that between that and the bank vault,—that is the vault for the use of the bank, and the customers' vault that is for storage of papers, and so forth, was a continuation of the corridor. And it was
1328 in that room that Scott said this meeting was when he came in the bank.

Q. That is the room that is the entrance to the customers' deposit boxes?

A. That is the room.

Q. How large a room was that?

A. It was a very small room; nothing in it except one small chair and a little table.

Q. And it was entered, not from the work room of the bank, but from the outside where the customers came in?

A. The entrance was from the lobby.

Q. How many men could comfortably hold a meeting in there?

A. Well you couldn't hold a meeting in there if you had more than two or three people, unless they were standing up.

Q. Did you ever attend a meeting in there?

A. No sir.

Q. Did you ever know of a meeting being held there?

A. No sir, never did.

Q. Did you have a place where you regularly held the meetings?

A. All the meetings I ever attended there was in this front office.

Q. On the "O" street front?

A. Yes sir, on the "O" street front.

Q. Was that the president's office, or Mosher's office also?

A. Yes, sir.

Mr. Rose: We offer the plat in evidence.

Plat received in evidence, being Exhibit "ar."

A. —the back room, or work room as it is called had a lot of cages in it where men worked inside of those, it was wire netting.

(Here follows diagram marked p. 1327.)

1329 Q. Was there any counter, or partitioned structure between the work rooms of the bank and the corridor or lobby?

A. Oh, yes, it was a regular counter; bank counter, the usual bank counter.

Q. You may state whether at any meeting at which Mosher and Outcalt, and A. P. S. Stuart, H. J. Walsh, and several others were present in the month of September, 1891, held in the little room at the entrance to the customers' safety deposit boxes in the Capital National Bank, after banking hours, you said that the whole thing was rotten right through, and you were going to get out of it?

A. Well I wasn't at any such meeting, so I couldn't have said any such thing.

Q. Well did you say any such a thing?

A. No. At that time if there had been any occasion for saying anything,——

Q. There has been a schedule of the notes purporting to have been signed by you, produced here. What is the fact as to whether all the notes that you gave to the bank during its existence were paid by you at or about the time they matured?

A. I never had a note to the bank that wasn't promptly paid.

Q. Did you have any large indebtedness to the bank?

A. Not what I would call large; I don't know what might be considered large; I think I never had a note there for more than a very few thousand dollars; I think I had one of ten thousand dollars.

Q. At the time you had that did that represent the aggregate of your whole indebtedness to the bank at that time?

A. It did, yes sir.

1330 Q. And that note and the others was paid?

A. Always paid.

Q. There was a note, or a record of a note shown of $1,640, or approximately that purporting to have been signed by yourself and C. W. Mosher, and also I think one not purporting to have been signed by you in your capacity as president of some electric supply company. Do you recall those transactions?

A. Were they separate notes?

Q. Yes one by you and Mosher and one signed by you as president of some electrical supply company.

A. Yes, I remember that. At the time I had charge of the Gas company there was a lot of electrical wiring to do and a lot of supplies to furnish, and so forth, and there was a little company arranged,—called a company, but in fact nothing but a partnership—for that purpose, and this little money was used for that purpose.

Q. Was it paid?

A. Yes, sir.

Q. What became of the company?

A. The company was dissolved; it wasn't a company, it was simply a partnership.

Q. Did it liquidate?

A. Yes sir.

Q. How long was it in existence?

A. I couldn't say how long; not very long. Our idea in the first

place was, or in arranging a partnership, as you might call it for doing this electrical wiring, was that there was no one else there to do it, and the Gas company needed something of that sort, and I arranged a little concern to do that work, and later others commenced doing it and then I quit.

Q. Kind of a little auxiliary to your main enterprise?

A. Yes sir, that is all it was.

1331 Q. And when other- occupied the field, you went out?

A. That's all there was to it.

Q. Did it leave any unpaid obligations?

A. No sir; it never had any only these small obligations and they were paid.

Q. What knowledge did you have of any excessive loans being made to director W. W. Holmes?

A. I never knew anything of it; the testimony I heard here was the first intimation I ever had of it.

Q. Now I neglected to ask you specifically about your knowledge of the Collection Account of March Brothers Mosher and Company. What knowledge did you ever have during the existence of the bank touching that particular account?

A. I never had any at all.

Q. What if any knowledge did you have during the existence of the bank of Bills of Exchange being credited counterbalancing the entries made of alleged notes of F. S. Johnson & Company, the First National Bank of Hastings, and the First National — of Kearney?

A. Nothing at all.

Q. What knowledge, if any, did you have during the existence of the bank of any credits to the Interest Paid account, or of credits to the Interest Paid account not deducted from the earnings of the bank, said to aggregate, during the existence of the bank, $90,-916.44?

A. No knowledge whatever.

Q. What, if any, knowledge did you have during the existence of the bank that the Deposit Ledger accounts, were at any time footed at a sum of $100,000, or any sum, less than the actual footing of those accounts?

A. No knowledge whatever.

Q. What if any knowledge did you have during the exist-

1332 ence of the bank that the footings on the Deposit Ledger were carried into the General Balance book of the bank at a sum $100,000 smaller than the aggregate footings as shown?

A. I knew nothing whatever of it.

Q. What, if any, knowledge did you have during the existence of the bank of any Certificate of Deposit account showing an overdraft?

A. I had no knowledge of anything of that sort.

Q. What, if any, knowledge did you ever have that the certificates of deposit outstanding exceeded the deposit credited to the certificate of deposit account in the bank?

A. I had no knowledge whatever.

Q. What knowledge did you have that at the time of the failure,

as to whether the outstanding certificates of deposit overran the sum credited to that deposit account in a sum exceeding $431,000?

A. I had no knowledge whatever of it.

Q. In a general way what was the extent of the deposits made by you, in your personal and individual deposit account in that bank while you were an officer?

A. In a general way how were they made?

Q. Well what would they run to; did they amount to any considerable sum?

A. In the aggregate?

Q. Yes, sir.

A. Oh, they amounted to a great deal; a great deal; I couldn't say how much, but I always, with a comparatively few exceptions, had good deposits there; I think the records if they are right will show that my account there was nearly always *had* a good deal to my credit, and when I borrowed anything, it was for a short time,—usually for a few days—and never for more than a very few months.

1333 Q. Did your balances fluctuate in the course of your business in accordance with your demand for money?

A. Changing all the time.

Q. Did that continue practically all the time up to the close of the bank?

A. Yes, sir. I had an account there up to the close of the bank, but as I said before, I had two accounts at that time; one with the American Exchange, and one with the Capital National.

Q. Now in connection with this examination we want to offer the record of the daily balances of Mr. Thompson covered by the deposit ledgers, so far as they have been produced, for the periods of time covered by the books exhibited here, and I would like to substitute a schedule of that that can be verified.

The COURT: I see no reason why a schedule cannot be prepared.

Mr. NORVAL: Of course the offer will not be received until we have time to examine it.

The COURT: Oh no, the schedule will not be received at this time.

Mr. ROSE: I just make the offer at this time so it will not be forgotten.

Q. What personal knowledge did you have of the bank's sending out to its country bank depositors printed slips embodying the presumed totals of the reports of the bank to the Comptroller of the Currency?

A. Well that is a matter that I never gave any thought to; never knew anything about what their custom was, what they did in the bank about that sort of thing; no knowledge whatever.

Q. It wasn't a matter that you personally participated in?

A. No sir, knew nothing of it.

1334 Q. What if any knowledge did you have of the publication, or translation and publication of any of the reports of

the bank's condition in the German language? In any German newspaper?

A. I had no knowledge of it.

Q. When did you first hear such a matter suggested?

A. On the witness stand here yesterday.

Q. Did you have any personal participation in that?

A. No sir.

Q. At the periods of time when you were absent from Lincoln what opportunity did you have,—or what part did you have in the making of any reports of this bank to the Comptroller of the Currency, or in the publication of any statements?

A. When I was absent from Lincoln?

Q. Yes, sir.

A. No part whatever.

Q. Did you have any knowledge whatever, of the proceedings when, I think you said,—you were in Europe?

A. No sir, at no time when I was absent did I know anything of their proceedings.

Q. State what, if any, part you had in the making or publication of the report, other than to merely attest it, at any time?

A. I had no part whatever in it.

Q. Did you have any part in the reports which were not attested by you?

A. No sir.

Q. Did those ever come to your attention, or were they ever checked over by you?

A. No sir.

Q. Would you be able to check over a report?

A. No sir, I would not.

1335 Q. Would it have been possible for you to have done otherwise than to credit the information such as you could obtain from anywhere other than the officers?

A. There would be no way that I could take a report and check it from any records, if that is what you mean?

Q. Yes, sir.

A. I couldn't do it.

Q. Do you have any personal recollection of signing the report of December 28th, 1886?

A. I have no recollection of it.

Q. What is your recollection as to where you were at that period?

A. I don't think I was in Lincoln at that time; I think I was up in this northwestern country.

Q. And how employed?

A. I was superintending this railroad building up into Wyoming and Dakota, and the west end of Nebraska; had charge of all the work that would come under the superintendent in the construction of a road.

Q. Do you recall any specific instance of that year that would make your absence necessary?

A. Yes sir, that was the year that we had a great deal of trouble up there I remember, and for that reason I remember that I was a

very large share of the time,—in fact most of the time, right in the center of the winter there—away from home.

Q. That report you have not been able to see, to verify the signature on it?

A. I have not. We had immense quantities of snow and all the troubles that go with construction and snow together up there that winter, and I was away a good share of the middle winter months when the trouble was the thickest.

Q. There is a certified copy of a purported letter by the
1336 Comptroller of the Currency addressed to Mr. C. W. Mosher, president of the Capital National Bank, of date September 8, 1891, which purports to have been written by R. N. Nixon, deputy and acting Comptroller. Had your attention been called to that letter during the trial and the alleged copy of a copy?

A. I read it this morning in the record; that is the only time.

Q. What is the fact whether that letter was called to your attention during the existence of the bank?

A. It was not: the first time that ever I saw that letter was this morning, while I had that record, and will add that I never looked over the part of it that that letter is in; this morning when you called my attention to it was the first time I ever saw it.

Mr. ROSE: I believe that is all.

Cross-examination.

By Mr. THOMAS:

Q. What is your age Mr. Thompson?

A. Fifty seven is my nearest birthday; I will be fifty seven the 28th day of this month.

Q. When did you say you became superintendent of the Lincoln division of the Burlington road?

A. When I was about 24 years old.

Q. What year was that in, if you remember?

A. Well it was, I think, in 1881.

Q. And you continued in that position until when?

A. Until 1890.

Q. What part of the year of 1890?

A. I left the road at the end of December, '89,—that is, the middle of December of '89 and went on a trip to Mexico, and came back in January, but my salary ran on until the end of
1337 January, 1890.

Q. I think you said you became interested in the Capital National Bank when it was organized?

A. Yes sir, as the Capital National Bank.

Q. And prior to that time you were a stockholder in the Gas company?

A. No, I never was until the Gas company that was organized with the combination of the Gas company and the Electric Light company in 1890; that was my first interest in that company.

Q. And is that the time that Mr. Mosher and Mr. Outcalt became interest- in the Gas company?

A. Yes sir, so far as I know.

Q. When did you become interested in the Farmers & Merchants Insurance Company?

A. That was organized I believe, in 1885, and I was interested in that from its organization.

Q. And were Messrs. Mosher and Outcalt interested in that company?

A. Mosher was; I don't remember that Outcalt was; he may have had some stock there,—I don't remember how that was.

Q. And Mr. Mosher owned, I think, one-fourth of the capital stock of the insurance company, didn't he?

A. I can't tell just what his holdings were.

Q. The capital stock at that time was $100,000?

A. Yes, sir.

Q. And Mr. Mosher at the time the bank failed, or shortly prior thereto had $25,000 worth of the stock, didn't he?

A. I can't say just what he had; he had some; I don't think there was a time that he didn't have some stock.

Q. Wasn't there some correspondence between you and the Mansfield estate concerning that stock?

1338 A. I think there were, but the amount I don't remember; I think it was perhaps $25,000.

Q. You were present and testified at the former trial of this case, I believe?

A. Yes, sir.

Q. You didn't meet Mr. Jones, you say, at that time?

A. No sir.

Q. Had you ever met him prior to that time?

A. Not so far as I had any sort of recollection; the first time I ever met Mr. Jones to recognize him was on a trip that I came up from Brazil, during the time I was in the diplomatic service down there, and that was after this case was tried, because I went within a few months after this case was tried to Brazil, and I have been out of the United States practically all of the time since.

Q. You had some diplomatic post at Brazil had you?

A. I went there as Minister in 1892; I was appointed in September, 1892, and I was there for a period of time as Minister and then I was elevated to the place of Ambassador in the same place, and from there I was transferred to Mexico.

Q. How long did you continue as Ambassador to Brazil?

A. Well I left Brazil in 1905; I think in November,—I believe it was.

Q. During that period from 1902 to 1905 you say you were not in Nebraska?

A. I was here either three or four times, on a trip, but I wasn't living here; I was living there; my work was there, but I came up here every year, and I think I came twice one year.

Q. Then when did you become Minister to Mexico?

A. My official commission did not expire in Brazil until I was appointed to Mexico, and that was in January, 1906.

Q. And you continued to act as Ambassador to Mexico until what time?

A. Until the end of December '90.

1339 Q. And during the time you acted as Embassador to Mexico, were you in Lincoln, Nebraska, frequently?

A. Not frequently; I think I wasn't up from Mexico during my official stay down there, from Mexico to Nebraska, more than once a year.

Q. And at which of those periods is it that you claim you first met Mr. Jones to know him?

A. It was, I think, on one of my trips up from Brazil.

Q. About when would that be?

A. Well it would be between 1902 and 1906.

Q. The former trial of this case was in the spring of 1902?

A. Yes, I think in May, 1902.

Q. About how long was it after that?

A. Well sir, I couldn't tell. I never even knew Mr. Jones well enough to recognize who he was until something more than two years ago; he was in the hotel in Lincoln one day and I passed him by without recognizing him. Mr. Mullen touched me, and he says "Do you know who that is" and I turned around and looked at him, and my first thought was to tell Mullen that I didn't, and then I said "Yes, that is Jones of Seward." And that was not a great while before Mr. Jones and Mr. Bignell made a trip to Mexico, which I think was two years this winter, and I entertained them down there for a couple of days.

Q. Then prior to meeting him during the time you were Minister to Brazil, which you say was some time prior to 1906, you had no acquaintance with him.

A. No sir, I had no acquaintance with Mr. Jones at all, until his trip to Mexico, but I had met him as I told you.

Q. Where do you remember of ever meeting him before that?

A. I told you that I was introduced to him once on some of those trips that I made from the foreign post, but I didn't meet

1340 him again until that time in the hotel at Lincoln, which was some time just before his trip and Mr. Bignell's trip to Mexico.

Q. Those are the only times you ever met him?

A. Yes sir. As I said the other day a man might come into my office, as Mr. Jones said on the stand here, on a business trip, like he and Mr. Norval, he said, did, with reference to some cars that they wanted taken out of a train, and I wouldn't know in ten minutes who it was, if somebody else did the talking.

Q. But you would remember if you had met him on personal matters, I presume you would have remembered that?

A. I should think I would; anything of any very great importance, I think I would probably remember him.

Q. And you never had any correspondence with him of any kind?

A. I wouldn't say that; that is another thing; correspondence is one thing and meeting a man is another.

Q. Have you ever had any correspondence with him?

A. Oh yes, there has been some little correspondence,—perhaps a couple of letters; I don't remember what there may have been, but I think there has been a letter from him to me, and one from me to him perhaps.

Q. Anything prior to that time?

A. I think very likely there has been.

Q. How far back?

A. I couldn't tell you about that.

Q. Had you ever had any correspondence with him prior to the former trial in this case?

A. Very likely.

Q. Concerning what matter?

1341 A. Well I couldn't tell you about that; correspondence is something that is going on all the time from a man to men everywhere about all sorts of things.

Q. Would you remember if you had any correspondence with him?

A. I doubt if I would, unless it was called to my attention.

Q. Do you remember of writing him a letter in 1900?

A. I wouldn't say I did not; It is quite possible I may have done it.

Q. Where were you in 1900?

A. In 1900; what time in 1900?

Q. Well at different times during the year?

A. Well in 1900 I was—the first part of January—in Mexico and got back from there early in January, and early in February I went to Europe and I was in Europe until late in the summer or early in the Fall and then I was here after that the most of the time. I say most of the time,—that was when the work of the reconstruction of the gas plant was taking shape, and I was here from that time on a great deal, buying and putting in electrical machinery and steam machinery.

Q. That reconstruction work was in 1902.

A. No, I say the work of getting ready for reconstruction, when the gas company was acquired.

Q. 1901 I was inquiring about.

A. Oh, I beg your pardon. I think I probably was here, I don't remember. Let me think of what 1900 was In 1900 or 1901, I can't remember which, Mrs. Thompson and I were in Europe through the summer time.

Q. In January 1899, that is during the 1899 session of the legislature you were a candidate for the United States senate.

A. Yes, sir. I had forgotten that little incident.

Q. And don't you remember of meeting Mr. Jones and Mr. Norval at that time?

1342 A. I do not; I met pretty near every man in the state at that time that thought he had any political influence.

Q. And in 1901 you were again a candidate for the United States senate?

A. That would be 1901, you said first 1899?

Q. The first question was if you were a candidate in 1899. And the second question is during the 1901 session?

A. I was a candidate two times, two years apart.

Q. The second time then was in 1901, at that session of the legislature?

A. That would be the winter of 1890 and 1891?

Q. They were electing a successor to Senator Hayward.

A. There were two to be elected that winter.

Q. And do you recall of there being a member of the lower house from this county by the name of Beetly?

A. Yes sir, I remember very well.

Q. And don't you recall that you had headquarters in the Lindell Hotel?

A. Yes, sir.

Q. And do you recall of having sent to Mr. Jones to come and see you?

A. No sir.

Q. And isn't it true that Mr. Eaton was one of your active workers during that campaign?

A. No, Mr. Eaton was at that time a dispatcher on the Burlington road,—you mean C. L. Eaton,—he was often around there. He wasn't what you would call an active worker for me, although he did some little work, chiefly on his o-n volition however.

Q. And isn't it true that Mr. Beetley, representative from this county, had been supporting you in your candidacy for the United States senate?

A. Yes, sir.

1343 Q. And isn't it likewise true that you had been informed that Harry Jones would oppose your candidacy, and was endeavoring to induce Mr. Beetly not to vote for you?

A. I don't remember that.

Q. And don't you remember of calling Mr. Jones to your room at the hotel and that Mr. Jones, and I think Mr. Eaton and I think Mr. Norval came to your rooms, and you asked Mr. Jones if he couldn't lend you his support for the United States senate; do you recall that?

A. I do not. Why should I have done that; Mr. Beetly didn't need very much urging.

Q. And isn't it likewise true that you had been informed that Mr. Jones came to Lincoln for the purpose of inducing Mr. Beetly not to support you for the senate and that you spoke to Mr. Jones and asked him to desist from his efforts in trying to get Mr. Beetly's vote from you?

A. I have no recollection of that at all.

Q. You were quite well acquainted with the leading Republicans throughout the state were you not?

A. I knew many of them.

Q. And during these campaigns of yours for the United States senate you made it a point to become acquainted with them did you not?

A. Yes sir, certainly.

Q. And you were acquainted with the Chairmen of the various committees, that is the State Central Committeemen and the Congressional Committeemen?

A. Of course in my efforts there to obtain an election I made it my business and made an effort to become acquainted with as many of them as I could and to get their support so far as I could.

Q. And at that time Mr. Jones was Chairman of the Congressional district embracing this county?

1344 A. That might be, but I wouldn't remember it as being so if it was.

Q. But you would have known it at that time, wouldn't you?

A. Very likely.

Exhibit "A-T" identified.

Q. I hand you Exhibit "A-T" and will ask you if that is your signature?

A. Yes sir, that is my signature.

Q. And I will ask you if that is not a letter that you wrote to Mr. Jones in May, 1900?

A. That is my letter, yes sir.

Q. And at that time Mr. Jones was the Congressional Committeeman from the Fourth Congressional District, was he not?

A. That appears to be so. A letter of introduction wouldn't mean so very much from me to a committeeman. It would by no means mean that I knew him.

Q. But if you had sent for him in connection with a reported effort on his part to get Mr. Beekly's votes from you, you would probably remember it?

A. If Mr. Jones had been sent for and had come to me and had been with me long enough to impress me I should have remembered it, but in a time like a senatorial campaign, when I met just literally thousands of people, you might talk with a man a minute or two minutes, more or less, and the thing would pass out of your mind, and when it was gone you might remember the occurrence and you might not remember the name or the man.

Q. Do you remember this occurrence or this controversy in regard to Mr. Beekly?

A. I never remember of talking with Mr. Jones about Mr. Beekly.

Q. Do you remember of having any difficulty in hold- Mr. Beekly's vote?

1345 A. I remember Mr. Beekly said to me on more than one occasion that these people were trying to get him to leave me but he says "I will never do it".

Q. What did you say in regard to having signed any letters written to the Comptroller of the Currency while you were a director of the Capital National Bank?

A. *Why* did I say about it?

Q. Did you say you had or had not signed letters to the Comptroller?

A. I don't remember what I said about it, if you are asking me generally.

Q. What is the fact as to whether or not you did sign letters that were directed to the Comptroller of the Currency while you were a director of the Capital National Bank?

A. I wouldn't say that I hadn't signed letters to him; if there were any reasons for doing it and they were matters that were presented to me I no doubt did it.

Q. You have seen the letters from the Comptroller, copies of which have been offered in evidence in this case have you?

A. To him, or from him?

Q. To him.

A. To what do you refer?

Q. The letters that have been offered in evidence. I refer in the first place to letter of date September, '92, which is identified by the reporter as "Exhibit x943", did you sign the original of which that purports to be a copy?

A. It is very likely I did. I couldn't tell from this.

Q. And did you sign the original letter to the Comptroller of date February 19, 1892, of which "Exhibit x944" is a copy?

A. Yes sir, I think I signed that one.

1346 Q. And did you sign any other letters?

A. I don't remember that I did. This one here I remember of signing this;—this first one, this February letter I remember, but this first one I haven't a very clear recollection of.

Q. Did you ever write any letters to the Comptroller that were not joined in by the rest of the directors?

A. I think not.

Q. Did you ever write any other letters than these to which I have called your attention?

A. Well I would have to have something to call my attention to them; I don't think I did; I don't remember of anything more. The one letter I remember because it was a matter that was brought to my attention there and the letter was written, but that is the only one that I have any clear remembrance of. It was one that was addressed to him with instructions to him to bring it to the attention of the directors.

Q. You say you wrote no letters to the Comptroller, personally?

A. I am of the opinion that I never did.

Q. But you wouldn't be sure about it?

A. Well I would be pretty sure, unless there was some evidence that I had done it, for I don't remember anything of it.

Q. You are not sure enough though to say that you did not?

A. Only as I have said.

Exhibit "au" identified.

Q. I hand you Exhibit "a-u", and will ask you if that bears your signature?

A. Well that would be somewhat questionable whether that is my signature.

Q. Isn't that your original genuine letter that you wrote to the Comptroller of the Currency?

1347 A. Well I think that is my letter although that signature really might not be mine. I had a conductor on the road here once that could write my name as well as I could,——

Q. You don't pretend to doubt but what you wrote that letter?

A. No, I think I wrote that letter.

Q. Now do you think you ever wrote any letters to the Comptroller?

A. That is a pretty difficult thing for a man to remember eighteen years, just what he did, without something to call his attention to it. If I have and you call my attention to it,—if I wrote them I won't deny it.

Q. You say you knew nothing about this letter of September 1891? Never heard about it?

A. No sir that letter never came to my attention in any way at all.

Q. You are positive as to that?

A. I am positive about that. I have read it in the record here, and there is nothing in that that makes me think that I ever saw it before, or heard of it.

Q. Was there ever any letter written by the directors in answer to that?

A. Well if I never saw it I wouldn't be likely to say there was a letter in answer to it.

Q. Would you say there wasn't?

A. I don't remember of ever having taken any part in any letter of that sort.

Q. You knew of the paper of E. W. Mosher and Mr. Small that was in the bank, didn't you?

A. Well I knew of that investigation. The Mosher matter came up through the bank having been doing business seemingly through an arrangement between the two Moshers. The Small matter was a matter that was known there because of the failure of Small,
1348 and the effort that was made as reported from time to time to pay the thing out from the securities in the shape of lands that the bank had.

Q. Do you have any recollection of the Comptroller of the Currency ever calling to the attention of the officers of the bank the matter of overdrafts?

A. He only gave the board a letter from him calling attention to overdrafts and other matters.

Q. Was there any action taken by the directors in that regard?

A. Yes sir, I think they wrote him a letter.

Q. And do you remember of anything coming out concerning the fact that your bank carried a premium account of four and one-half percent United States Bond, which had no premium value on the market?

A. Well I wouldn't remember just now from my memory what there was in that; it covered several matters, but in detail I can't tell you what it was.

Q. And calling your attention to overdue paper, which was classed as bad debts?

A. Well in detail I can't tell you what that letter of the Comptroller's covered, nor what he answered to it. I have read that record there; I will tell you without any hesitancy at all that I have read that, and that is my memory of it.

Q. In that letter the Comptroller criticised the account of overdrafts, didn't he?

A. That was one of the things that was spoken of in that letter as I remember it.

1349 Q. And it also referr-d to the Mosher and Small loans which they considered excessive?

A. Very likely; I wouldn't undertake to say that it was or was not so; very likely it was, because those are things that the Comptroller could have spoken of, and it would be a natural thing for him to do.

Q. And your attention was called to that, and that is what called for the explanation on the part of the directors.

A. Well the Comptroller's letter,—whatever it was, was what caused the letter to the Comptroller explaining the matters.

Q. And his criticism was that you were carrying these loans in an excessive amount inasmuch as the capital stock was only $300,000.

A. Well I wouldn't have any recollection as to what he did write about that, but I doubt if there is any criticism from the Comptroller,—none that I remember of anyway, of any specific loans that would aggregate over the amount that would be permissible to any one man.

Q. Isn't it true that they were criticising the Small loan and you explained that it was on account of some real estate that you had redeemed?

A. I didn't understand that that is what you meant. I understood from your question that you had especial reference to some excessive loans to one man.

Q. That is what I refer to,—the Small loan.

A. The loan of Small there grew out of the original loan, or loans, that aggregated something like $20,000 I believe. Then the buying of the land, or paying mortgages on land that was given the bank as collateral brought the amount up to something over $50,000, as I remember, which of course was making an ex-

1350 cessive loan to one man, but that was protecting money that was loaned.

Q. But that is one of the things that the Comptroller spoke of?

A. I think possibly it was.

Q. Then you said something about E. W. Mosher; the books showed excessive loans in the matter of E. W. Mosher's did it not?

A. Very likely because under the arrangement that Mosher had made there that might have shown as an excessive amount to Mosher, when in reality it might not have been.

Q. Well did that show as an excessive loan to E. W. Mosher?

A. I think it did.

Q. And that thing was called to the attention of the officers in this letter, and you explained how it happened?

A. Yes sir, I think that is right.

Q. Then you knew about the E. W. Mosher matter.

A. I knew of it in that way; it came up and was a matter of discussion, and the directors had a meeting which I don't think I was at, but the directors had some criticism of the way Mosher had been sending money up there, and insisted that he endorse those notes or

stop the arrangement, and it was instructed, I believe, that he endorse the notes and the thing might continue under that plan.

Q. And quite a large number of loans were made out in that county—York county—in that way?

A. Well under the arrangement as it was inaugurated, I think, by Mosher, and afterwards agreed to conditioned that Mosher endorse the notes, the bank was sending money up there for Mosher—or Stark and Mosher—to loan, and the collateral that they took for the loans that they made was sent to the bank,—the Capital National Bank—and held as collateral to E. W. Mosher's note that would be taken and endorsed by Mosher at the time the
1351 money was sent to Mosher & Stark,—or Mosher—I don't know how that was carried,—it was either Stark & Mosher that were partners,—or Mosher.

Q. In fact both ways.

A. It may be, I don't know as to that, but under the arrangement the collateral which was taken for all the money sent up there was sent in to secure the notes given by E. W. Mosher and endorsed by C. W. Mosher.

Q. And how was that paper secured, did you say? The paper that was taken out in York county, the so-called collateral?

A. I think the security was anything they saw fit to loan the money on,—I don't know.

Q. Well how was it in fact done,—did they take personal notes, or real estate security?

A. I couldn't tell you as to that; I never had anything to do with the details of it, and don't know anything about that.

Q. I think you testified on your former trial that they took a lot of real estate as security and afterwards acquired land by way of foreclosure?

A. Well it would be natural to think that some of the security was real estate.

Q. In fact the most of it was real estate, wasn't it?

A. I couldn't say as to that, I don't know, for that was a matter for the officers of the bank, and those that had charge of the internal workings of the bank to work out in their own way.

Q. You had by laws of the bank with reference to permitting overdrafts, didn't you, Mr. Thompson?

A. Well I couldn't say as to that; I have no recollection as to that.

Q. Isn't it true that there were by laws that the officers were not to permit overdrafts?

1352 Q. Isn't it true that under the by laws as they existed under the Marsh National Bank the officers were not permitted to allow overdrafts, and then when it became the Capital National Bank the directors modified that so as to permit overdrafts with the consent of the president and cashier?

A. I don't have any sort of recollection at this time about anything of that kind.

Q. How many meetings did the directors regularly have, as provided by the by laws?

A. I have no recollection of that.

Q. Isn't it true that you offered an amendment to the by laws whereby the meetings were run down to two a year?

A. I have no recollection as to that.

Q. Isn't it true that at one time in the history of the bank these by laws provided for four quarterly meetings a year and that you offered an amendment and cut out two meetings so as to have just the January and July meetings?

A. I have no remembrance of anything of that sort; it would have been a very unusual thing for me to do—the more the better.

1353 Q. Isn't it true that at the meeting of the directors held in January, 1888 you offered a motion that the by laws be amended to read as follows "Section 14, line 5, erase April and October" with the result that that amendment was to cut out 2 meetings a year that were formerly held in April and October?

A. What character of meetings do you refer to?

Q. The meetings of the directors, Mr. Thompson. You will find the original by laws over here. Calling your attention to page 14 of the Minute Book, which contains the section referred to as having been amended and calling your attention to the fact that the words April and October appear to be crossed out and the reference in red ink "Amended January '88".

A. Very likely that is true; this indicates that, altho' I have no recollection of it at all. That would mean that the directors would meet twice a year as a body.

Q. At the dividend declaring periods. And the fact of the infrequently of your meetings was a matter that the Comptroller criticise, wasn't it Mr. Thompson?

A. Well I have no recollection as to that; I don't know. If he had criticised it in any way that meant anything, of course it would have been changed.

Q. Isn't it true that the Comptroller called attention that more frequent meetings of the directors should be held and that

1354 it appeared that you had only two meetings a year, and that the directors ought to actively participate in the affairs of the bank?

A. When did he do that?

Q. In a letter.

A. I wouldn't probably remember that,—I don't anyway. I don't undertake to say that he did not do that. I would say however that if that criticism was made in a way that meant his displeasure with it that it would have been changed.

Q. The facts are that you did hold but two meetings,—two regular meetings of the board of directors a year, those being at the dividend declaring periods?

A. I think that is the fact—the directors as a whole, but the executive committee was always in session.

Q. And the Comptroller suggested that there ought to be more frequent meetings.

A. I would say that the executive committee; the finance committee, I believe it was called,—either finance or executive, but it

was a committee that had, with the active officers of the bank, absolute control of everything in there all the time.

Q. And they had the active management, you say?

A. They had the active management.

Q. At the time you first learned of the failure of the bank you were in Terre Haute, Indiana?

A. Yes sir, I was in Terre Haute.

Q. You and Mr. Stull had gone to Terre Haute to examine a gas plant, I think you said?

A. Yes sir; I think two gas plants there.

1355 Q. And Mr. Stull was interested with a party by the name of Fearson was he not, of Chicago, who proposed investing in that, or inducing some of his friends to invest.—do you remember the name?

A. Farson, you probably have reference to, because he was a broker there, but he had nothing to do with that scheme at all, so far as I know; I don't know what his understandings were with Mr. Stull.

Q. You don't know who Mr. Stull was representing in those negotiations?

A. I do not.

Q. Isn't it true that he was representing Mr. Farson of Chicago?

A. I couldn't say; I had nothing to do with Mr. Farson.

Q. You were there at the suggestion of Mr. Stull?

A. No, that was hardly it; the gas plants over there were supposed to be for sale, and I can't just now recall how the thing reached the point where I made a trip over there, but Mr. John Walsh.—John R. Walsh who was then president of the Chicago National Bank was the one who I was going for, and I was acting for him only in this way, that if the plants could have been gotten hold of that I was to have an interest, but the money that was to be paid for the plants, if a price could be agreed upon, was to come from Walsh.

Q. But the fact is that you and Mrs. Thompson and Mr. Stull left Lincoln together and went by the way of Chicago, did you not?

A. Well I don't remember; that might very likely be so.

Q. And you left her at Chicago while you and Mr. Stull went to Terre Haute.

A. That might very likely be true, while I don't remember about it.

Q. You wouldn't say that is not so?

1356 A. No, because that is her home and she was frequently going there.

Q. And when you got to Terre Haute you were advised of the failure of the bank?

A. Well while I was there I was advised of it.

Q. And you immediately started west?

A. Yes sir; I immediately came back to Lincoln.

Q. Well isn't it true that Mr. Stull also came back, by the way of Chicago, and got Mrs. Thompson, and you came straight home without going to Chicago, by the way of Peoria?

A. I don't remember that that is not so.

Q. Isn't it a fact that you came home by the way of Peoria; that you wired Mr. Mansfield to meet you on the way home, and that you were behind a wrecked train and were late and didn't get to see Mr. Mansfield?

A. I think that is so.

Q. And Mr. Stull came home by the way of Chicago?

A. I don't remember about that.

Q. But you do remember of coming home by the way of Peoria?

A. Yes, sir.

Q. And wired Mr. Mansfield to meet you there?

A. Yes sir, because he was the father-in-law of Mr. Mosher, and I very likely did.

Q. You recall that circumstance do you not?

A. Yes sir, I think I went that way; that would be the quickest way I could get to Lincoln from Terre Haute, if the connections were direct from there; I don't remember how they were, but that is the quickest way I could get to Lincoln.

Q. And while you were in Terre Haute you received a message from Mr. Whedon announcing the failure of the bank?

A. I think it was Mr. Mullen, my secretary, that wired me.

Q. You wouldn't be certain about that?

A. Oh, I think Mr. Mullen wired me.

1357 Q. You showed the telegram to Mr. Stull and it was from Mr. Whedon.

A. I thought it was Mr. Mullen, but I wouldn't be certain about that.

Q. What time did you get to Lincoln, Mr. Thompson, on your return from Terre Haute?

A. The day, or the time of day, do you mean?

Q. Well both.

A. Well I can't be sure as to that, but it is likely that I got there on Tuesday morning, and probably on Burlington No. 7 that got there near noon.

Q. Isn't it true you got there on Burlington No. 1, that got there at 5 a. m.?

A. I couldn't tell as to that; I don't remember what train I travelled on; I got there as soon as I could I know.

Q. You were a witness in a case in the district court of Lancaster county in which the Farmers & Merchants National Bank of Galva, Illinois, was plaintiff, and yourself and a number of others were defendants were you not?

A. When was that?

Q. Well the case was begun shortly after the failure of the Capital National Bank—I think it was in the courts for a number of years?

A. About eighteen years ago,—yes sir. That was a case—well of hand I don't remember what it was for; it was a case against Mosher.

Q. You remember being a witness in that case?

A. I was president of the Gas company; I don't know whether I was a defendant as that, or for myself.

Q. Well both, wasn't it?

A. Possible.

Q. And since you have been in court here you have seen
1358 the Bill of Exceptions which contained the testimony in that case?

A. You mean I have read it?

Q. Yes sir.

A. No, I have not; I started to read them here one day, the only opportunity I have ever had to read them was here on that table there and I read at them probably twenty or thirty minutes and that is the only time I have seen them.

Q. Had them all afternoon one day, didn't you?

A. That is the only time I had to look into them, and you took them away that night.

Q. That is the Bills of Exceptions and the record that your counsel demanded of us to give to you?

A. That is the one, yes sir, but I never finished reading it.

Q. Mr. Mullen has examined it?

A. No sir, Mr. Mullen and I have never spoken about that record.

Q. Mr. Mullen never examined it?

A. I don't know as to that.

Q. Calling your attention—you say you have not read over your testimony in that record?

A. No sir, only a part of it; I started to read it and wanted to read it after you delivered the record up, but I never did it.

Q. You remember being a witness in that case?

A. Yes, sir.

Q. And didn't you testify at that time, Mr. Thompson, that you returned from your trip to Terre Haute on Burlington No. 1, that was due into Lincoln at 5 a. m.?

A. It is quite possible I did; I don't remember the train I arrived there on; that testimony was 17 or 18 years ago.

1359 Q. Your testimony at that time—at that time your memory would be clearer than it is now as to the facts?

A. Well it would be clearer as to most facts, yes. Time wipes out some things in a man's memory.

Q. Now you and Mr. Stull and Mrs. Thompson left Lincoln for Terre Haute January 21, at 2 p. m., wasn't it 1893?

A. I couldn't tell you when we left there, but I would think it was before then. January 21st was Saturday; I would think it was before then, but I couldn't tell the day now.

Q. Now referring to your testimony in the Farmers and Merchants National Bank of Galva against you and others, and your testimony at that time, I will ask you if this question was not asked you "At what time between the 11th day of January and the 23rd day of January, 1893 did you leave Lincoln" to which you answered "I left Lincoln on Saturday at 2 o'clock, that was the 21st, I think"?

A. Very likely.

Exhibit "av" identified.

Q. Now Mr. Thompson, I hand you Exhibit "a-v", and will ask

you if that is not your answer in garnishment in the case to which I referred,—that is, where you answered personally as garnishee, and see also if it bears your genuine signature?

A. Shall I read this through?

A. No, just see if it is your signature.

A. Yes, sir.

Q. And do you recall that as your answer in this garnishment proceedings in the case in which the Farmers & Merchants National Bank of Galva, Illinois, was plaintiff, and yourself and others were defendants, and at this time I want to call your attention to the
1360 same question and answer which appears in the same, with your signature: "At what time between the 11th day of January and the 23rd day of January, 1903 did you leave Lincoln?" Answer; "I left Lincoln on Saturday at 2 o'clock Saturday, that was the 21st".

A. It seems as if it ought to have been before that, but it might have been the 21st.

Q. Now as a matter of fact that answer in garnishment was made on the 4th day of March, 1893, wasn't it?

A. Yes sir, that appears to be the date.

Q. Just a trifle over a month after the failure of the Capital National Bank?

A. Yes sir.

Q. And the probabilities are that your memory of the transaction at that time would be better than it is now?

A. I should hope so. There are some things a man likes to forget.

Q. Now at the former trial of this case, I believe you stated you left Lincoln on that occasion on Tuesday or Wednesday of that week preceeding the failure, did you not?

A. I may have done it; I gave my best recollection of it at the time. I presume I said I believed it was then. If you will permit me to say, I hardly see how I could have gotten from Lincoln to Terre Haute before about Sunday night; left there on the 21st—that might possibly be, and then if I got the telegram relative to the failure on Monday I could hardly have gotten back to Lincoln before Wednesday.

Q. Well, isn't it true that you got the telegram on Sunday?

A. I am not certain as to that, but I couldn't have gotten to Terre Haute before Sunday evening, I wouldn't think.

Q. If you left Lincoln at 2 o'clock in the afternoon, you would have gotten in Chicago early the next morning?

A. The train that left Lincoln at 2, got there somewhere about 9 o'clock in the morning, and then it would be evening before
1361 we could have possibly got to Terre Haute, even if we got out of there soon afterwards.

Q. How far is it from Chicago to Terre Haute?

A. Well isn't it about a couple of hundred miles; I don't know just how far it is.

Q. Just a two or three hours' ride?

A. I think it is longer than that, but I don't know how far it is.

Q. Was Mr. Stull with you when you got your message?
A. I think he was.
Q. Did you show it to him?
A. I presume so.
Q. I refer of course to William Stull.
A. Yes sir, I to-.
Q. And is it true that that morning before office hours Mrs. Mosher telephoned to you to come to their home, on your return from Terre Haute, that same morning before office hours, Mrs. Mosher 'phoned you to come up to their house?
A. I don't remember that she did; I went up there just about as soon as I could; I don't remember that she telephoned to me.
Q. Didn't you so testify in this same Galva bank case?
A. Very likely I did, but if I went there—that would be an incident—I went there that's a fact.
Q. That very morning after you got back from Terre Haute?
A. Well I don't remember when I went, but I went there that day; my memory is I went up there just as soon as I found out what the conditions were around there.
Q. Well a message had informed you what had occurred?
A. Well, that the bank had failed, but there are a whole lot of different kinds of failures of banks; some are one thing and some are another; this seems to have been one of the other kind.
1362 Q. In this same testimony of yours in the Galva bank case as I will refer to it, you were interrogated concerning your trip made from Terre Haute, and this question was asked you: "Where were you on January 23rd, 1893, on Monday morning, the first morning the Capital National Bank failed to open its doors?" to which you answered, "I was there in Terre Haute, Indiana, and I left there Sunday, or Monday night I left there on my way home." Question: "On your way home did you stop at Peoria?" to which you answered "No, sir. If I remember right I sent Mr. Mansfield a telegram to come down to the train and meet me, but he didn't come down; the train was late and the train that I was on was behind a wrecked train and when we got in Peoria was several hours late." Do you remember of that question being asked you and of making that answer?
A. Yes sir, I think I did.
Q. How long after that were you in Peoria?
A. I went over to Peoria not very long after that and tried to get Mr. Mansfield to take care of Mosher's troubles. Mr. Mansfield was a very wealthy man, and there was an effort made to get him to save the situation, and I was asked to go over there and see what I could do with him, and I did.
Q. Immediately upon your return to Lincoln you wrote Mr. Mansfield a letter, did you, telling him that you were disappointed in not seeing him at the train?
A. You have reference to the time I passed through there when I am said to have telegraphed him?
Q. Yes, sir.
A. Yes, very likely I did; that would have been a very natural

thing for me to have done. I tried very hard to get Mr. Mansfield to take care of the situation there before I knew, or anybody else knew what it was; it was supposed to be just an ordinary failure.

Q. And after Mr. Mosher was arrested this Farmers & Merchants Insurance stock that Mr. Mosher held in your company was
1363 held by Mr. Mansfield, was it not?

A. As I remember it that was held by Mansfield as collateral for something that Mosher owed him.

Q. He afterwards turned that over to you and permitted you to use it to endeavor to prevent Mr. Mosher's prosecution?

A. No, that wasn't the idea; he turned that over to me and I brought it to Lincoln and gave it to, I think, Mr. Whedon, and the object of it was, as I remember it, to use that if it could be used to relieve the situation here. You might call it to relieve Mosher, or the bank, or both because if you relieved one you would relieve the other. Mind you, at that time nobody had any idea that the situation there was anything more than an honest failure; everybody was trying to do what they could to relieve the situation and make it possible,——

Q. I will ask you if at the trial in the Galva bank case, to which I have referred before, this question was asked you: "Were you asked by Mr. Mosher or his attorneys to raise, either directly from your own funds, or out of securities in your hands belonging to Mosher, any part of the fund so to be given for his release?" To which you answered "I never was asked to do anything in connection with the thing except to make a trip to Peoria to see what Mr. Mansfield would do to help him out of the trouble"?

A. I don't remember the question, but if I was asked the question I presume I did. I don't remember the question, and I don't remember the answer except as you have it there.

1364 Q. And in another case, I think you testified that this Farmers & Merchants stock was turned over to you to be used if you could, to bring about Mr. Mosher's release, and upon condition that it was to be returned to Mr. Mansfield?

Q. Now isn't it true, Mr. Thompson, that this Farmers & Merchants stock was turned over to you for the purpose of helping Mr. Mosher out of his troubles?

A. That stock was turned over by Mr. Mansfield for me to give to Whedon. Whedon was Mosher's attorney, and Whedon tried as I remember it, to use this to relieve Mosher, but I didn't understand that it was to relieve Mosher at the expense of anybody else.

Q. Isn't it true, Mr. Thompson, that this stock was in your hands, and that you had some correspondence with the Mansfield estate after Mr. Mansfield's death in reference to the return of that stock?

A. I don't remember just where that stock was located, but the best of my memory is that it was in Whedon's hands, and Mr. Mansfield, while he was a very rich man, he was extremely hard fisted, and there was quite a lot of correspondence about it; he had a son working for me by the name of Hank——

Q. That's Henry Mansfield, Junior?

1365 A. Yes sir,—and there was quite a lot of correspondence about the interests that Mr. Mansfield had there that Mosher had charge of, and in a way were turned over to Hank, it he never trusted Hank very much, and he always appealed to me because he seemed to believe in me, and there might have been some correspondence about this stock, but I think the stock was in Mr. Whedon's hands.

Q. Shortly after Mr. Mosher was arrested you called on him in the jail in which he was confined, and he gave you an order for some dividends on his gas stock, did he not?

A. Yes sir, he gave me an order for the disposition of the dividends on the gas stock that as he said the dividends should follow; that is the stock that belonged to him—was in his name he considered he had a right to the dividends on. There were other stocks that he had had that he said the dividends should follow, and he gave me an order for the dividends that he said would be his.

Q. And he gave you that order for dividends amounting to upwards of eight thousand dollars?

A. Yes sir, I think—it wasn't given in that way as I remember it; the order was given to cover all dividends, but they finally aggregated something like eight thousand dollars.

Q. And you withdrew those dividends and put them in a safety deposit box for him, and held that for some years?

A. Yes sir, I did.

Q. And afterwards turned a part of that over to Mrs. Mosher?

A. Yes sir, some of them went to Mrs. Mosher on an appeal for something to live on.

Q. And upwards of two thousand dollars of it was used to buy in some gas stock that had been offered for sale, that you bought in in the name of Mr. Bell?

1366 A. Yes sir. There was a lot of stock in the intricacies of the local situation as it developed, there was a lot of gas stock that was to be sold under Sheriff's sale; that didn't, any of it, as I remember it, carry with it the actual transfer of the stock, but it was putting the stock in a complicated situation that might make it impossible to transfer it for a long time, and entail the gas company in a great deal of litigation, and so under the advice of my attorney I bought in for two thousand, or whatever it sold at, that right, whatever it carried with it. It wasn't anything that was of interest to me.

Q. But you paid for that out of the dividend of Mr. Mosher?

A. I paid for it out of that dividend, yes sir.

Q. Now at this Galva Bank trial, to which I have referred before, was this question asked you; "The amount that had accumulated to Mr. Mosher's credit at the time you reimbursed yourself of the $500., was the remainder of that, except the $2,000 and interest already paid to the bank, turned over to Mrs. Mosher in bulk?" Answer: "Yes sir, I turned over to her about $5,500, something like

that, maybe a little more, I don't remember just how much it was." Do you remember that question and answer in that way?

A. No, I don't remember it that way, but the distribution of it there would probably be as I put it at the time. The question seems to be very much involved.

Q. And the following question was asked you: "Do you remember how you turned it over,—in what form?" to which you answered "In cash." A. "It had all been in a safe deposit vault in cash, and was turned over also in that way. Mrs. Mosher had borrowed money so she told me right along to live on since he was in the penitentiary. I think she rustled around as best she could to get something to live on *on* while he was there." Do you now remember that question?

1367 A. Yes sir. I think that would be the fact, anyway.

Q. And the following question was asked; "In whose name was the safety deposit vault rented that contained this money?", to which you answered: "I don't know in whose name I am sure. I don't know in what one Mr. Mullen kept it in. The insurance company had one there and I had one there for a time but I don't know which one he kept it in. I haven't had one for a year or more." Question: "Do you think this money was kept in yours?" Answer: "I couldn't say. I don't want you to say I am trying to conceal this, because if you had been smart enough you could have gotten this on garnishment most any time. This money has lain there since July, 1895; that was the very first that was taken, and if you folks had been as cunning about that as about some things you might have gotten that money."

A. Yes sir, I remember that very well. Mosher had given an order for that, but I didn't want to distribute it on his order, so to make the thing perfectly secure for any future developments when the dividends were paid I took it and put it in the safety deposit vault, or had it done, from that time on until they were disposed of in the way spoken of here.

Q. And of course you were not telling anybody about that?

A. Certainly not; there is no reason why I should, but if they had garnisheed me and asked me anything about, I would have done just as I said there.

—. But of course you didnt tell any of the creditors about it so they could garnishee you?

A. I didn't tell anybody about it. That wasn't anything that concerned me at all, because Mosher gave that order which protected the Gas company; the protection of the Gas company was what I was after.

Q. Couldn't the Gas company have retained those dividends in the proper way without having them withdrawn and put in a——

1368 Q. What difference did it make to the Gas company whether the dividends were paid or not, or to whom they were paid?

A. Why if Mosher was the owner of the stock, even though he was in prison for any sort of crime, no matter what it was, he would

have a perfect right to dispose of these dividends. Now his order was direct that I should pay those dividends to Mrs. Mosher, but simply because I didn't feel that I wanted to do it and take the chances against whatever might develop in the way of lawsuits against those dividends I went just that far under his order, and to satisfy him I put the dividends away and kept them so the future might develop what should be done with them, but if I had done what he wanted done, I would have paid them from time to time direct to Mrs. Mosher.

Q. He gave you an order to pay the money to his wife?

A. Yes, sir.

Q. But as a matter of precaution to the Gas company, it wasn't necessary that the dividends be drawn at all?

A. Oh no, except if a man owns a piece of stock, the man has a right to dispose of it as he likes.

Q. But the fact is that so far as the Gas company was concerned, the records, and so forth, it showed the dividends paid.

A. Yes, sir.

Q. While as a matter of fact they were held in the safety deposit vault. The effect of it was to show that the Gas company paid the dividends.

A. Yes, sir.

Q. But didn't show to whom it was paid?

A. I presume the order would show to whom it was paid.

1369 Q. But the order wasn't made a matter of public record.

A. It is likely the secretary of the Gas company had the order; he must have had it, although I as president might have retained it; I don't know how that was.

Q. Now, Mr. Thompson, I think you said at the time of the trial of this case before, I think you said you were interested in several institutions, among which was a bank at Crete, was it not?

A. I had some stock in a bank at Crete.

Q. What was the name of the Bank?

A. The First National Bank of Crete.

Q. Who were the officers of the bank at that time?

A. John L. Tidball was president.

Q. Had you stock in the Fairbury bank?

A. This stock that you are asking me if I had, I think, belonged to the Insurance company, not to me personally. The stock at Crete I think belonged to me, but that I am not certain about, because that came in a trade that Mr. Tidball and I had on a mining matter of some sort, and just what the ownership of that was I don't remember.

Q. How much was it?

A. I think it was five thousand dollars, but the Insurance company had stock in the Fairbury bank I think it was, and a bank in St. Joe, and one in Tecumseh, at one time.

Q. At the time the bank failed you had stock in the Bank of Fairbury?

A. Myself?

Q. Yes, sir.

A. No sir, I never had.

Q. Do you recall Mr. Thompson of having made a public statement in the State Journal just a day or so after you returned from Terre Haute, concerning the failure of the Capital National Bank?

1370 A. I published one?

Q. Yes sir, over your own signature?

A. I published one over my own signature?

Q. Would you say you did, or did not?

A. I wouldn't say either one; I have no recollection of it at this time.

Q. Did you give out an interview, or rather a signed statement which was published in the Journal, in which you reviewed the different institutions in which you were interested at the time of the failure of the Capital National Bank, in which you stated that you had stock in the Crete Bank, and in the bank of Fairbury and in the Aurora Bank, and among other things you reviewed the amount they had on deposit in the Capital National Bank at the time of its failure to indicate your good faith?

A. Very likely that is so, and that same thing would apply to the insurance company as it did to me personally. There might not have been a differentiation between myself as president of the insurance company and myself as an individual, because I was really in same place to the one as I was to the other. I had absolute control of the insurance company money matters, and I owned a very large share of it. When I sold out a little bit later I owned over half of it.

Q. At the time of the failure of the bank, you owned how much?

A. Of the insurance company?

Q. Yes sir, at the time of the failure.

A. I can't tell, but I owned a very large percentage of it.

Q. You owned about one-fourth of that didn't you?

A. I might not have had more, but I probably did, because I acquired that stock whenever there was a reasonable opportunity for doing so, and finally I had half of it.

1371 Q. But not at the time of the failure of the bank.

A. I couldn't tell just how much I had at that time.

Q. How much gas stock did you have at the time the company was sold out?

A. Well, I can't say that.

Q. Well approximately?

A. I couldn't say what I had. I was prevailed upon by the owners of the stock to get enough, to get the required amount that was asked for in order to make the transfer: I didn't own control of it.

Q. Approximately how much stock did you have?

A. I think I had something over $100,000 personally.

Q. And what was its capital stock at that time?

A. Well the capital stock was authorized at one million dollars, but hadn't all been issued; there was some of it that wasn't issued.

Q. You said that Mr. Mosher and Mr. Outcalt gave you some gas

stock as collateral for your bank stock, I think, sometime in November, 1891.

A. Yes sir, when I sold the bank stock to them they gave me gas stock as collateral for it.

Q. And then a year or two later than that the stock of the gas company was doubled, wasn't it, practically, and new stock issued—two of the new for one of the old?

A. It was doubled after that but I don't think it was as much as a year or two, but it was after that time sometime.

Q. Before the bank failed?

A. Oh yes, before the bank failed.

1372 Q. That is, the holders of the old stock received two shares for one, with the exception, I think, of 5% which was issued as a sinking fund, isn't that true,—or an improvement fund?

A. Oh, the only way I can make you understand the way that was done, and I don't mind telling you the history of the Gas company.

Q. I am simply referring to your testimony in this other case.

Q. Sometime after you received the gas stock as collateral for that note of $22,500, which was given you, as you said in payment of your bank stock which had been sold to Mosher and Outcalt, new stock was issued in place of the old, so that each holder of a share of old stock got practically two shares for one?

A. Yes sir, that is right.

Q. Now at the time you were a director in the Capital National Bank, you were interested in these various other banks you spoke of. Now what was the name of the bank at Fairbury, the one you were interested in?

A. The First National Bank, D. B. Cropsey, President.

Q. Who was the cashier?

A. I couldn't say as to that.

Q. And the bank at Aurora, what bank was that?

A. The Aurora State Bank.

Q. Who were the officers of that bank?

A. Well I was the president of that bank.

Q. And you also became a stockholder in the American Exchange Bank at Lincoln, I think you said?

A. Yes, sir.

1373 Q. And I believe vice president in January 1892?

A. Well I said I thought it was January, but the date I couldn't fix. They had been at me to come over there for some little time and wanted to make me Vice President, and finally I consented to do it.

Q. Now, Mr. Thompson, I will ask you this question, if very soon after your return from Terre Haute, you published an article in the Lincoln State Journal, under date of January 26th, 1893, over your own signature as follows:

"To the public: I am surprised and deeply grieved to learn on "my return from Terre Haute, Ind., where I have been on a busi- "ness trip with Mr. Wm. Stull, that I am in a way to blame by some

"of the public for the condition of affairs at the Capital National "Bank.

"A $1,000 in stock has been my total holding in this bank since "November, 1891, for over fourteen months, and this amount of "stock I now hold. My business relations with the bank have been "practically that of others who have done business regularly with "it; that is, I have been a depositor, having kept four accounts "there—one for the Gas Company, one for the Insurance Company; "one for the Aurora State Bank, of which I am President, and my "personal account. All of these accounts were kept in the Capital "National Bank in the usual way until it closed its doors, except "my personal account which was transferred to the American Ex-"change National Bank at the time I was elected a director and "Vice-President of that bank at its last annual meeting. In the "three accounts herein named as having been kept with the bank "there is something over $20,000, which I believe is more than any "other one depositor except the state has in the closed bank.

"Besides this, both the First National Bank of Fairbury
1374 "and the First National Bank of Crete of which I am a "stockholder have accounts with the Capital National Bank, "but at this time I do not know how much they have on deposit "there at the time it closed its doors. In addition to the sums given "as above on deposit by the three institutions that I am connected "with, I gave before leaving for Terre Haute a check to the Union "Savings Bank and one to the Lincoln Savings Bank for $3,000 "each as a deposit for the Farmers & Merchants Insurance Company. "As these checks were given on the morning of the day the bank "closed its doors I considered myself morally, if for no other reason, "liable to the two Savings Banks for any loss that may occur on "account of them, and I shall see that these banks suffer no loss "because of the deposits which they accepted from me so soon before "the failure of the Capital National Bank.

"In explanation of the fact that the transfer was recorded on "Monday morning from Mr. Outcalt to me of his farm known as "Grassland Stock Farm and the stock on it and a mortgage from "Mr. Mosher to me covered his personal effects, I will say, that a "deed to the Grassland Stock Farm and Mr. Outcalt's stock was "given to me, with a deed to a stock farm in York county, some "weeks since to be held as collateral in lieu of the Gas stock that I "held for more than a year as collateral to the note for $22,500 "given by Mosher and Outcalt and held by me.

"The chattel mortgage on Mr. Mosher's personal effects was "given by Mosher without my solicitation or knowledge beforehand "that it was to be given to secure $2,000 of stock which Mr. Mosher "held in trust six years for my little daughter Laura, and as those "deeds were held as collateral they were not filed by me, but when "trouble came to the bank in my absence, Mr. Mullen, my confiden-"tial man filed them, believing it the best thing to do.

1375 "$4,000 of my original holdings in the Capital National "Bank was sold about two years ago for 33 per cent premium. "This was at the time when the bank stock was considered work-

"$1.40, and a transfer had taken place only a short time previous "at this figure. $3,000 of this stock went to a Philadelphia lady and $1,000 to Mr. G. P. Fancon, who is now as he was then a B. & "M. employee.

"$18,000 of my holdings were sold over 14 months ago to Mosher "and Outcalt at a 25 per cent premium, and the collateral I now "hold given by Mosher and Outcalt is to secure the note given for "the purchase of the stock. My reason for selling at the time was "personal such as no one could criticise.

"It is not a pleasant thing for a man to be blamed for some- "thing that he is in no way responsible for, but in conclusion I "want to say if, even in a moral sense, I am taking from the assets "of this bank in taking the collateral, I have anything I am not "perfectly justified in taking, I will very willingly relinquish my "claims whatever they may be. $4,000 will cover my legal indebted- "ness in this world and I neither have to, nor feel disposed to do "anything either legally or morally dishonest for any such sum "of money as there is involved in this case." Signed D. E. Thomp- son and published in the Journal. Do you remember of publishing such an article?

A. Yes, sir, I remember that now,—yes, sir. It passed from my memory all together, but I remember it.

Q. Now in addition to these banks, and having been superinten- dent of the Burlington road, did you state that you had a line of railroad hotels?

A. Yes, sir.

Q. In which you were the owner, or half owner?

A. Half owner.

1376–1377½ A. (continued). I was never less than half owner, and at two different times I was the sole owner.

Q. And after you sold the Farmers & Merchants Insurance Com- pany you organized the Columbia Fire Insurance Company?

A. Yes, sir.

Q. And since you established a daily paper there at Lincoln called The Star?

A. Yes, sir, I had.

Q. Now I hand you "Exhibit A-i" and will ask you if you can read that and understand what it says?

A. I certainly can read that and understand exactly what this all means. It is liabilities and assets.

Q. You understand here what is listed under the resource column, what that means?

A. Why Mr. Thomas, anybody that can read can understand that, but for me to take that and try to verify it by the books——

Q. You understand what it means here under the head of re- sources, don't you?

A. Well a man's resources are what he has.

Q. And you understand what is meant under the head of liabil- ities?

A. That means what you owe.

Q. And you can look through this statement and you can tell,

if things are what they purport to be on the face, you could ascertain the condition of that institution, could you?

1378 A. I don't understand how I could; I wouldn't know how.

Q. If those resources are what they purport to be; worth their face as indicated by the report, and the liabilities correctly stated on this report, then you could tell the condition of the bank?

A. If its liabilities are correctly stated I would know that the bank had this much and owed this much.

Q. And if you contemplated making a purchase of the stock of that institution you feel competent to pass upon its condition from these resources and liabilities?

A. From a card of that kind?

Q. Yes sir.

A. Well I think I would depend more on the confidence I have in the people than I would in that.

Q. But simply as a business proposition you could examine that card that I hand you Exhibit "a-i" and from an examination of it you could satisfy yourself as to the value of that stock couldn't you?

A. Yes I could tell that the stock ought to be worth what was shown there.

Q. What the capital stock, surplus and profits indicates?

A. That would be my idea of it.

Q. And you understand that one column represents the resources and the other column the liabilities?

A. Certainly I do, yes sir. But you have got to go a long ways further than the statement to know whether the statement is right or not, but if you pin your faith to a man and he makes the statement that's about all there is to it; if you can't go farther why you are lost.

Q. Calling your attention to Exhibit X986, you would be able to look over that, the list of resources and liablilities, and you could determine from that, if the report were correct, what the

1379 financial condition of that institution would be?

A. If the report were correct I should know what the institution would have beyond its liabilities from that statement, but how would you find out if the report was correct?

Q. Just now I am not on the witness stand, but I will be glad to take the matter up later if you want me to. Now this Exhibit X986 is the same as Exhibit X1047, is it not Mr. Thompson?

A. I couldn't tell about that.

Q. Well examine it. Exhibit X1047 is also a statement of the assets and liabilities, isn't it, giving the items?

A. I couldn't tell about that; it don't indicate that way.

Q. I mean looking at the items, beginning at the top of the list—Capital stock $300,000. That indicates a liability doesn't it? And the item United States bonds $50,000. Doesn't that indicate that the institution owns bonds to the amount of $50,000.

A. I would think so, but I wouldn't really know anything about what that would mean.

Q. Suppose this were headed now Assets and Liabilities of the

Capital National Bank, you would understand then that the item of Stock and Bonds account $52,913.49 was an asset?

A. I wouldn't know.

Q. So far as the statement would show you would know that wouldn't you?

A. I wouldn't know, no sir.

Q. You couldn't tell anything about that?

A. No, I wouldn't know whether that is an asset or liability.

Q. Then take the next one, Cash $67,398.46, would you understand whether that was an asset or liability?

A. Well if it was cash belonging to the bank, I would call
1380 it an asset; if it belonged to somebody else it would be a liability.

Q. And Bills Receivable, would you know whether it was an asset or a liability?

A. My understanding of Bills Receivable is that it is paper of value that is held by the institution holding it.

Q. Would it be an asset, or would it — ?

A. I would think it would be an asset.

Q. And you know that national banks have as a rule circulation notes that they issue, National bank notes?

A. Money?

Q. Yes sir.

A. Yes, sir.

Q. And you understand those to be a liability?

A. Well sir, I couldn't tell you whether they consider that a liability or an asset. I don't know.

Q. If you were to issue your note, Mr. Thompson, for a thousand dollars, and circulate it as money, you don't know whether you would consider that as an asset or a liability. Say it was payable on demand to bearer. Would that be your note,—would it be a liability?

A. That would be my liability.

Q. If a bank issues the same kind of a note, wouldn't it be a liability of the bank?

A. Yes sir, but I don't know how they handle it.

Q. Don't the American Exchange Bank issue its notes?

A. I was vice-president, but I have not been for many years.

Q. At the time you were its vice-president didn't it issue notes of this character?

A. I don't know whether it did or not.

Q. Did you ever sign any?

A. I don't know: I have told you frequently I am not making even an effort to equivocate at all; all the intricacies of a
1381 bank are like Greek to me.

Q. I hand you a National Bank note and will ask you if you ever saw anything like that before?

A. Well gentlemen, now when you get to talking about things of this sort, you pretty near bring tears to my eyes, because my whole life has been a struggle, and, my education is not such that

I can tell anything of books or what they mean, and during my whole business life I have had to depend upon men who I have placed confidence in for the well being of my part of the institution that they have had in charge. Now I beg your pardon. If it were necessary for me to understand the books of the Gas company, or of the Insurance company, or of any bank that I have been interested in; if I had to, under the law, understand the intricacies of those books I couldn't have been in business; I would be shovelling dirt on the section, like I had to in the beginning.

Q. Now Mr. Thompson, you don't mean to tell me that with all the immense business transactions you have had, that you don't understand a simple statement like this Exhibit x1046 that I hand you?

A. Mr. Thomas, I will say this, and as my God is my judge I never looked over the books of an institution I was interested in in all my life.

Q. I am simply asking you if you mean to say to me that you do not understand a simple statement like the one I hand you?

A. I could take anything that I could read of course, and if it was an asset and called an asset I would know what it is. Things that I understand like Bills Receivable,—I know that is an asset.

Q. And the mere fact that they're arranged a little different on the card, but show the same columns and exactly the same things,—you don't mean to say you don't understand them as well as the other one?

1382 A. No I couldn't, because that is condensed, and I can tell that.

Q. But if these items were condensed a little bit more you could understand it then?

A. Well I understand what it means here, in a way I understand that thing, but for me to find out whether there is any truthfulness in it, I couldn't do it.

Q. I am simply asking you to say if there is any difference between your ability to comprehend "Exhibit a-i", and this "Exhibit x1047"?

A. I should think there would be a great deal of difference; one is a long statement of assets and liabilities, it seems to be, and the other is a condensed one.

Q. If you were examining a statement with a view to investing in a corporation, you would want to know more about the details than simply a condensed form like this?

A. Well if I were going to invest in a corporation I would have somebody inspect their assets, or else I would do it on faith.

Q. You don't think you could look over the Bills Receivable and ascertain what notes they had?

A. How much they aggregated?

Q. Yes, sir.

A. Certainly I could do that, if I would have the time to foot them up.

Q. You can add can you?

A. Yes sir, in a way.

Q. And subtract?
A. Oh, I guess so.
Q. You can add and subtract and multiply, but haven't learned to——
A. Oh now, I don't think you ought to expose any farther the ignorance of a poor devil like I am.
1383 Q. Isn't it true that you have dealt in vast enterprises, and in the past few years built a railroad in Mexico involving millions of dollars?
A. Yes sir, but there is not a book connected with that concern that I ever saw the inside of,—not one.
Q. But you don't mean to say that you couldn't understand the books if you were to go through them; if they're in a simple statement form you could go through them?
A. Now Mr. Thomas, I could do that; so a boy of thirteen could do it, but that would be my limit when it comes to knowing anything about books.
Q. Now these various banks in which you have been interested; you have kept some sort of an account of what they were doing?
A. Nothing only what the men in charge have reported, and in there the same as that card, or what they would tell me; that's all, nothing else.
Q. These banks in which you have been interested, they sent you statements of their condition you say, but simply in the condensed form?
A. A card like that.
Q. Never have sent you a more itemized statement?
A. I don't have any recollection of it, except that it seems to me that Peterson used to sometimes send me down a brief written statement between times, of what he was doing.
Q. Who is Peterson?
A. He was the cashier of this Aurora bank that I was president of; he is now the president of it; he bought my stock a few years ago.
Q. And he would send you what?
1384 A. It seems to me that he used to between meeting times and sometimes at meetings when I wasn't there, send me down a brief statement. It would be more or less like this (indicating) unless it would be something he wanted my judgment on. I don't have any recollection of anything of that sort (indicating)—he may have done it, because Peterson was always giving the best information he could all the time I was interested there and used to write about all sorts of things, and I presume—doing things as he did—he might have written a good deal about the condition of things there in his bank.
Q. And the other banks with which you have been associated merely sent you condensed statements, such as Exhibit "a-i?"
A. I have never had any statements from any of these banks; the stock in those banks—this one at Crete,—when that became the property of the Insurance company in some way there; it wasn't mine at all, it belonged to the insurance company; the stock was

bought as an investment; the insurance company owned while I was there a lot of what you would call ready money securities, the object being to keep a good deal of our money in securities we could cash if we needed it, and these different bank stocks of which you have spoken were not mine at all; they belonged to the insurance company; they may have been in my name, but they were not mine, except the one at Crete and there was a change came in there through some little business arrangement between Mr. Tidball and I up in Idaho.

Q. The Fairbury bank, and the Crete bank and the Aurora bank?

A. I say all those banks—if I said all,—all excepting the Aurora bank, and this little transitory ownership in Crete. That is what I meant. The Aurora bank the Insurance company never had anything to do with.

Q. These different banks, in which you were interested, either directly or through the Insurance company, issued statements similar to this one I handed you a while ago?

1385 A. I presume they did, because I think all banks do that.

Q. And that's where you got your information as to their condition?

A. Well I never had any information as to the condition of those banks. The stock in those banks was bought on the recommendation of Mosher, as I remember, and they were not very fortunate investments either, as an investment. The bank in St. Joe failed; the bank in Tecumseh failed; the bank in Fairbury has always been good, but there was never any investigation made by me or anybody for the insurance company as to the value of the stock before they were bought.

Q. Now with reference to having checked out some of the insurance account and placed $3,000 in the Union Savings Bank and $3,000 in the Lincoln Savings Bank. Is that correct?

A. Well yes, that is correct, and I think there was one more.

Q. That is what I was going to ask you.

A. I don't remember; it was one of the savings banks, but this was the situation as I found it when I got home. These checks were given those savings banks because of the interest——

Q. What rate of interest were they paying?

A. I think 5%. Now I always expect at the end of the year—sometimes then I was short of cash—to make a good statement; I try to have cash enough on hand to make a good statement and then I always get that cash earning interest as soon as I can, and in the Capital National Bank the deposit earned no interest, it was just an open account.

Q. When did you put it in the savings bank?

A. The checks were given on the Capital National Bank for these deposits on the savings bank.

Q. When it became a deposit in the savings bank, it wasn't an open account?

1386 A. It wasn't an open account, but there was no reason for keeping an open account at that time of the year. There

was always at that time of the year more money coming in than we needed for daily business.

Q. Is that the one that Imhoff was interested in?

A. The Union Savings Bank was the one that he was interested in.

Q. You don't remember the third one?

A. No, and I will tell you why. There were three checks given and when I came back two of them had been deposited in the Capital National Bank and credits taken, so that it was a loss to them, that is, it was a loss except what would have come out of the bank in liquidation, and I went to them and said "I don't want you to stand this loss" and they didn't have to, I settled every cent of it.

Q. The way you kept them in the savings banks they were not subject to check?

A. No, not subject to check but a deposit in a savings bank you are always supposed to get if you want to lose the interest; if you want to save the interest why you have to let it go a period of time.

Q. Now Mr. Thompson, you spoke of having some difficulty with Mr. Mosher at the time you sold him and Mr. Outcalt your bank stock. You said that occurred, whatever this episode was, that you were on a train coming home from Chicago to Lincoln.

A. Yes sir, that is what it came from.

Q. That was the reason you insisted on getting out?

A. That was the reason I did get out; I didn't insist on Mosher buying my stock. I called him over there and I said "Mosher, I am going to sell this stock, and if you want it you can have it, and if you don't somebody else is going to buy it."

1387 Q. I think at the former trial of this case that you testified that after that Mr. Mosher and yourself just spoke as you passed by.

A. Well Mr. Mosher and I were not very friendly after that. Of course there were business reasons why we had to be civil.

Q. But you said in your former testimony in this case that after that you just spoke as you passed by.

A. Oh well, that was just a figure of speech.

Q. But you were not on good terms?

A. We were on good business terms so far as it was necessary to be. Mosher was interested in both the Gas company and the Insurance company, and I had to be on reasonably good terms with him.

Q. You didn't force him out of those companies?

A. Well he had more than I had in those companies—he had in the other—but it was immaterial to me because I was managing those companies myself.

Q. In your testimony at the former trial of this case in which you were a witness I will ask you if the following questions were not asked you: "You say you had a personal difficulty with Mr. Mosher?" to which you answered "Yes sir." Question: "About when?" Answer: "That was the day that I sold him my stock, the very day that I sold it to him." Question: "And your relations were not amicable after that?" Answer: "Well we spoke as we

passed each other." Question: "You spoke as you passed by and that was about all?" Answer: "Yes sir, that was about all." You may state if you so testified at that time.

A. Yes sir, I did; I meant just what I said; just as I say now; our business relations were just what they would have to be under those circumstances or what they might be; there might be reasons for being in a business way apparently friendly after that.

1388 As I say, Mr. Mosher up until that time I always liked; I thought very kindly of him. I liked Mrs. Mosher and I liked the whole Mansfield family; they were people that I had come to know and I liked them, and that night on the train made me pretty angry at Mosher and I went after him just about as hard as I was capable of going after any man for anything.

Q. You had heard previously that he had a woman out at the penitentiary?

A. I heard that but I didn't believe it.

Q. But you had heard some scandal in connection with Mr. Mosher and a school teacher that lived at Lincoln, had you not?

A. No, I never heard of it; the woman that you call the school teacher was the one that he afterwards married.

Q. Hadn't there been some scandal about that, prior to that time?

A. There might have been and I not have heard it; I don't remember that there was. You can hear scandal about most anybody, but you don't always see it like I saw it on that occasion.

Q. And that was the sole reason for the disposal of your stock?

A. Yes sir, I had no other reason at all.

Q. And you took their note on five years' time?

A. Yes sir.

Q. How does it come they didn't pay you the cash?

A. I couldn't tell you as to that. That was his offer when he asked what I would take, and I said I would take what it was worth; the note was worth more to me than the cash; I would rather have had their note at that time than to have had the cash for the stock.

Q. You say you didn't want any security, but he insisted on giving the security?

1389 A. Yes si, that's right. He said "What security do you want?", and I said "I don't ask for any, I don't insist on your giving me any security, you needn't do it." And he says "I prefer to give you security" and I says All right, I am very willing," and that ended it; that was about the conversation and it was agreed that he would give me gas stock of the face value of $35,000, and it was worth about sixty cents on the face value at that time.

Q. Didn't you in some of your letters to Mr. Mansfield at about the time the bank failed, state to him that the gas stock was worth about sixty five cents after the failure of the bank?

A. Maybe I did; I say now it was worth about sixty cents, this $35,000 was, after it had been doubled. The first that he gave me was less than that and of course when it was doubled it came to me as collateral.

Q. And it was doubled while you held it as collateral?

A. Yes, sir.

Q. And after it was doubled it was then of the value of about sixty five cents?

A. Well it sold, like all stock does, varying some, but something like that.

Q. But in your letter to Mr. Mansfield you told him it was worth sixty five cents.

A. Possibly I did. I could go further than that because I always contended that it was worth par.

Q. That became practically——

A. Well another company got it, and they filled it so full of water,——

Q. Notwithstanding the water that you got into it.

A. There wasn't so much water that got into it at that time, but the stock didn't increase in value beyond about the sixty cent; we only made it the same value it was before, because the stock
1390 was worth before it was doubled par; then when it was doubled we kept fifty thousand in the treasury; maybe it was a hundred thousand, but something for the use of the treasury, contingencies, anything we neded it for; then my effort was to make the Gas company sufficiently valuable as an earning property, to make that stock worth par, and I was travelling along in that way pretty well when somebody came and bought it.

Q. When you went to Terre Haute to buy these plants, did you have drafts or letters of credit?

A. I had a letter from John R. Walsh saying that he would honor any checks I might make to such an amount to pay for that gas property there.

Q. John R. Walsh of Chicago?

A. Yes, sir.

Q. He afterwards got into some difficulty?

A. Yes sir, but if it hadn't been for John R. Walsh along about the time the banks were having so much trouble in '93, I guess every bank in Lincoln would have busted. I went to New York, together with C. G. Dawes of Chicago, and I. M. Raymond, to get help for our American Exchange bank if it were needed and after being there three days thinking we were going to get help we failed to get it, and Raymond and Dawes turned tail and left me. Dawes went to Ohio and Raymond went home, and I went to Chicago, and I went to Walsh's bank in Chicago; Dawes and Raymond knowing Mr. Walsh, they had asked for help there and he said "I won't give it to you; you keep your account elsewhere, and you mustn't come here in time of trouble and ask for it." We were all three there on our way to New York. They did the talking and they were about to go and he said to me, "Will you tell me what you think about this, Mr. Thompson?" And I told him what I thought of it; that I didn't think the bank would need any help, but under the disturbed condition we might. Mr. Raymond and Mr. Dawes passed out ahead of me, and Mr. Walsh touched me on the
1391 shoulder, and he says "You come back when these other men are gone." And I went back in to see what he wanted, and he said "Mr. Thompson, I am very much pleased with the way you put

the situation out there, and I want to talk with you about it again" so we sat down and talked it all over; the assets of the bank as Mr. Burnham had written it, and I was giving him the letter and he says "You go on to New York, and when you come back, stop here and tell me what you do. We went to New York; we went to Ives' Phenix Bank and couldn't get any assistance, but finally the Phenix bank give us credit for $25,000, and that was all we could get in New York, and I went back to Chicago and told Walsh what success I had over there, and he asked me if I had anything more from Mr. Burnham, and I says "Yes, here are some letters from him. The outcome of it was that before I left the bank Mr. Walsh says "You can go home and if anything happens out there that you need it, the American Exchange Bank can depend on my bank for anything it needs to pay its depositors. And I have always had a very kindly feeling for Mr. Walsh, although he is in prison now. That very thing gave a better feeling to our bank, and everything steadied down and went all right, when if we had had no assistance only what we could get in New York the whole thing would have failed, and when it failed all the banks in town would have gone.

Q. Now Mr. Thompson, a week or so before the Capital National Bank failed, I think on about January 11, there were some deeds and other instruments given you by Mosher and Outcalt, were there not?

A. Deeds for some land, yes sir. Is that what you have reference to?

Q. Yes sir. And is it true that at about this time a deed executed by Mr. Mosher and wife, and Mr. Outcalt and wife purporting to be dated December 28th, 1892, filed for record January 11, 1893, was given to you in which there was conveyed to you the south east quarter of 19-11-2 in York county, and the south half of the north east quarter of 19-11-2 in York county, 240 acres?

1392

A. Yes sir, and that's the way Mosher protected me and my confidence in him and I didn't have sense enough to know it. The transaction was this. Mosher had,—or I had, I should say this gas stock that I held as security to that note, and I held that gas stock until the time I began to take these lands and Mosher came to me at that time and he said, asked if I would change——

Q. And you afterwards sold this same land to Alexander M. Landon?

A. Yes sir, that is the piece that I sold to Landon; that was one of the pieces I got from Mosher in exchange for the gas stock.

Q. On January 18, 1893, Mr. Mosher and wife conveyed to you by Warranty Deed the north west quarter of 19-12-1, York county, did they not?

A. I can't tell you as to any of the descriptions nor the dates very definitely, but I can tell you the transaction if you want to know.

Q. I have several more I want to interrogate you about first.

A. They all came under the same schedule; I can't tell you about

any of the descriptions; I wouldn't remember a thing about any of the descriptions.

1393 Q. And isn't it true that Mr. Mosher by deed of date January 7, 1893 conveyed to you the southwest quarter of 31-10-1, York county, Nebraska, which was filed January 14, 1893?

A. That very likely is true, because the beginning of it was the exchange of the gas stock, which I held as security, for a few pieces of land, and then afterwards Mosher wanted to exchange other pieces for some that he had given me.

Q. Well now wait until I get through with all my descriptions, and it will expedite the explanation. And isn't it true that Mr. Mosher and wife, and Outcalt and wife conveyed to you by warranty deed the West half of the southeast quarter 20-10-2, York county, the deed purporting to have been executed January 7, 1893 and filed for record January 14, 1893?

A. Very likely.

Q. And isn't it true that Mr. Mosher and wife, and Mr. Outcalt and wife conveyed by Warranty deed the southwest quarter of section 13-12-2, York county at the same time?

A. Very likely.

Q. The deed having been filed January 11th, 1893.

A. Quite likely.

Q. And then Mr. Outcalt deeded to you a quarter section of land in Lancaster county, did he not?

A. Yes, sir.

Q. Known as the Grass Land farm?

A. Yes, sir.

Q. And did you have no deeds filed for record?

A. I can tell you better if you will let me, how it was done and then you will understand it better. Mosher, when he asked me if I would as soon have land for security as the gas stock I

1394 said "Yes"; there was very little talk about it, but I said I would, and he brought me over deeds to several pieces of land up in York and Hamilton counties; I don't know just how many or which pieces he brought then, or brought later. With the exception of the piece in Lancaster county which had no mortg. on it, they all had large mortgages; the whole transaction was one of security to me, and then I had no doubts about the business integrity of Mosher; I wasn't looking for bears or anything of the sort; I was very willing to give him what he wanted, and to take what he offered me as security for that note. Then when he came and asked me to change some pieces that I had for others that he wanted to give me, saying that he had sold or could sell some of those that I had, I very readily exchanged with him, and the thing ran along in that way until the time of the failure*m* and then I could see without putting on my spectacles that the whole thing had been done to bunco me; that was his scheme.

Q. As a matter of fact some of those very conveyances were made to you during the very same week the bank failed?

A. It might be, because I would have taken it the very last day

of the bank and never questioned it,—as to the integrity of the bank.

Q. Didn't Mr. Outcalt give you a Bill of Sale of his personal property at the same time?

A. Outcalt gave me a Bill of Sale of the horses and equipment that was with that farm, but remember the note that was taken for that bank stock was a joint note of Mosher and Outcalt. The deed that came to the stock farm came as collateral security, the same as all of those deeds up here in York and Hamilton counties; and, with that, or later, I don't know which came the Bill of Sale for the farm property that was on Outcalt's farm. Now my memory
1395 is that that Bill of Sale came while I was away. Mr. Mullen, my secretary, who has had absolute charge of all my papers for near twenty five years, both when I am home and when I am away, thinks he remembers that they came with the deed, but that's a conflict in memory.

Q. And isn't it true, Mr. Thompson, that that Bill of Sale came to you at the same time that you got the deeds?

A. Well I just told you my best recollection of that. My memory was that it came when I was away on this trip to Terre Haute with the one that Mosher sent over there on some stuff to secure this obligation of his for my little girl, but Mullen thinks that it came before.

Q. Now when were those deeds delivered to you Mr. Thompson, as near as you can remember? Some of them purport to be dated in December.

A. I can't tell you just when they were delivered, as they were brought there and later exchanged for others, and so forth, and being a matter of security only there was no question of when they came, or how, when it seemed to be perfectly satisfactory. When they first came I don't remember.

Q. And if this Bill of Sale had been given to you prior to the failure of the bank would you have remembered it?

A. The Bill of Sale from Outcalt?

Q. Yes.

A. Well I haven't remembered it. As I have explained to you, my memory is that I never saw that, and I may never have seen it; it may have been brought over and given to Mr. Mullen because Mr. Mullen has been my only dependency there for 25 years or more. In exchan-ing and taking that security it might not have been done by myself, but with him, because he has had charge of all
1396 my papers.

Q. You say at the time you took those securities you had no doubt of the financial integrity and worth of both Outcalt and Mosher?

A. No, I didn't; I didn't when I started for Terre Haute.

Q. And if Mr. Mosher had offered to give you a chattel mortgage on his household goods would that have aroused your suspicion?

A. That probably would, because that would have been outside of anything that would have been legitimate security for any debt of that kind, and I think it would.

Q. And if Mr. Outcalt had offered you a chattel mortgage on his household goods, would that have aroused your suspicion?

A. Well I should have felt the same way about it, of course.

Q. And if he had offered you, prior to the failure of the bank, if he had offered you a Bill of Sale of all his chattels and everything in detail, wouldn't that?

A. No, not if it came with a deed to the land as security, because that situation there was not of an ordinary farm; his place there was a stock farm.

Q. Well Mr. Thompson, the fact that you thought Mr. Outcalt worth a great deal of money, would you think it a singular incident that he would want to give you a chattel mortgage or Bill of Sale on a lot of personal property to secure a debt of that kind?

A. I think if that had come to me,—but I don't think it did; I think it probably went into Mr. Mullen's possession; there is where it naturally would have gone.

Q. If it had come to your knowledge would you have been suspicious?

A. No I wouldn't, because that property was a part of that farm, belonged to the farm, and wouldn't be worth a rap without the farm, or one without the other.

1397 Q. At that time Mr. Outcalt was the owner of perhaps two hundred thousand dollars' worth, or more, of stock in the gas company?

A. I can't say how much he had; I don't think he had that much though.

Q. Very nearly so?

A. I can't say as to that. The gas stock, if I remember, was mostly in the name of Mosher and Outcalt together.

Q. But he was supposed to be a very wealthy man?

A. Both Mosher and Outcalt were supposed to be well off; Mosher very wealthy and Outcalt reasonably so.

Q. And you mean to say that it would not have aroused your suspicions to have — man of the reputed standing of Outcalt to give a chattel mortgage on a lot of curry combs and things of that kind, to secure a debt?

A. Well now Mr. Thomas, if that mortgage ever came to my attention I never read it at that time.

Q. I mean the Bill of Sale.

A. I never have read it so far as I know of at all. It is certain I never had read it at that time; I don't think they came into my personal possession, but of course coming to Mr. Mullen, that is in my possession, but Mr. Mullen is the one, as I have said before, that for twenty five years has had charge of everything that comes and goes for me in the way of papers of any kind.

Q. Now referring again to your testiomny as given in your answer of garnishment, along in March, 1893, to which I called your attention, I will ask you to state if this question was not asked you: "Were you here at the time that Bill of Sale was delivered to you" referring to the Outcalt Bill of Sale, to which you answered "At the time what Bill of Sale was delivered?" Question: "To the horses,

yes sir?" Answer: Why the Bill of Sale was delivered at the
1398 time the deeds were delivered". Did you so answer?

A. I may have done it. My recollection is what I have told you.

Q. The further question was asked you at that time in March 1893: "Was the Bill of Sale delivered at the time the deed was delivered to you?" Answer: "Yes sir, it was." Was that question asked and did you so answer at that time?

A. I couldn't say as to that any more than I said a moment ago, because my recollection as to that and Mr. Mullen's is different.

Q. But this was in March, 1893, scarcely more than a month after the occurrence.

A. In that case again I might say it was delivered to me and it may have been delivered to my secretary. I might say this was delivered to Mr. Mullen, and another delivery made to me, and Mr. Mullen might not say anything about it at the time except to say that it had been received.

Q. And further along in this same testimony, was not this question asked: "In what county is the personal property that Mr. Outcalt gave you the Bill of Sale for—this county or York county?" Answer: "Lancaster". And the further question asked "When was the bill of sale delivered?" And you answered "It was delivered at the same time the deed was delivered". Is that not true?

A. That very likely may be true. If Mr. Mullen's recollection of it is right.

Q. I am asking you for your recollection.

A. I have no recollection at all.

Q. Didn't you so testify at that time?

A. Very likely I did.

Q. If that is your testimony at that time, don't you think that would be the fact?

1399 A. In the way I have explained. That might have been delivered to my office, and gone into Mr. Mullen's possession and the books without my knowing anything about it.

Q. And the question was asked you "Was the bill of sale dated when it was delivered to you?" And your answer was: "I have never noticed whether it was or not; I presume it was". Did you so answer?

A. Well that says so there; I presume so; I don't say it wasn't: I didn't try to qualify it.

Q. If you testified so at that time, what do you say now as to whether or not it is true?

A. Except in the way I have said that whatever may be done through a man's office by a man's secretary, of course it would be true, but there is always a little "come and go" there when it comes to a business man's office, or coming to his secretary.

Q. You don't deny having so testified, do you Mr. Thompson?

A. Oh no, I don't deny it.

Q. Now the agreement that you had to hold these deeds and bill of sale as collateral, was made with Mosher you say?

A. Yes sir, I never had any talk about the matter with Outcalt at all.

Q. And that agreement was not in writing was it?

A. No, I think not.

Q. It was an oral agreement, was it?

A. Why the agreement would consist of nothing as I remember it except asking me if I would take real estate, or him saying he would give me that and take the gas stock, and then later making the changes.

Q. They were verbal statements were they not?

A. Yes, sir.

Q. In March, 1893, you testified that Mr. Mosher came to you with this paper and asked you to take it in lieu of the—

1400 and you were asked "Was that an oral agreement" and you said it was. That is true isn't it?

A. I think so.

Q. Well if it was an oral agreement, Mr. Mosher must have been there in person.

A. Have I said he wasn't?

Q. Then I understood you to say you didn't know whether he delivered the papers to you in person.

A. I am talking about the beginning of the thing.

Q. I am referring to your testimony here where you say that he came to you with certain deeds executed—deeds and bill of sale—and he came to you in person and stated to you, as you have testified, that he wanted you to take these deeds and the chattel property instead of the security you had, and that you consented to it and accepted it.

A. That is very true.

Q. How do you reconcile that with the statement that you didn't see the bill of sale?

A. Perfectly so, and you understand it to-.

Q. No, I don't.

A. Well I will explain it to you. You understood from your questions here that this transaction of exchanging real estate for the gas stock covered some little time; the arrangement with Mosher and with me to deliver the one to him and receive the other in lieu of it was the beginning of the thing, and then after that there was no question about it, except he would just bring the one and take the other.

Q. Isn't it true that you testified in this case, that Mr. Mosher came to you with the deeds already executed and the bill of sale already executed signed by Mr. Outcalt, and part of it in Mr. Outcalt's writing, and that Mr. Mosher asked you to take these in lieu of the gas stock, and that he delivered them to you in person in place of the gas stock security?

A. You are speaking of the first time that Mosher came

1401 to me?

Q. Yes, sir.

A. I couldn't say that I did, or that I didn't; I told you that the first visit was to ask if I would make the changes. When he first came and I agreed to it it wasn't supposed or understood by me that there was to be any changes after that in the collateral, but as oppor-

tunity was offered for the sale of some of the property that was given as collateral, he came and asked to have the changes made and they were made.

Q. And isn't it true that at the same time—the time before referred to—that this question was asked: "Was that oral agreement that the deeds was intended as a security made at that time?", to which you answered—"I previously said I had stock security but Mosher brought these to me with the bill of sale, part of them signed by him as I remember, and part by Mosher and Outcalt, asking if I would give up the other security I had and take these in lieu of them and I consented to do it and did it". Did you not so testify?

A. That may be true.

Q. And the question was asked—"Was Outcalt present at that time?" and you answered "No sir, he was not".

A. But I didn't say anything in that——

Q. And then wasn't the further question asked you—"Then the agreement was between you and Mosher alone as to the deeds being held as a security for the indebtedness that they were owing you?" And you answered: "It was an agreement he brought them, part signed by Mosher and part by Outcalt and asked if I would exchange what I had for them, and I consented to do it and did it". Did you so testify at this former trial?

A. Very likely, because that is the fact. It may be some satisfaction to you to know that every piece,—everything I had except one piece was confirmed in me after going through all the processes that the receiver could find to go through.

1402 Q. Are you quite sure of that?

A. I think there was only one piece that was taken away from me.

Q. You are not certain of that are you?

A. I think only one; there may have been two; anyway, everything I got or everything that I took Mr. Thomas, didn't near cover what they owed me.

Q. But Mr. Thompson, isn't this the fact, when we get to that subject, that the lands you succeeded in holding were lands that you had succeeded in conveying to innocent purchasers after you had gotten them?

A. Very likely some of them were transferred.

Q. Now the south half of the northeast quarter and the southeast quarter of 19-11-2 in York county, isn't it true that on May 23th, 1893 you conveyed that land to Alexander M. Landon?

A. Yes sir, and afterwards it came back to me.

Q. You sold it to Mr. Landon for $12,000, didn't you, and he gave a mortgage to you for $4,200, and you assigned that mortgage to the Farmers & Merchants Insurance Company of Lincoln, of which you were president, and then afterwards that mortgage was foreclosed,—that is, not your mortgage but a prior mortgage was foreclosed,—isn't that true?

A. Very likely. But Landon paid I think three thousand dollars, and there was no foreclosure to do anything with Mr. Landon: I tried to get him to keep the place, and told him he ought not to lose the

money he had in it, but he really begged me to take the place back and he says "I can't pay it".

Q. Isn't it true that there was a foreclosure of the Northwestern Mutual mortgage and the property was taken back in the name of the Farmers' & Merchants' Insurance Company, and a deed made to L. M. Wing?

A. Very likely.

1403 Q. Who is Mr. L. M. Wing?

A. He is president of the Coldwater National Bank of Coldwater, Michigan. You spoke of me transferring them to innocent purchasers. The piece of land in Lancaster county, which was the only one that didn't have a mortgage on it, was held by me in my own name until just a few years ago; I must have had it ten or twelve years.

Q. Which piece have you had that long?

A. The piece in Lancaster county; the Outcalt piece.

Q. Isn't it true that that was foreclosed in this case,—was foreclosed in court and you bought it in?

A. Yes sir, it was done in that way.

Q. The same tract of land that you say you held for ten or twelve years.

A. Yes, sir.

A. And afterwards sold it to Dr. Dayton?

A. Yes sir, but this is the fact that all of these processes were taken to establish my right to my claim, and all the money that I ever got out of all the securities that I had didn't cover all that they owed me.

Mr. ROSE: Was the decree of foreclosure in favor of yourself?

A. Yes, sir.

Q. The only land in which you were decreed foreclosure was the Outcalt land; you never foreclosed the mortgage on any tracts of land that you got in York and Hamilton county, did you?

A. My recollection is, and I think I am right, but I may be wrong—but I think not, that the receiver after investigating the situation as it was, and having his attorneys do it, in order to establish the right to the properties up here that I held as security for this note of mine, agreed that certain ones they would take and others I should take, which gave me what was supposed to be property enough to cover the security that I held there as col-

1404 lateral.

Q. Now, Mr. Thompson, isn't this correct, that the only lands outside of Lancaster county, were those that you had sold before the suit was commenced?

A. How would that apply to the Landon place; it was the only one that was of much value?

Q. But isn't that a fact?

A. I don't know as to that, but I do know this very distinctly that I said to Mr. Hayden,—there never was any effort made to hold anything——

Mr. THOMAS: We don't care for any self-serving declarations just now.

A. There was all the frankness possible in dealing with the receiver of the bank, and he was told very frankly that if there was anything here that I was not entitled to he could have it.

Q. Now in regard to the Hamilton county land, Mr. Thompson, isn't it true that Mosher and his wife conveyed to you by warranty deed the north east quarter of 12-12-5 in Hamilton county, the deed purports to be dated January 18, 1893.

A. Only just as a part of this same transaction that I have related to you.

Q. And isn't it true that on March 29, 1893, you sold that same tract of land to Reuben C. Newman and Nancy B. Middleton?

A. I presume, if the record shows that.

Q. I am asking you for the purpose of showing that the deeds that you retained were those that had been conveyed before the receiver suit was begun.

1405 A. There is no way that I could tell about that.

Q. Now these deeds that you got to the York and Hamilton county lands, when were they recorded with reference to the time you got them?

A. That I can't tell.

Q. Who attended to that?

A. Mr. Mullen.

Q. Were the deeds sent up by you or Mr. Mullen, for record?

A. Why there were no deeds handled there that Mr. Mullen didn't have charge of, so far as I know.

Q. Who attended to sending them to the various counties for record?

A. I think Mr. Mullen.

Q. Do you know whether he did or not?

A. Well I feel very positive about that.

Q. Did he take them up personally, or send them up by mail?

A. I wouldn't hardly think he made a trip personally to have a deed recorded.

Q. And he filed the bill of sale, and the chattel mortgage for you didn't he?

A. Yes, sir, I think he did; he had charge of all of those things; if there had been any exception to that rule that he did it all, why it would have been an exception, that's all. I have no recollection of how it was done.

Q. What is your recollection as to whether you knew anything about this bill of sale of Outcalt's before you left for Terre Haute?

A. The only recollection I have as to that I have recited to you.

Q. Well what is your recollection as to the chattel mortgage?

1406 A. Well that I know I knew nothing about.

Q. You knew about the deeds to the York and Hamilton county lands before you left for Terre Haute?

A. I think all of those deeds were prepared before I went to Terre Haute, I don't know; but that transaction was just a running transaction and covered the changing of securities. My thought

was that Mosher had all of these lands up here; I hadn't any idea that he didn't.

Q. Did you record the deed to the Lancaster county land at the same time you did the deeds to the York and Hamilton county land?

A. I have no recollection as to when they were recorded; it is very likely that the one to the Lancaster county land wouldn't be recorded at all, until the end of the thing.

Q. Why would you withhold the Lancaster land from record and allow the York and Hamilton county deeds to be recorded?

A. I presume it was done on request, if it was done that way.

Q. Request of who?

A. I presume of whoever delivered it; if Mosher delivered it, and he no doubt did, if it was done in that way, it would have been done on the request of whoever brought it there.

Q. Isn't it true that Mosher and Outcalt requested that you do not record or file the papers that they gave you in exchange for gas stock, insofar as it affected the Lancaster county property?

A. Well you know Mosher and Outcalt were the givers of that note; they wanted the gas stock for a purpose that they didn't expose to me and I didn't take into consideration what it was. The Outcalt farm out there was the only real estate that he had; I didn't think he had any interest in any of this up here, so if he had,—if Mosher had brought it for Outcalt and asked that it be not recorded why that wouldn't have meant anything to
1407 me at all, because there was a place that to my mind I never thought that he ever expected to lose, and he had his horses out there and they were his babies, and the fact that he would ask not to have that recorded wouldn't mean anything to me.

Q. Isn't it true that when you testified in this bank case that you were asked with reference to these instruments, this question: "Why was that not recorded," and you answered.—"Well they requested me not to record it and for that reason I didn't do it."

A. Well that is covered by what I said.

Q. "But they didn't make a similar request in regard to the other deeds?" and you answered.—"No, sir." Is that true?

A. That would all be covered by what I just said.

Q. Did they ask you not to file that bill of sale for record?

A. If that came with the deed that same thing would apply to that, because that bill of sale, as I tried to make you understand before, is quite a different thing from a chattel mortgage on your household goods, you know.

Q. I think you referred to th-se horses as Mr. Outcalt's pets.

A. He thought quite a considerable of those horses; that is what I say.

Q. They were standard bred trotting horses?

A. They were high bred horses.

Q. He thought a great deal of them?

A. I suppose he thought a great deal of them of course, because he was eternally out there at the farm.

Q. Well didn't he know it would reflect on his credit?

A. Well of course he had to give something as security; I say he had to—he wanted to give something as security.

1408 Q. Isn't it true Mr. Thompson, that Mr. Outcalt was a part owner of a tract of land in York county which was conveyed to you at this time?

A. Not, so far as I know.

Q. Isn't it true that the west half of the south east quarter of 20-15-2 was conveyed to you by Mosher and Outcalt jointly, with their wives?

A. That may have been; that may have been a part of the Small affair.

Q. I understood you to say that he didn't own any other real estate?

A. I said I didn't think he did: he had that farm and I thought that was about all the land he did have.

Q. Isn't it true that the south west quarter of 13-12-2 was deeded to you at this time by C. W. Mosher and R. C. Outcalt and their wives?

A. That may be: I don't know about that.

Q. Then you must be mistaken about Mr. Outcalt not owning any other land.

A. No, I am not mistaken, because I didn't mean to say that I knew that he owned no other land, but meant that a quarter section of land up there with a mortgage on it that might have taken it, and did in many cases, wouldn't mean very much in the way of security. Now Outcalt was never much of a land owner so far as I understood, and Mosher had lots of it, and that was the difference between them. The place that Outcalt had in Lancaster county was a place without any liens against as I thought, and it was good security for his share of that note. I finally sold it for $12,000. But take that and everything else that I got and it didn't quite cover what they owed me.

Q. Isn't it true that several tracts of land in York county, when they were conveyed to you they were conveyed jointly by

1409 Mr. Mosher and Outcalt and their wives?

A. Well if the records show that it is true; but these conveyances I don't presume I ever saw one of them, after the first ones that came to me.

Q. You don't say that you did not?

A. I don't say that I did not, but just in the natural course of the way things were done in my office, it is not to be presumed that I ever saw one of them.

Q. That is your deduction, and not your memory of it?

A. That would be my conclusion.

Q. But your memory at the time you made your garnishment answer in March 1893 would be better than it is now, wouldn't it?

A. Yes, sir, it would be. But as I said a man may speak of things that he does right now, and his right hand in the next office may be the one that does it. A man wouldn't get very far in this world if he tried to do everything himself, with all the intricacies of business.

Q. Those deeds which you made in which you reconveyed some real estate to Mosher and Outcalt, or either of them, where were those executed?

A. I couldn't say as to that.

Q. Do you remember whether they were executed in the bank or in your office?

A. Well I never went to the office to execute any deeds to them, no, sir. My office was in the Burr block at that time.

Q. Hal C. Young was an employee of the Capital National Bank, was he not?

A. Yes, sir.

Q. The Notary Public in the bank?

A. I presum- so.

Q. And didn't he take your ackonwledgments to some of those instruments?

1410 A. I don't think he ever came to do it; I think those acknowledgments were taken like they often are,—the name signed and the acknowledgment put on afterwards.

Q. Do you think that is the way this was done?

A. Yes, sir. I guess they—any of them—do that if they know your signature.

Q. You think you didn't acknowledge them in person?

A. I never acknowledged anything at the Capital National Bank, I feel very confident, because I didn't do my business at the Capital National Bank.

Q. But you were down there frequently?

A. Not very frequently, no, sir, I was not—not very frequently.

Q. That was because your relations with Mr. Mosher were not very pleasant?

A. Well my relations with Mr. Mosher were such that I wouldn't have gone down there and visited with him; if I had had a meeting of some sort down there I would have gone, but I wouldn't go down there to visit with him.

Q. You remember Mr. Hal C. Young was an employee of the Capital National Bank during the entire time of its existence?

A. Well I knew he was there; I don't know how long he was there.

Q. Now, Mr. Thompson, you referred to a room at the back end of the Capital National Bank building, to which Mr. Scott referred in his testimony.

A. Yes, sir.

Q. What do you say was the size of that room?

A. Well I went down there this morning to look that over as well as I could; of course it is merged into a big store there now. The whole banking room was the width of one business block; they may be 22 feet or they may be 25, less the walls of the banking room. This room was back of the lobby that run along the

1411 front side of the counter, it was a continuation of that lobby. Now it couldn't have been more than seven feet wide, and it might have been that long; it might have been a foot or two longer; there is a partition across it at the end of the aisle to make a partition of this room, to partition it away from the aisle.

Q. Isn't it true that there were two vaults at the north end of that room?

A. No, sir.

Q. I mean the south end?

A. No, there were two vaults at the south end of the banking room; one of them was the vault that this room made an entrance to; that room was arranged for people who went into the vault; that was a public safety deposit vault. Every one had a key there that wanted it that was a customer of the bank, and this room was made for people to come there and do the business by themselves, or with anyone else, if they had papers in the vault. Then there was a partition between that room and the banking room, without a door in it.

Q. Was there an open door from that little room into the banking room?

A. I am not certain about that whether there was an opening there. Now that little room, in the very nature of things,—it was a very small banking room,——

Q. You say there were two vaults at the south end of the banking room?

A. One used as a b-nk vault, and one used for the use of the customers.

Q. And those two vaults extended the full width of the banking room?

A. Extended the full width of the banking room, yes, sir.

Q. And the west vault was the one used for the bank books?

1412 A. The west vault would be the one opening out of the banking room, and would be used for the books, papers, and so forth of the bank.

Q. And the other vault was used for the safety deposit.

A. Yes, sir.

Q. And those vaults were each about the same width, were they not?

A. I don't know about that; I would think not, because the safety deposit vault there wasn't a very deep vault; I bought from Hayden for $75.00 all of the boxes that were in that vault, and I now have them in the Lincoln hotel.

Q. Isn't it true that the two vaults were about the same width, and that there was a partition at about half way,—that is about the dividing line of the two vaults, and that that partition made the west wall of that little room, and that the little room extended west beyond the lobby,—that is, that there was inside of the banking room inside the lobby here a counter of about two or two feet and a half?

A. Inside of the lobby?

Q. Inside of the banking room, and there was a counter there of about two or two and a half feet in width, and that this little room extended west beyond that?

A. What was inside of that banking room I don't know, because I never, in all my time in the bank I never was in there.

Q. How do you know the size of it then?

A. I mean I wasn't in where the clerks work; the banking room

was just the size of an ordinary business lot. The lot belonged to Walsh & Putnam. They had three lots.

Q. And what occupied them?

A. Two store- and the bank.

Q. What were the two stores?

1413 A. A drug store and the other was a millinery store.

Q. What was the size of those lots?

A. The whole lot was 75 feet, but the walls themselves wasn't the full depth of the lot because on the back end of this building of Walsh & Putnam, in which the bank was, was a little store with the entry from Eleventh street; these stores, the drug store and millinery store all entered from "O" street. Now what was in the working room there of the bank I don't know anything about, but I am very confident of this that this counter that run along the whole length of this bank clear up near the front extended clear through to those vaults, and the only room there was there that the lobby entered into was the little room that I told you of.

Q. Isn't it true that this little room that I refer to, was sometimes used for small political gatherings?

A. Never to my knowledge; I never was there at a political gathering but there couldn't have been very many politicians in that room at one time.

Q. Are you sure that room couldn't have been as much as eleven or twelve feet square?

A. No sir, it couldn't.

Q. What is the largest you say it might have been?

A. Well I don't see how it could have been, if the lobby was, say seven feet wide, that wouldn't have left any great amount of room for the bank. Now the length of that room might be seven, eight, or nine feet, more or less; it couldn't have been very long, because the room wasn't to be spared, the banking room was crowding everywhere.

Q. What kind of a room did they have at the north end of the building where Mr. Mosher and Outcalt had their desks?

A. Well that was a room that they used there for anything that they had to use a room for.

1414 Q. It wasn't divided off from the rest of the bank?

A. No; if I remember that right it was a room that you could see right down through the bank.

Q. Just a low partition, four or five feet high dividing it from the rest of the bank, or was it divided off with a railing?

A. I was trying to think; I think it was a railing there with a swinging gate in; it seems to me it was, that came out into the lobby.

Q. There was nothing to separate it from the rest of the room, that is, it wasn't enclosed by itself?

A. No, I think not.

Q. Where was it the directors held their meetings?

A. They never held a meeting that I was at that wasn't in the front end of the bank.

Q. When were those usually held?

A. I think they were always held in the evening, as far as I remember they never were held at any other time.

Q. Mr. Thompson, how much money had you on deposit, in your personal account with the Capital National Bank at the beginning of the week of its failure?

A. I can tell you by looking here. (Witness refers to memoranda.) Commencing the 3rd of January I had $40.20.

Q. Beginning that week.

A. Let me read it right on down. On the 4th I was overdrawn $92.01; on the 6th I was over drawn $208.40; on the 15th of January there was $2090.30.

Q. And on the 17th?

A. No 17th here. On the 18th, $41.97; on the 19th, $20.77.

Q. Did the First National Bank of Crete have an account with the Capital National Bank at the time of its failure?

A. I don't know.

Q. Did the Bank at Fairbury?

1415 A. I don't know; I had no control over those accounts at all; nothing to do with them, not a thing in the world.

Q. Now I think you said in your testimony the other day that you gave the same attention and degree of diligence to the Capital National Bank that you did to your other concerns. Is that true?

A. Not exactly that way; that I gave as much attention to the bookkeeping of the Capital National Bank as to anything else.

Q. Didn't you state in your testimony that you gave the National Capital Bank the same degree of diligence and executive ability, as you did your other institutions, of which you were a director?

A. Anyone that I wasn't actively managing, I gave it as much. For illustration, the Aurora State Bank that I was president of, I never gave that any more attention than I did the Capital National Bank.

Q. You didn't give that any attention.

A. The Aurora Bank?

Q. Yes, sir.

A. Oh yes; I went to their meetings as often as I could and when I couldn't I didn't go.

Q. Now in reference to various statements of the condition of the Capital National Bank. When these various statements were made that bear your signature what effort did you make before permitting them to go out in that way to ascertain whether or not they were true?

A. Well my only effort to know the truthfulness of any statement that was ever made there, was simply through the executive committee,—the finance committee and through the officers of the bank.

Q. You never looked over any of the assets yourself?

A. No sir, never.

1416 Q. Never counted any of its money?

A. Never counted any of its money.

Q. Never made any examination into the actual assets at all?

A. No sir, I never did.

Q. Never examined any of the books of the bank?

A. No sir, I never did; there was a committee that always had that in charge, a committee appointed by the directors; a finance or executive committee and the officers of the bank who always did that; I never had anything to do with that; anything on the inside of that bank.

Q. Never looked into the books of the bank?

A. I don't see how a question of that kind can be answered.

Q. I mean you never examined a book of that bank?

A. No I never did; looking into a book is like looking into the Bible, you may look into it and not read it.

Q. You never looked into the Bible much.

A. Well I did a little.

Q. When these statements went out purporting to give the condition of the bank, over your signature, you hadn't at that time any knowledge concerning its actual condition?

A. Nothing at all, except the information I would get from those I had trusted.

Q. But so far as personal knowledge went you knew nothing?

A. So far as personal knowledge went I knew nothing.

Q. And you were aware of that fact?

A. Well there never was a question entered my mind; never has been in anything I was interested in that there could be anything wrong.

Q. Well you were aware of the fact that you didn't really know anything about its condition?

A. It never entered my mind in that way; I thought I did.

1417 Q. But you never made any investigation?

A. How could I make any?

Q. I am not asking you that.

A. I never did.

Q. Then you never could know of your own knowledge what its condition was.—You could know how much cash it had.

A. I could have counted the money, but that wouldn't mean anything.

Q. You could have looked over its Bills Receivable.

A. Why yes, I could have looked over its Bills Receivable and tell that they had eight hundred or two hundred thousand dollars, but that would be all.

Q. But you never did it?

A. No sir, I never did it.

Q. And yet you made these statements in which you stated there are certain amount- of liabilities and assets and cash.

A. I made those statements after the sworn statements of the officers.

Q. Absolutely on the statement of someone who handed you the statement.

A. That is very true.

Q. And you say you have never examined any book of the bank?

A. I never have.

Q. Isn't it true that you examined the Interest book?

A. That is not a book that needs any examination; that Interest book is always a book that just laid there that any officer or director or stockholder that went in there could look into and see what the earnings were; nothing else.

Q. Then you did examine that?

A. No sir, I didn't, because there it would show what the interest was for that day; it was just like the—I don't know what you call the book that you make the daily entry of that kind in lying
1418 on your desk and interest earnings would be $208, and then there would be a line under that, and tomorrow it would be so much and a line under that,—just like a hotel register.

Q. You have examined that book?

A. Well not to examine it; that book was always there so that when you went into the office where Mosher was there, the book was there for anybody to look at, anybody that had the privilege of going into the office, but I never paid any attention to it, only just what it showed there day by day, the same as I would a hotel register to see what people were arriving.

Q. Didn't you testify in the case of Hayden against yourself and others that you had examined the interest book of the bank?

A. There is no testimony that would mean any more of an examination than I have testified to here, because that is all there was of it; you can call it an examination or inspection, or optical illusion if you want to, for that is what it seems to be.

Mr. ROSE: You think it showed earnings that came in from day to day.

A. That is the way it looked.

Q. In one of the questions you answered you spoke of your knowledge of directors' paper that was carried by the bank. Did I understand you to say you didn't know the bank was carrying any directors' paper?

A. Well I don't remember as to what I testified to.

Q. What are the facts?

A. I don't know that I ever said that I didn't know they had any; that might be qualified. Excess directors' paper you mean, or any at all?

1419 Q. Did you know that they carried any large amount of directors' paper?

A. No, I don't think I ever knew that they had any large amount; I would naturally know that they had some, because now and then I had a note of my own in there for a few dollars.

Q. What was the largest amount that you knew of them carrying as directors' paper?

A. I couldn't say as to that.

Q. You say you didn't know that either Mr. Mosher or Mr. Outcalt were borrowing from the bank?

A. I have no recollection of knowing that they were borrowing of the bank; those things, Mr. Thomas, are all things that didn't come under my notice in any way at all.

Q. I want to ask you if you didn't know that they were borrowing money of the bank?

A. Well I could hardly say that I didn't know that they borrowed money from the bank; I couldn't say that I knew that they did.

Q. Did you know that Mr. Holmes was borrowing money from the bank?

A. No, my guess would have been that Holmes never borrowed money from anybody, but he seems to have borrowed a great deal. Mr. Holmes was a very wealthy man.

Q. Did you ever know that Mr. Phillips ever borrowed any money?

A. No I have no recollection of knowing that any of them borrowed any money there.

Q. Did you know that Mr. Hamer ever borrowed any money there?

A. No I wouldn't suppose that he would; he was a very wealthy man.

Q. And Mr. Walsh, did you ever know of him borrowing
1420 any money from the bank?

A. No, I never did; he was considered a very wealthy man.

Q. And that is true of every one of the directors?

A. That they were wealthy?

Q. Yes sir.

A. Yes sir, I think with the exception of Phillips, they were all considered very wealthy men—so considered. Phillips was understood to have less money than the others that were in there, but the directory of the bank were all men that were understood to be possessed of much wealth.

Q. And you didn't know that any of the directors were borrowing money of the bank?

A. I have no recollection of any just now, Mr. Thomas, but I don't think that I knew that they were what you would call chronic borrowers or anything of that sort, if I ever knew anything about it.

Q. Did you ever hear of this concern that is referred to as the Western Manufacturing Company?

A. Yes sir; I knew there was a Western Manufacturing Company; I never knew there were two of them until after the bank failed.

Q. Did you know there was one that Mr. Mosher was connected with?

A. Yes sir, I knew Mr. Mosher was connected with one.

Q. Did you know there was any of the Western Manufacturing Company paper had been discounted by the Capital National Bank?

A. No, I never did.

Q. Did you know that it carried any of the paper of that company in its Bills Receivable?

A. Well I don't know that I would know definitely whether they did or did not. I have got to keep saying to you what I said before;
we might have that in there and it wouldn't concern me at
1421 all because there were men there who were appointed to attend to those things and to look after the welfare of the bank, and with me everything ended there.

Q. Referring to those appointed to look after the concern, you mean the finance committee?

A. Yes, sir, the finance committee and the officers, and that committee was composed,—in the beginning, of Professor Stuart and Mr. Holmes, and later when Holmes died, Dr. Hamer succeeded him.

Q. When did Mr. Holmes die?

A. Well I think he died in 1891.

Q. Was it '90 or '91?

A. I think '91.

Q. Isn't it true, Mr. Thompson that the matter of carrying this Western Manufacturing Company paper was discussed at different times by the directors?

A. No, not to my recollection; never when I was there.

Q. Never with any of them?

A. No, I never discussed it with any of them; have no recollection of ever talking about any of the assets of the bank there except in reference to the Mosher and Stark business and the Small business, and that's about the limit of my knowledge.

Q. You mean the York county matter?

A. Yes sir, and then in the beginning when the Donnell, Lawson & Simpson business came up, when the Capital National Bank began.

Q. These York county loans are the ones you refer to as having been made in the name of E. W. Mosher, who loaned the money and took the notes of the borrowers as collateral?

A. Those are the ones I have reference to; the ones you went over earlier.

Q. Then as I understand, the notes of Ed Mosher were
1422 entered up on the books of the Capital National Bank as a part of its Bills Receivable, were they?

A. Well how they were carried I couldn't say. The arrangement there was as I have before told you, that the money when it was sent to Mosher up there was to be covered by a note from him that was to be endorsed by C. W. Mosher, and then as the money was loaned and paper taken they were collateral,—or whatever was taken, always paper of course—that was sent in to serve as collateral to the note of E. W. Mosher endorsed by C. W. Mosher. That was the instructions but what the fact was I couldn't tell because that gets beyond me again.

Q. That was the instructions of the board?

A. Yes sir, to the president of the bank.

Q. But you don't know in fact whether it was done in that way?

A. No sir, I don't know what was done.

Q. You made no further inquiry?

A. Well that is not a fair way to put it, because if it hadn't been done in that way the finance committee would see that it was reported.

Q. It all falls back on the finance committee?

A. Yes sir, that is what it would do.

Q. These loans that were made there were the means of the accumulation of a great deal of this real estate?

A. That's something I don't know anything about.

Q. Those notes that were taken from the borrower, the men who ultimately got the money, were they simply carried as collateral, or entered by the bank and carried as part of its Bills Receivable?

A. That I couldn't say. That question would come under the direction of the officers of the bank and what the discount committee would agree upon; I presume they would be carried as collateral.

1423 Q. Was that matter discussed by the directory?

A. No, I don't think there ever was any discussion of that. It was to go there to the bank to secure the note that was sent.

Q. Now this committee, Mr. Thompson, that you speak of,—they were a sort of a committee to examine into the paper of the bank were they?

A. Well they had authority and that was their direction and to... office, to examine into everything in the bank; to know that it was run right; that was the duty of that committee.

Q. To run the bank?

A. In conjunction with the officers of the bank.

Q. Well you understand as a matter of fact that the directors are presumed to be the bank and to control the bank, do you not?

Q. Now you recall the matter of the Sherman county matter, or the Hogg matter coming up before the Board?

A. I don't remember anything about it.

Q. Don't you remember of testifying to that in your former testimony in this case?

A. I don't remember anything of it just now. Call my attention to it and I will tell you.

Q. Where the Capital National Bank made a loan and had some litigation over it.

A. I don't recall it at all.

Q. Now you say when the Capital National Bank became such in name that there was a discussion over the Donnell, Lawson & Simpson matter, was there?

A. Yes, sir.

1424 Q. And I think you said that Mosher and Outcalt were to take care of the matter and did it?

A. Well I said that at that meeting they said it didn't belong to the Capital National Bank, the new bank, and that it was a loss; that the bank had failed or something like that and that he and Outcalt would take care of it.

Q. And did they take care of it?

A. That comes again to the committee, because it was arranged that they should.

Q. Didn't you at the former trial of this case, state in substance this, that Mosher and Outcalt were to take care of that and that they did do it?

A. I think they did; I think they took care of that, and I never had any other knowledge of any condition there indicating that they

didn't, and I don't understand why the committee in charge of that wouldn't pay some attention to it, if the record here as I have read it of this last trial would show this fact to be a fact. Now that seems to have gone out of there entirely, as they said it should do, that is, it was taken away from the bank, and then later it appeared in there and I don't know anything about it beyond that.

Q. How about the matter of the Marsh paper. You learned that that Marsh paper was in the bank constantly from the time it was the Marsh National Bank until it failed as the Capital National Bank.

A. I didn't know anything about that. There you have got to call your officers to account again. It seems very strange that even though the immediate officers of the bank wanted to carry a thing for a period of years, that the committee who is placed there for that purpose——

Q. It was a matter of public notoriety that the Marsh companies had failed?

A. I never knew anything about that.

1425 A. (continued). When they failed as I understand it, I wasn't think- about people at home very much; I was tending to my railroad business.

Q. That was just about the time you became interested in the Capital National Bank?

A. When they failed? I don't know.

Q. Just immediately,—the year preceeding the change of the name.

A. I had no knowledge of that.

Q. You knew that prior to that it had been known as the Marsh National Bank?

A. Yes sir I knew that, but I never had any business with it.

Q. And you knew that about ten or eleven months before that it was known as Marsh Brothers, Mosher & Company?

A. Well I don't think I ever knew of that,—anything about that.

Q. You knew that Mr. Mosher and Outcalt had been doing a sort of a collection and banking business before they organized the Marsh National Bank, did you not?

A. W-ll now, I presume I knew it, but it would be like any other little concern there in Lincoln doing business that I might know of, and yet not know anything about.

Q. You were acquainted with both Mosher and Outcalt before you became interested in the Capital National Bank?

A. No sir; I think I knew Outcalt in a way, but again showing perhaps my weakness, and lack of going into things as maybe I sometimes should to protect myself, I never had any acquaintance with those men at all,—that is Mosher at all, and Outcalt I think I had simply known in a way for some little time before that, until Outcalt, I think it was,—it may have been Mosher, came down to my office in the railroad building and told me that they were

1426 going to increase the capital stock in the bank and change its name, and wanted me to take some stock, and after talking

the thing over with them I agreed to do it, and that is the way I went into the bank; I had no acquaintance before that with them, what you would call an acquaintance.

Q. How long did you live in Lincoln prior to that time?

A. I came back to Lincoln from Kansas,—the Sante Fe road—probably in November or December, 1878 and I had been there all the time, when I wasn't away from home, I wasn't like a resident would be, I was a railroad employee and away from home most of the time.

Q. How was it when you became superintendent?

A. I never had any business with anybody up-town in a business way until I went in that bank in 1884; that was the beginning as I remember it of everything of a business character in Lincoln, and then as time went on these other things came to me. Now when that was presented to me they told me who were going in the bank and the question of good faith never entered my mind as a matter of fact when I paid a premium and cash for the stock, and to do what I did I don't think my good faith could be questioned very much; I wouldn't be throwing money into a rat-hole, as that seemed to be, if I had known it.

Q. Do you remember a loan to a man by the name of J. W. Ferguson?

A. Yes sir, I remember Ferguson.

Q. Did you ever know of his dealings with the bank?

A. No sir, not with the bank; I knew of his dealings with me.

Q. You didn't know anything of the bank loaning him money?

A. No I didn't; I didn't know anything except in this way. Now Mosher said to me one time in speaking of Ferguson said "You can do some business there and make you good big
1427 interest on your money if you have got some money you want to let him have." There was some little talk about it at that time and later Ferguson came down to Lincoln and I think I let him have ten thousand dollars, for which he was to pay me 12% interest. That is the only business I had with Ferguson, and it is the only knowledge I had of his doing business with the bank, except that Mosher told me he would give me good big interest if I would let him have the money, and I think I let him have ten thousand dollars at that time. I know I was beaten out of part of it and didn't get it at all.

Q. Now Mr. Thompson, this chattel mortgage that Mr. Mosher gave you on his household goods was given ostensibly to secure, I think, to secure some stock that Mr. Mosher held as trustee for you. Is that true?

A. Mosher was given to hold as trustee twenty shares of the stock of the bank for my little girl, and that is what that refers to, He was the trustee of it until the thing failed and when he saw the fix he was getting in at that time, he made that chattel mortgage, and gave as his reason for it to secure that trust.

Q. Well was Mr. Mosher liable to you for the amount of that stock, Mr. Thompson?

A. Well in a way he was. He accepted the trust, and agreed

that it should be held under the conditions,—those conditions I cannto recite,—I don't know what they were. I never had the stock certificate, that was issued to cover that trust. There was a change in a certificate that I had as I remember it and these twenty shares put in his possession as trustee under some sort of an agreement, as to what he was to do with it, but I can't recall that.

Q. The chattel mortgage provides that he was to hold you harmless on account of this stock, and to pay your daughter $200 a year until she arrived at the age of eighteen and at that time he was to return to you its par value of $2,000 or the stock at your
1428 election. Was that the condition?

A. That probably would be something like the arrangement that we made. Mr. Marquette made that arrangement, I think. It was at the time I had some family trouble and the arrangement was made with Mr. Marquette; it wasn't anything that I made myself.

Q. The chattel mortgage wasn't made then?

A. No, the trust arrangement I am talking about.

Q. The chattel mortgage provided that he was to pay your daughter $200 a year until she arrived at the age of eighteen and at the end of that time,——

A. Well I don't remember about that you know, and I didn't make that deal; it was made by my attorney who was Mr. T. M. Marquette, who is now dead. Now the conditions of that little trust I don't remember about at all.

Q. Well prior to it being transferred to Mr. Mosher you were the owner of that stock?

A. Yes, sir.

Q. And Mr. Mosher was merely to hold it in trust, and to pay your daughter the dividends from it, was he not?

A. Yes sir, that was the trust arrangement. My agreement was that until she reached a certain age she should have the earnings or the revenue or whatever you may call it as Marquette arranged it, from this stock, but it wasn't given to her or anybody else; it was simply placed there and taken from me during this period of time.

Q. Didn't you retain the ownership of the stock, you might say the reversion?

A. At the end of the period of time as I remember it that would have come to me, but the bank failed I think before that period was up. Mosher was obligated to return that to me at the end of that period of time, or its equivalent.

Q. And did you pay the assessment made by the receiver on that stock?

1429 A. No, I did not. I paid the assessment on the ten shares that I had; I paid $1,000 on that.

Q. In your testimony at the former trial of this case did you not testify that you left Lincoln for Terre Haute, Indiana on Tuesday or Wednesday before the bank failed, or maybe a day or two earlier than that?

A. I think I wasn't very definite as to when I did leave; I couldn't quite remember when I did leave.

Q. Wasn't this question asked you at that time: "When did you leave for Terre Haute, Indiana?" To which you answered: "It was probably Tuesday or Wednesday before the bank failed, and may have been a day or two longer than that. Stull and I went there to inspect a gas plant there". Was that your testimony at that time?

A. I think it was.

Q. And during the progress of this trial you have read over your garnishment answer which was made by you in March, 1893, in which you stated it was Saturday afternoon, the 21st when you left for Terre Haute.

Q. And isn't it true, Mr. Thompson that that is the reason that you have testified at this trial that you don't remember when you left for Terre Haute?

A. No sir, that wouldn't be my reason for testifying any differently than what I remember. If I said the first time that I left on Saturday that was probably right, because that was soon after the failure of the bank, and to say ten or twelve years afterwards would be a different thing.

Q. The failure of the bank made quite an impression on your mind did it?

A. Well I would say Yes.

1430 Q. And do you think you could remember how long it was after you left Lincoln until you heard of the failure?

A. I know I heard of the failure in Terre Haute; I heard of it there, but that wouldn't fix the time I left Lincoln.

Q. Nor the time that had elapsed.

A. No.

Q. And isn't it true that at the former trial of this case you testified that the bill of sale from Mr. Outcalt to yourself wasn't known of by you, and wasn't received and you had no knowledge of it until you got back from Terre Haute?

A. I think that's true.

Q. But when you went over your answer in the garnishment matter you learned, during the progress of this trial, that you had there testified that it was delivered to you with the deeds prior to your arrival from Terre Haute?

A. Yes sir, for the reason that I had a talk with Mr. Mullen,——

Q. You are testifying in reference to what your Alter Ego remembered?

A. Yes sir, because he has always had the responsibility of my papers.

Q. And in position to take the blame for anything if it were necessary.

A. No. Mr. Mullen isn't a man that would take the blame for anything that he wasn't responsible for, and you know that and everybody that knows him knows that.

Q. Did you know that the Capital National Bank carried a daily

advertising card in the daily papers of Lincoln during its existence and while you were connected with it?

A. No sir; I would have no recollection as to that.

Q. You have no recollection of seeing any card in which they advertised the bank, giving the name of the directors, and the capital stock and surplus?

1431 A. I wouldn't say that I did or didn't; that would be a matter of advertising and I don't read the advertising very often.

Q. You are a reader of newspapers?

A. I am not a reader of advertisements in newspapers.

Q. And I don't suppose you ever noticed any of the cards in the newspapers?

A. No sir; I have no recollection of noticing any.

Q. And never remember of having noticed any of the published statements of the bank's condition?

A. I have no recollection about the matter.

Q. You don't look at advertising matter you say?

A. I do not; I don't have occasion to read advertisements; I usually know about what I want.

Q. Isn't it true that your eye will catch advertising matter, if you don't make a practice of reading it?

A. It is very likely.

Q. It is likely that you recall of reading advertisements of Peruna in the newspapers?

A. Those matters are all a matter of the general conduct of a bank; something I didn't have anything to do with, the placing of advertisements, and I would have no occasion for reading them.

Q. Now in your testimony at the former trial, you were asked, were you not, this question: "Did you take a mortgage from Mr. Mosher on or about the 27th day of December, 1892?" To which you answered as follows: "Now I will tell you about that. That was while I was in Terre Haute, Indiana, and while I was there it became evident that the bank was going to fail, and they took this chattel mortgage over and gave it to Mr. Mullen, my secre-

1432 tary, and I never knew anything about it until I came back."

A. Very likely I did.—If I understand your question right, then I answered wrong, because that would be impossible. If that testimony read that way it was a mis-statement as to dates; it couldn't have been otherwise.—the 27th of December.

Q. Isn't that mortgage of Mr. Mosher's dated December 27th, 1892?

A. That's very true, but it goes on to state, the question and answer as I understand it that when that mortgage was brought to me it became apparent the bank was going to fail. Is that what it says?

Q. I have read it just as your answer was.

A. Well that is an error of the month, if that is the way it reads. It couldn't have been any other way.

Q. At that same trial was this question asked you: "Mr. Outcalt also gave you a bill of sale dated December 24th, 1892 on a lot of

personal property including some horses and timothy hay and oats and harness and horse boots and sulkies, and a lot of other stuff on a farm about five miles south of Lincoln?" To which you answered: "Yes sir, that was the same time when I was away and given to Mr. Mullen".

A. That is what I testified to at that time that they came in my absence. Mr. Mullen's recollection is that it came with the deed; Mr. Mullen probably had charge of those papers.

Q. And isn't it true that at that former trial you were being interrogated concerning certain real estate that was conveyed to you in York and Hamilton counties, and you were asked this question: "Isn't that deed dated,—the deed to the north-west quarter of 24-9-6, isn't it dated December 27, 1892"? To which you answered "Yes sir it was, and I will tell you why; when Mullen came to have that recorded he found there was no date on it at all, and I re-
1433 member now of his telling me that he put a date on there". Did you so testify at that trial?

A. I remember that Mr. Mullen found a date—a vacant date line at the time he called my attention to those papers and I said I see no reason why he shouldn't fill a date in.

Q. And didn't you further testify in that same answer, "I don't know what date he put on, but there was a date filled in, because there was a date belonged there"?

A. I presume that I did; I should have told Mr. Mullen if he asked me the question, as he seems to have done, if there was no date there to fill it in. It would be immaterial as to what date was filled in I presume if it was nearly correct.

Q. And at that same trial were you not asked the following question by your counsel, Mr. Rose, "And these chattel mortgages Exhibits 1059 and 1060 executed one of them by Outcalt, and one of them by Mosher, you say were executed and left at your office without your knowledge at all". That wasn't answered. Then another question followed that "What is the fact about it?" To which you answered "They were both left in my office in my absence and without my knowledge and very much to my displeasure when I came home."

A. Yes sir, I covered that just as well as I can.

Q. Well you did so answer at that time?

A. I presume I did. That would have been my recollection because of the manner in which those things were handled; I wouldn't be certain now hether that bill of sale from Outcalt came when the deed came or whether it came later.

Q. I will ask you Mr. Thompson, if the instrument I hand you here is your testimony, subscribed by you in the case of Kent K. Hayden against yourself and others in the United States Circuit Court for the district of Nebraska?

A. Is it signed?

Q. I think it is.

1434 A. I presume it is. I would say it was my signature there.

Q. Examine it and satisfy yourself.

A. I think so, although it is not the way I usually write my name. I don't look at the matter there because there is too much of it.

Q. In that testimony or deposition of yours, and on page 7 thereof you purport to give the monthly balances and the notes of the Lincoln Gas Company in the Capital National Bank during the years 1891, 1892 and January 1893, do you not?

A. That is what the heading of it indicates.

Q. Do you recall it?

A. No, I have no recollection of it; that would have been made up by the secretary.

Q. It is incorporated in your deposition?

A. Very likely, but I didn't make it; Mr. Honeywell made that.

Q. And isn't it true, calling your attention to that statement, that it shows that on May 1st, 1891 the Gas company's credit on deposit in the Capital National Bank was $10,532.48?

A. That is what it indicates there, yes sir. My memory of it is that the testimony of Mr. Honeywell here the other day as to the balance on that date shows something over ten thousand dollars; probably the same as this.

Q. Mr. Thompson, you remember of writing a letter to Mr. Mansfield, Mr. Mosher's fatherinlaw, about January 25th, 1893, do you?

A. I presume I did; I tried very hard to get Mr. Mansfield to save the situation there, and I presume I wrote him a letter; I know I went over there as much as two times, and maybe more.

Q. You made several trips back there?

A. I think I did; Mr. Whedon asked me to do it and I did do it.

1435 Q. And in that letter you said—among other things—"I regret exceedingly that I did not see you yesterday, but as soon as things straighten out a little, if you wish, I will come over to Peoria to see you"?

A. Well that would be just about in line with what is developed here,—that is, I telegraphed him in coming west.

Q. And in that letter did you not state as follows, referring to the Farmers & Merchants Insurance Company "At the end of each year I cull out everything that I consider bad so that we are always in first class condition"?

A. Well if I had said that I would have stated facts, because that is the system that I always apply there in the conduct of that company, as I have all of the companies I have been in immediate charge of. We carry no "dead dogs" in our accounts. The reason for that would have been that if Mr. Mansfield had asked me about the company,—he had $25,000 of that stock—that I think was stock that Mosher had put up with him as collateral for some purpose,—he had borrowed considerable money from Mr. Mansfield.

Q. Now you have testified to a ten thousand dollar credit to the account of the Gas company which was being carried in the name of R. C. Outcalt treasurer. I believe you said you went into the bank

on the 30" day of April, 1891 and got a credit of $10,000 and on the day following you took a note of the Gas company in.

A. When have I testified as to that?

Q. Haven't you testified to that?

A. I can say I didn't testify to that because that is not the manner in which that was done. That credit is a credit for a note that was given the Cadiz, Ohio, bank, and the record as shown by Mr. Honeywell the other day and as looked up by Mr. Rose,
1436 and Mr. Mullen, shows that was taken into our account on the first day of May.

Q. Didn't you testify in reference to that same transaction in the Hayden case; do you recall of testifying about that?

A. No, I have no recollection of having done it.

Q. The testimony in that case which I hand you,—does that bear your signature?

A. Yes sir, that is my signature.

Q. And at that time did you not state "On April 30th we received credit for $10,000 at the Capital National Bank and on the next morning I gave this note to cover that credit", and the question was asked "Who signed the note" and you answered "I signed it for the Lincoln Gas Company, by D. E. Thompson, its president". Question: "And has the signature, or part of it been torn off?" Answer: "The signature was torn off when the note was returned paid". Question: "Was there any discount paid by the Lincoln Gas Company on this note, if so, just explain that transaction and how and when it was". Answer: "When we took credit for ten thousand dollars, the next morning after the credit was given us I took this note to the bank for re-discount and our account stood credited with $10,000 on account of this note until the note was sent to Cadiz, Ohio and discounted there, and when the rate of interest that bank charged us on this note was reported back to the Capital National Bank our account was charged with that amount, which was $375 interest on it for six months." Question: "That was on what date?" Answer: "As soon as the returns came from there, probably four or five days". Now were those questions asked you?

A. That would be when the interest was charged.

Q. The $375.

A. Yes, sir.

1437 Q. Do you remember of so testifying in that case?

A. No, I don't remember; but, that no doubt is true, because that is substantially the transaction there; the credit was for a note of ten thousand dollars; the interest was charged when the interest was fixed in Cadiz, Ohio.

Q. Now I want to ask you, Mr. Thompson, if at that same trial the following question was asked you: "I notice that on January 1st, 1886 and January 1st of each succeeding year the deposit seems to be larger than at other times. Will you explain why that is, or the reason for it?" You answered: "The explanation for that is this, in making our annual statements to the State Auditor and to the public, we like to show a fair cash balance, and in order to do that we deposit in the bank, in which we are doing business, some of

our best securities, and take credit for them, and add this credit to our running account, whatever it may be, and in that way show a larger cash balance on the first of January than we would care to carry throughout the year; in other words our cash balance would be enough to take care of our running expenses and pay any losses likely to occur; our assets are always such that if we want to realize money quickly we may do so, but we keep our account pretty closely in interest bearing investments, in order to get our interest and not lose it, as we would if carrying it in the bank."

A. This has reference to the insurance company?

Q. In dealing with the bank.

A. Well this question as you have read it over is just as good as my answer; it is just as good a way as I can put it.

Mr. NORVAL: The question is whether you so testified.

A. I no doubt did.

1438 Q. To what institution did that refer, the Farmers & Merchants Insurance Company?

A. That referred to the Farmers & Merchants Insurance Company.

Q. Are you acquainted with Mr. Dobson, the cashier of the First Bank of Ulysses?

A. I think not.

Q. Don't ever remember of having met him?

A. I don't know; possibly I may have met him, but at this moment I don't recall him.

Q. George Dobson of Ulysses.

A. I don't at this time recall who he is.

Q. I will ask you if you recall having had a conversation with him in the Capital National Bank during the month of January 1893?

A. No sir, I have no recollection of any conversation with him, not remembering him.

Q. I will ask you if during the month of January, 1893, Mr. Dobson was not in the Capital National Bank, in the portion of the room occupied by Mr. Mosher, at which time there were present Mr. Mosher and yourself and Mr. Dobson, and in that conversation you were introduced, I think, to Mr. Dobson, or met him, and Mr. Mosher referred to you as one of the principal stockholders of the Capital National Bank, and a director, and in the course of the conversation between you and Mr. Dobson you talked concerning the bank of which Mr. Dobson was cashier being a correspondent and depositor in the Capital National Bank, and told him at that time that the Capital National Bank was as good as any in the state, and that you were pleased that he was doing business with that bank, or words to that effect, or in substance.

1439 A. I have no recollection of any conversation of that kind; it is hardly a likely conversation, because at that time my interests were practically all in the American Exchange Bank, which was a competitor of the Capital National Bank, and Mr. Mosher would hardly have said in my presence that I was one of the principal stockholders, in view of the fact that I had only ten shares, and

I would hardly have made any declaration, as you say I made, as to the value of the Capital National Bank in view of the fact that all of my interests were elsewhere.

Q. I don't know that you were asked to state specifically with reference to the various statements of the condition of the Capital National Bank, excepting the one of December, 1886, and I want to ask you this: Did you sign a statement of the condition of the Capital National Bank purporting to give its condition under the date of August 1st, 1887?

A. I couldn't answer specifically; I would say this, that any time that ever I attended a meeting of the Capital National Bank, if a statement was sent me later to sign I should have signed it, but I do not remember any of the dates that I signed.

Q. Did you sign one under date of October 2nd, 1890?

A. I would have to give the same answer as to that.

Q. And one of December 19th, 1890?

A. And the same answer as to that.

Q. And did you sign one under date of July 9th, 1891?

A. I would have to give the same answer as to that.

Q. And in the testimony, which I have just shown you, which was taken in the same case of Hayden, Receiver, against yourself and others, did you not there admit that you did sign each of those reports to which I have called your attention?

A. If I knew at that time I had signed them, I should have admitted it.

1440 Q. Is it true that you did at that time admit having signed each of those reports?

A. I don't remember as to that?

Q. I call your attention to question 75 as shown there.

A. This question is "How many", presumably meaning how many did I sign, and I say four, one under date of August 9, one under date of October 2, 1890, one under date of December 19th, 1890 and one under date of July 9, 1891.

Q. That is correct then is it?

A. It probably was as I remembered it at that time. If I was at these meetings and asked to attest these reports when they were brought to me I should have signed them.

Q. There was no meeting of the directors on December 19th, was ther-, Mr. Thompson?

A. December 19th of what year?

Q. Of any year.

A. Oh, I don't know.

Q. How near that?

A. I can't tell you that.

Q. And there was no meeting at any time on October 2 of any year was there?

A. I couldn't answer as to that; my memory is hardly good enough to carry me back to dates and things of that sort eighteen years.

Q. The only meetings that you attended was at dividend declar-

ing times, or did you attend other meetings than at the dividend declaring time?

A. I never so far as I remember, attended any called meeting while I was in Lincoln, nor missed any of the regular meetings, when I was in Lincoln. A man in business in Lincoln would be there the most of the time, but I was in Lincoln comparatively little; my business was of a character that took me away from home most of the time.

1441 Q. In addition to the various interests and matters of which you have had charge, and properties under your control, I think I omitted to ask you if you are not the owner of the Lincoln Hotel and the Capital Hotel at Lincoln, and manage those?

A. No, I have nothing to do with the management of them; I am interested in them; I am a stockholder in them.

Q. You are the largest stockholder in those enterprises, and own practically all of the stock?

Mr. ROSE: That is objected to as immaterial.

Mr. ROSE: Did you have any property of that kind when this bank failed, or for years afterwards?

A. Oh, no, the hotels referred to were acquired since my appointment to Brazil,—on one of my trips home. The Lincoln hotel was in trouble. The Omaha National Bank held a claim against Merkel, who was then operating it, and they came to Mr. Stevenson or Mr. Mullen or both of them with a proposition to buy Markel's claim, and that was the beginning of the matter that put the Lincoln and the Capital hotels in our hands.

Mr. THOMAS: That is all.

Redirect examination.

By Mr. ROSE:

Q. There may be a question or two that I don't think I asked you formerly, that may not be strictly redirect examination. When you signed the four reports during the existence of that bank, to which attention has been challenged on cross examination, or rather when you attested them, you may state whether or not you believed the statements contained in them to be true?

A. Yes, sir, indeed I did.

1442 Q. Now at the meeting of the directors what means did you employ if any, to ascertain the condition of the bank?

A. Well at every meeting at which I was present, a general statement was made by the president of the situation of the bank, and there was always a report of the finance committee of the condition as they found it, and that was the only information I had of the condition of the bank.

The COURT: That was all covered, Mr. Rose.

Q. You spoke of having knowledge of one Western Manufacturing Company. Who was manager of that?

A. D. B. Welch.

Q. What was its business?

A. Manufacturing implements, and I think barrels, out at the penitentiary.

Q. You spoke of Mosher being interested in it; was that the company that Mosher was interested in?

A. Yes, sir, that is all I know of.

Q. Did you ever have any knowledge of Mosher's embarking in the enterprise, the Western Manufacturing Company, on a capital of $25,000 borrowed from the Capital National Bank?

A. No, sir, I had no knowledge of it.

Q. Did you ever know of such a purported institution during the existence of the bank?

A. I never did.

Q. Respecting the order of Mr. Mosher, that Mr. Mosher gave you for dividends on stock in the Lincoln Gas Company, standing in your name. Was that transaction before or after the failure of the Capital National Bank?

A. You say standing in my name?

Q. Did Mosher give you an order for dividends?

1443 A. Standing in my name. You said standing in my name.

Q. Well I meant standing in Mosher's name.

A. That was after the failure of the bank.

Q. Now that is the fact Mr. Thompson, as to whether any of the shares of stock in the Gas company, the dividends of which were involved in the order that you received from Mosher, were actually at that time owned by Mr. Mosher?

A. Well Mosher's claim was that those certificates of stock belonged to him, and it was on that line of reasoning I presume that he gave the order for the dividends, but later a decision of the Supreme Court brought by some one of the holders of one of those certificates, decided that the stock belonged to the people in whose hands it was held as collateral and the dividends belonged with the stock.

Q. Wasn't that held in the case about which you were interrogated of Galva Illinois bank?

A. Yes sir, that is the case.

Q. So in respect to the legal opinion that you expressed about those funds being subject to garnishment as Mosher's funds, you were mistaken about that?

A. Well in saying that they were subject to garnishment,—what I would mean, not being a lawyer, that they were there subject to process; my idea was that they belonged to the man in whose name they stood, but the court decided otherwise,—that they belonged to the man who held the stock.

Q. As collateral?

A. As collateral, yes sir; that is the Supreme Court of this state that rendered that decision.

Q. So you were not held in that case for any portion of those dividends?

A. No, sir, I was not.

Q. During the existence of this bank, did you have any knowledge that the Jones National Bank was a depositor in the Capital National Bank?

1444 A. No sir, I had not.

Q. During the existence of this bank did you have any knowledge that the Bank of Staplehurst was a depositor?

A. No, sir. I hadn't even any knowledge that there was a Bank of Staplehurst.

Q. Now in addition to the interests that you had at risk at the time of the failure of the bank, were you interested, directly or indirectly, in the deposit of the funds of the city of Lincoln, in that bank? If so how?

A. I was one of the signers on the bond, at that time, of the city treasurer.

Q. Did the city treasurer have a deposit?

A. He did.

Q. Who was the city treasurer?

—. Mr. E. B. Stephenson.

Q. Did you have any liability fall on you on account of that?

A. I was one of a number that made up a deficit there that the treasurer was unable to take care of himself.

Q. After this bank failure what was your opinion and belief as to the value of its assets, and its ability to pay out the depositors immediately after it failed?

1445 A. I believed that the bank would almost liquidate the claims against it, from all the information I had.

—and in talking with Mr. Macfarland when he was temporary receiver there, he was of the same opinion.

Q. Did you take any action at that time in the matter of disposing of any claims that you controlled in that bank?

A. The treasurer Stephenson, had something like twenty thousand dollars in there, as I remember it, and he came to me and said that he had been offered by Mr.——

A.—N. C. Brock of Lincoln had offered him seventy five cents on the dollar for his claim, and asked what I thought he should do about accepting it, and I said to him I didn't think he ought to do it; he went away and came again; he came to me several times,—probably three or four—each time rather pressing me to say to him that it would be best that he accept this seventy five cents on the dollar that Mr. Brock had offered him; Mr. Brock had bought some other claims there and paid seventy five cents for them, and each time he came I insisted in my talks to Mr. Stephenson that it would be a loss to him if he accepted that, and that he should stand for what the bank would give him. The outcome of it was that instead of getting seventy five cents, he got seventeen cents and I got the privilege of paying something

1446 on the bond.

Q. In case the claim had been sold for 75c on the dollar had Mr. Stephenson made arrangements by which he could

discharge his whole liability and not let any loss fall on you as bondsman; had that subject been mentioned?

A. Mr. Stephenson said in his conversations with me that if he accepted the 75c he could clear his obligation with the city,——

—that with his own personal funds seventy five cents on the dollar would give him enough so he could take care of the obligation.

The COURT: Why did you stand against that?

A. Mr. Stephenson was a friend of mine, and I didn't like to see him lose any money; Mr. Stephenson has been a friend of mine for many years and I thought in advising him as I did that I was advising him to the end of getting the best results for himself.

Q. Now in respect to the chattel mortgage of Mosher on his household goods to secure the trust obligation, on account of the funds placed with him for the use of your daughter. Did you ever make any claim or exercise any right whatever, under that mortgage?

A. No, I never did.

Q. Did you ever have any part in its execution or record?

A. I did not.

1447 Q. Or filing?

A. I did not.

Q. Did you know of its existence at the time you were in Terre Haute, Indiana, when the bank failed?

A. No, I did not.

Q. Now in respect to the possibility of your looking over the Bills Receivable of the Capital National Bank, I want to ask you, if at any time during the existence of the bank you were acquainted with the signature of F. S. Johnson & Co., or of F. S. Johnson of that firm, of Milford?

A. No sir.

Q. Were you acquainted with the signature of the officers, if any, who had authority to execute promissory notes of the First National Bank of Hastings?

A. No sir, I was not.

Q. Were you acquainted with the signatures of the officers if any, who had authority to execute the promissory notes of the First National Bank of Kearney?

A. I was not.

Q. Were you qualified to go over the Bills Receivable and ascertain whether the notes were genuine or whether they contained any forged instruments?

A. No, I couldn't have known anything of it.

Q. As to the genuineness of the paper.

A. No sir, I couldn't.

Q. Now if I recall correctly the last report that you ever attested on the condition of the Capital National Bank, was of its condition on July 9th, 1891?

A. The reports will show for themselves better than a man's memory, that is, if they're here, but I believe that's true.

Q. You had nothing to do with any report subsequent to that date?

1448 A. I think not.

Q. Up to the 18th day of July, 1891, when the official report of the bank's condition at the close of business on July 9th, 1891, purports to have been executed, had your attention ever been called to any communication of any sort touching the condition of the bank, received from the Comptroller of the Currency?

A. No sir. So far as I recall nothing of that kind ever came to my attention.

Q. The letter which came after that calling attention to the Small and some other matters—two of them which may have come to your attention—only one of them in the record, were of a date long subsequent to that?

A. Yes sir, they were.

Q. When you spoke of the date of the chattel mortgage evidently being a month wrong,—or the bill of sale,—did you know anything about the Mosher chattel mortgage being dated December 27th, 1892, or of any reason why it should bear that date?

A. The Mosher?

Q. The Mosher chattel mortgage on his little animal cage and his boys' pet rabbits.

A. I never knew anything about that as I have testified.

Q. Did you ever make any request for that security?

A. No sir.

Q. Did you ever know anything of the execution of that and delivery to Mr. Mullen?

A. No sir, it was a source of extreme torment to me, and I expressed myself pretty severely to Mr. Mullen when he told me he had recorded it, and I said I wasn't in the chattel mortgage business.

Q. So the matter of whether it was ante-dated, or anything of that sort you would not have any knowledge of?

A. No sir, I wouldn't.

1449 Q. And you never claimed or expected any benefits under it?

A. No sir, I never did; never exercised it in any way, or had anything to do with.

Mr. ROSE: That is all.

Recross-examination.

By Mr. THOMAS:

Q. But Mr. Thompson you were in the chattel mortgage business with Mr. Outcalt were you not?

A. I don't think I would call it that.

Q. Your bill of sale was merely a mortgage?

A. The bill of sale for the equipment that belonged on that farm, as I said to you, *as I said to you* before, was just about as much a part of that farm as your clothes are of you.

Q. Just answer me direct. That bill of sale was merely given you as security; it wasn't an outright sale?

A. That is true.

Q. Then it was in fact a chattel mortgage, was it not?

Q. And the property that was described in that bill of sale was sold by you,—foreclosed and sold and the proceeds, after paying a lot of expenses, applied on your note from Outcalt and Mosher?

A. The property that was included in that bill of sale; I don't remember that it was foreclosed; it was sold in this way. The horses,—I kept them there and they were depreciating in value and costing a lot to keep them, and I think a car load of them was sent to South Omaha and sold to the late Senator Hayward and C. E. Cotton of Syracuse, and the proceeds were credited on my note.

Q. The net proceeds were credited on your note.

A. Yes, sir.

1450 Q. Now referring to these dividends which Mosher placed in your custody; did I understand you to say that the court held that the stock upon which those dividends had accrued did not belong to Mosher?

A. That was the decision of the Supreme Court, yes sir.

Q. Now you say you wouldn't have recognized, or known the signature of the Johnson note if you had seen it?

A. I never had known Mr. Johnson's signature.

Q. Nor would you have known if the signatures to the note of the Hastings or the Kearney bank were the genuine signature of the proper officers?

A. No sir, I never had any way of knowing the signatures of those men.

Q. But you would have known the signature of C. W. Mosher to notes in the bank?

A. Yes, sir.

Q. And you would have known the signature of Mr. Outcalt to notes in the bank?

A. Yes, sir.

Q. And if you had seen notes there executed by Marsh Brothers, or Marsh Binder Company, you would have known that?

A. Yes, sir.

Q. And if you had seen notes in there signed by Donnell, Lawson & Simpson, you would have known something about that?

A. I wouldn't have known their signatures; I would have know what they purported to be; I would have known that they purported to be Donnell, Lawson & Simpson notes.

Q. And you knew that they had failed?

A. I knew that at the time of the organization of the Capital National Bank; that was a subject of discussion.

Q. You knew one E. Hurlbut Jr. Was he an employe of the bank and around there all the time?

1451 A. No, I don't think he was around there, what you would call very much of the time. I always supposed he was collection agent of the manufacturing company, is what I thought his business was.

Q. And if you had seen notes in the bank executed Western

Manufacturing Company, by E. Hurlbut Jr., Manager, you would have known that?

A. Yes, I would have known how they were signed?

Q. And you would have known that they were not signed by the one of which M. D. Welch was manager.

A. Yes sir, I would have known that, because the company of which Welch was manager would probably have been signed by Welch.

Mr. THOMAS: That is all.

Redirect examination.

By Mr. ROSE:

Q. In reference to the taking of the notes of Donnell, Lawson & Simpson out of the assets of the bank that were transferred to the Capital National Bank from the Marsh National Bank, did you at any time receive any information other than what you have stated here as to the character of the securities Mosher and Outcalt alleged to have substituted for them?

A. At the time of the organization, if you may call it that, of the Capital National Bank, as I have repeatedly said before, the Donnell, Lawson & Simpson claim was one that was settled in this way: That that bank had failed, as was said at the time, before the Capital National Bank became a fact, and at that time it was admitted by Mosher that he and Outcalt were responsible for it, and they said they would be responsible for it, and that they had
1452 some bonds and some land,—I think Kansas City water bonds, and it seems to me that they had some land that Donnell, Lawson & Simpson had given them for collateral to cover the claim, and that is the last that ever I knew about it. I never knew anything about it; nothing came to my attention after that; the finance committee never mentioned anything, and I never heard anything after that. It was very much of a surprise to me to find that that thing got back in the bank again after that; I never knew it.

Mr. ROSE: That is all.

Witness D. E. Thompson excused.

1453 Mr. J. K. HONEYWELL, called as a witness on behalf of the Defendants, and being first duly sworn testified as follows, to wit:

Direct examination.

By Mr. ROSE:

Q. Where do you live and what is your business?

A. I live in Lincoln, Nebraska; not much of any business; run a little dairy part of the time.

Q. What was your business in April and May, 1891?

A. I was employed by the Gas company.

Q. The Lincoln Gas Company?

A. Yes sir, at that time I was secretary.

Q. Did you devote your time exclusively or nearly so to the business of the company?

A. Yes sir.

Q. Who run the company's public office; who was in immediate and direct charge of the company's public office?

A. In the collections, and so forth?

Q. Yes sir.

A. I was, and made out the bills.

Q. Who attended to the keeping of the company's books and records and deposits and withdrawals of its funds from the bank?

A. I did.

Q. Where was the company's deposit account kept at that time and what name was it kept under?

A. In the Capital National Bank, by the name of R. C. Outcalt treasurer.

Q. Did Mr. Outcalt have any control over the deposits and withdrawals in that account?

A. Nothing with the withdrawals, or the deposits either.

Q. Did he have authority to sign checks?

A. I couldn't answer that, but he never did.

1454 Q. Did the printed forms of the check in use have any place for the signature of the treasurer, or was it printed on the check?

A. I think it was printed on the check.

Q. Who in the ordinary course of business signed and issued the checks?

A. I did.

Q. Did you keep a complete set of books for the company?

A. Yes, sir.

Q. What books did they consist of?

A. Cash book, journal and ledger.

Q. Did you have a ledger account with the Capital National Bank?

A. Yes, sir.

Q. That is kept on the books of account of the Lincoln Gas Company?

A. Yes, sir.

Q. Are the books here produced being the Cash book "B", Journal "B" and Ledger "B" the original books of account of the Lincoln Gas Company in use in April and May, 1891?

A. Yes, sir.

Q. In whose handwriting are the entries in these books if you know?

A. Mine.

Q. Were they made at or about the date of the transactions therein recorded?

A. Yes, sir.

Q. Were the entries, within your knowledge, correct?

A. Yes sir, I used to take off a trial balance every month. Sometimes I had trouble, but I always get th*h*ough.

1455 Q. The transactions were always correctly entered by yourself and in your own hand?

A. Yes, sir.

Q. And they were transactions of which you had personal knowledge at the time?

A. Yes, sir.

Q. Do those books show continuous dealings of the company with persons generally?

A. Yes sir, but not with the consumers or anything of that kind, or total amount of cash collected and paid out.

Q. Of course these are not the summarized records at all.

A. No.

Q. They are the general books of account?

A. Yes sir.

Q. Show the money borrowed and paid for construction, and the dealings generally with persons other than the mere patrons of the company?

A. Yes sir.

Q. You may refer to the books and state what was the balance of your deposit account with the Capital National Bank as shown by these books of the Gas Company, on the morning of May 1st, 1891.

A. My balance was $10,532.49.

Q. On that day was there a deposit of $10,000,—or was there an item of $10,000 charged by the Gas Company to the Capital National Bank?

A. Yes, sir.

Q. Was there any such item charged against the Capital National Bank on the date of April 30th, the previous day, on your

1456 books?

A. No sir.

Q. Now have you traced through the Journal and records of the Gas company sufficiently so that you can ascertain the source of that $10,000 deposit of May 1st, 1891?

A. Where it came from?

Q. Yes, sir.

A. It was the amount borrowed from the Cadiz, Ohio, bank.

Q. On what?

A. On a six months note.

Q. What bank of Cadiz?

A. The First National Bank.

Q. Do you know through what source that particular note was negotiated?

A. Through either Mr. Thompson, or Mr. Mosher. Of course I couldn't tell that. That part of it, the borrowing of money at that time I had nothing to do with, except to keep the books.

Q. Where notes were forwarded for discount through the Capital National Bank, what would be the course of the transaction, and what would be the authority for you to charge the item up against the Capital National Bank?

Q. You had a record of all that was done in that respect?

A. Yes, sir, all the cash business I had charge of.

The COURT: The objection is overruled.
Plaintiffs except.

A. When they got the money they would notify me.
Q. And then on receiving advice of the credit what would you do?
A. Deposit it in the bank.
Q. Or charge it to them, if they had received it?
A. Yes, sir, charge it to the bank.
1457 Q. Now have you examined the deposit account of the company in the books of the Capital National Bank, as exhibits here in the two books Exhibit X-52 and Exhibit X-54, so as to be able to reconcile your credits with the credits shown in the deposit account on the books of the Capital National Bank?
A. I never examined those books much.
Q. You examined them here this morning?
A. Just a little bit this morning, yes, sir.
Q. Can you find credit for that same item on the deposit account of the Capital National Bank?
A. There seems to be a credit of $10,000.
Q. Under what date?
A. April 30th.
A. And in the same account under date of May 1, 1891, do you find any credit for that item?
A. Don't find any; there's none there.
Q. Now I notice in your own book under the date of May 1st, there is another charge to the Capital National Bank of an item of $5,000.
A. Yes, sir.
Q. Can you identify what that was from those books?
A. Nebraska City National Bank.
Q. What was the source of that?
A. That came from Nebraska City; borrowed of the Merchants National Bank of Nebraska City on six months' time.
Q. On what?
A. On a note.
Q. For $5,000?
A. Yes, sir.
Q. Was there any discount, or interest credited gainst that on your books so as to show what the net balance of that credit would be, after offsetting the discount or interest?
1458 A. Yes, sir, $141.94.
Q. Now have you got the item?
A. Yes, sir.
Q. Were you in error as to the—you were in error were you as to the particular item?
A. Yes, sir, in regard to where it came from. It came from Farce & Leach.
Q. It was a four months' note was it?
A. A four months' note, yes, sir.
Q. What was the discount on that?
A. $141.94.

Q. You may state whether your credited that discount against the charge in the Capital National Bank account?

A. Yes, sir.

Q. And what would be the difference?

A. $4,858.06.

Q. Now in order to reconcile that, at or about that time, see whether you find any corresponding credit in the deposit account on the books of the Capital National Bank here.

A. Yes, sir, there is a credit here of $4,858.06.

Q. Under what date is it entered on the books of the Capital National Bank?

A. May 2nd.

Q. Now under what date did that transaction actually go upon the ledger of the books of the Gas company?

A. April 27th.

Q. No, on the ledger. When was it charged on the ledger to the Capital National Bank. You will have to get your ledger account and see under what date you posted it.

A. May 1st.

Q. And what were the items in your ledger posting under which you posted that item,—what were the items of charge and credit?

1459 A. Charged with $5,000 and they're credited with $141.94.

Q. Does that reconcile your credits,—did that reconcile the two books in respect to those credits?

A. Yes, sir.

Q. You may state whether the charge on your books of the $10,000 to the Capital National Bank referred to, was for a bona fide deposit in that bank?

A. Yes, sir.

Q. And was the note which was the source of that credit afterwards paid by your company?

A. Yes, sir.

Q. When was it paid?

A. It was paid on November 2nd, 1891.

Q. Have you any memoranda that will identify the particular manner in which it was paid?

A. Paid by check.

Q. Drawn in favor of whom? You have your stub here so you can identify it?

A. Yes, sir, there it is right there.

Q. To whom did you draw the check—through whom was it paid?

A. The Capital National Bank.

Q. You have the stub here for inspection,—you don't have the original check?

A. I don't know whether it is or not.

Q. Now I will hand you Exhibit "as" and ask you if that bears your signature?

A. Yes, sir.

Q. Does that show the printed form of check that was in use in the account with the Capital National Bank?

A. Yes, sir.

Q. Is that the same check form that was in use in 1891?

1460 A. Well I would think so, unless there was some checks printed for '91, but ordinarily I think it was the same thing.

Q. Does that show the form in which the checks were signed?

A. Yes, sir.

Q. And shows the form in which it bore the name of the treasurer?

A. Yes, sir.

Q. That indicates the method of withdrawals from that account?

A. Yes, sir.

Q. Did any check actually bear the signature of R. C. Outcalt for any withdrawals so far as you know?

A. Never.

Mr. ROSE: We offer that in evidence, merely to illustrate the form of check.

Mr. THOMAS: We object to it for the same reason that counsel on the other side objected to the card we offered yesterday merely to show the form.

Objection overruled.

Plaintiffs except.

Exhibit offered is received in evidence.

The Lincoln Gas Company. No. 5256.

LINCOLN, NEB., Jan. 20, 1893.

Pay to the order of B. & M. Freight $80.70/100, Eighty 70/100 Dollars.

To Capital Nat'l Bank, Lincoln, Neb.

R. S. OUTCALT, *Treasurer.* J. K. HONEYWELL, *Secretary.*

Exhibit as.

Endorsed: For Deposit in First National Bank, Lincoln, Neb. For Credit of C. B. & Q. R. R. Co. Grantee and Assignee of The B. & M. R. R. R. in Neb. M. Scott, Agent.

[Stamp:] (1. Paid through Lincoln Clearing House Jan. 21, 1893, to First National Bank.)

1461 Q. And so long as Mr. Thompson was president of that company did anybody else actually make withdrawals of funds from the Capital National Bank?

A. No, sir.

Q. Did you have charge of the pass book of the Gas company at the time the bank closed?

A. Yes, sir.

Q. Do you have the pass book that was used at the suspension of that bank?

A. Yes, sir.

Q. Did you have it balanced under the date of the suspension by the persons in charge of the bank?

A. I think the Receiver done that; McFarland or some of his clerks.

Q. Is this the original pass book that was used at the close of the bank?

A. Yes, sir.

Q. What was the last deposit in that bank?

A. On the 21st we deposited $488.85, that was the last; it seems to me that was on Saturday before the bank closed; that is my recollection of it.

Q. The 21st.—was there any deposit there on the 19th?

A. Yes, sir.

Q. What was the deposit on the 19th?

A. $1,452.53.

Q. Was there any deposit there on the 17th of January, 1893?

A. Yes, sir. $1,292.99.

Q. Then in closing out the account did you charge to the Capital National Bank the outstanding checks that were returned?

A. Yes, sir.

1462 Q. And what was the balance of your ledger account against the Capital National Bank when you included those items that had been returned?

A. $13,520.82.

Q. Did you credit up some items that you had previously charged in your book, after that, or not?

A. You mean where people got scared and brought their checks in?

Q. Yes, sir.

A. Yes, sir, there seems to be two accounts of that kind. $36.30, and the other for $9.00.

Q. Does that make a little variance between your account at the close of the month and theirs on January 23rd?

A. Yes, sir, it would make $45.00.

Mr. ROSE: That is all.

Cross-examination.

By Mr. THOMAS:

Q. You have no personal knowledge as to how that account of the Gas company was carried on the books of the Capital National Bank?

A. No, sir, I had nothing to do with their books.

Q. And you don't know how it was carried there?

A. No, except in the name of Outcalt as treasurer I think.

Q. What makes you think that?

A. Because it was on the pass book, and I am not sure but what he made that out; I am not positive of it.

Q. All the checks that were issued for disbursements on account of the Gas company were issued by you?

A. Yes, sir, with a few exceptions, when I was away.

Q. Aside from that you always attended to that?

A. Yes, sir, every one; I don't think there is a scratch in that book that I didn't put in.

1463 Q. You made all the collections?

A. I had charge of them.

Q. You made the deposits in the bank?

A. Yes, sir.

Q. And bills and things of that kind you paid by these checks?

A. Checks, or cash, whichever happened to be convenient; mostly checks.

Q. Those checks were not signed by Mr. Thompson?

A. No, sir.

Q. None ever signed by Mr. Thompson?

A. Only what he issued himself.

Q. But those were very few and at long intervals?

A. I don't remember but one space when he done that, and that must have been at the end of the month and there wouldn't be much to pay anyhow. I remember of being in Colorado at one time and Homer had charge of the office—that's my son—and I think there were some bills paid. There may have been other occasions, but I have no recollection of them.

Q. You were quite a heavy stockholder in the Gas company yourself?

A. Oh some.

Q. About how much stock had you in the Gas company at this time?

A. Well I think I had a couple of hundred shares at the time we sold out; possibly more than that,—not much though. I can't remember distinctly, but I had some from 1890, I guess, somewhere along in there.

Q. And of course you don't know of your own knowledge just what was done with that account on the books of the Capital National Bank?

A. No, I had nothing to do with that, except what I saw there this morning.

1464 Q. And Mr. Outcalt was treasurer of the company during these periods to which you have testified?

A. Yes, sir.

Q. And if any entries were made on the books of the Capital National Bank you wouldn't necessarily know that,—in fact you wouldn't know it at all unless you examined the books of the Capital National Bank?

A. Yes sir, and I never examined them until this morning.

Q. When you made a loan of the Capital National Bank, how would you do that,—you would execute a note?

A. When I would make a loan?

Q. Yes sir,—I mean the company.

A. Credit bills payable and charge the bank.

Q. That is you would make out a note and take it over to the bank?

A. No. I never made the note out; had nothing to do with that part of it at all.

Q. I mean the note was made out anyway, and you took the note to the bank?

A. No, they attended to that themselves.

Q. Who would?

A. Either Mr. Thompson or Mr. Mosher. I think mostly Mr. Mosher.

Q. Was Mosher also a stockholder in the Gas company?

A. Yes, sir.

Q. Pretty heavy stockholder?

A. Pretty heavy.

Q. About how much stock had he?

A. Oh, I would say two thousand shares,—something like that.

Q. How heavy a stockholder at that time was Mr. Thompson?

A. Well I would want to be within reason,—I would say two or three hundred shares.

Q. Was Mosher ever president of the company, or an official?

1465 A. Vice President.

Q. And sometimes he would negotiate these loans for the Gas company, would he?

A. Yes, sir.

Q. And sometimes, Mr. Thompson would?

A. Well he and Mr. Thompson together, I think they generally consulted, but possibly not always. They kept the thing going with money until we sold our bonds and just as soon as the bonds were sold and the money came in then I paid off these notes.

Q. Those bonds were not sold until 1892?

A. Something like that; we were doing a great deal of construction work, and was at a heavy expense.

Q. That construction work was in 1892?

A. Well it commenced in 1890.

Q. The bond issue to which you refer was in 1892?

A. I think they were mostly sold in 1892.

Q. Those were sold by Stull Brothers, weren't they,—negotiated?

A. A great many of them.

Q. Along about March 29th, 1892 Stull Brothers negotiated $24,750 of bonds for the company didn't they?

A. Whatever it shows there; they made numerous sales.

Q. Is that correct?

A. Yes, sir.

Q. And on about March 31st, 1892 Stull Brothers sold $50,000 more of bonds for you?

A. Yes sir.

Q. And on April 1st, Stull Brothers negotiated $50,000 more in bonds?

A. Yes, sir.

Q. And on April 7th, Stull Brothers negotiated $38,000 more of bonds for you?

1466 A. Yes sir.

Q. And on April 13th, Stull Brothers negotiated $10,000 more of bonds for you?

A. Yes, sir.

Q. And April 25th, Stull Brothers negotiated $25,000 more of bonds for you?

A. Yes, sir.

Q. And April 28th, Stull Brothers negotiated a $1,000 bond for you?

A. Yes, sir.

Q. And May 4th Stull Brothers negotiated $11,000 more of bonds for you?

A. Yes, sir.

— —— —.

A. I didn't borrow the books.

Q. When did you get these books Mr. Honeywell?

A. Got them in the room there this morning.

Q. How long since you have been connected with the Gas company?

A. October 1900, I think.

Q. Eleven years ago?

A. Something like that. Ten years last October.

Q. And do you know where these books have been?

A. I don't know where they have been, but I have got a guess a coming.

Q. I would like to have your guess.

A. I think they were in the possession of the Gas company.

Q. The present corporation?

A. Yes sir.

Q. Of which Mr. Armstrong is president?

A. Yes, sir.

1467 Q. They have been in Mr. Armstrong's possession?

A. I think so naturally,—that is, in the possession of the Gas company.

Q. Well Mr. Armstrong is now president?

A. That's right.

Q. And they have been in the custody of that company?

A. Yes sir.

Q. And who directed you to come here as a witness,—who requested you to come here as a witness?

A. Mr. Mullen told me.

Q. As representing Mr. Thompson?

A. I think so.

Q. Did he tell you that he had the books of the old company here?

A. I think so.

Q. I believe you said the period during which these notes were given the company were doing some heavy construction work. Were they constructing a part of the plant?

A. No, mostly new.

Q. Rebuilding it, and that was the occasion of your borrowing money at that time?

A. Yes sir.

Q. And you were borrowing pretty heavily during these periods?

A. That's right, until we got returns from the bonds.

Q. What is this entry here on the Journal, "Cadiz note" under May 30th, 1891? What does that indicate?

A. It would indicate the interest that we paid.

Q. Was that the interest on the Cadiz note?

A. I would think so.

Q. That was interest on that note. Was that the $10,000 note to which you have referred?

A. I expect it is.

1468 Q. Is that what it was?

A. I think so.

Q. That was on the $10,000 note?

A. Yes, sir.

Q. And you spoke of another item there in which it appears the books of the Capital National Bank show a credit for $4,858.06. You say that credit grew out of a note of $5,000 that was negotiated or rediscounted by Farson, Leach & Co.?

A. Yes, sir.

Mr. ROSE: You mean rediscounted?

A. No.

Q. The note by your company,—you gave it to the Capital National Bank and took credit and they sent it to whoever ultimately got the note, was that it?

A. Yes sir.

Q. Who was it, this firm of Farson, Leach & Company?

A. Yes, sir.

Q. Were they at Chicago?

A. That is my recollection, that they were bankers of Chicago. It may be New York for all I know.

Q. And is that the same matter that is referred to in the entry on your ledger under May -st, Bills Payable $5,000 debit?

A. Yes sir, that has been deposited with the bank.

Q. That is a charge to the Capital National Bank of $5,000?

A. Yes, sir.

Q. And on the Journal under date of April 27th, 1891 is a charge to the Capital National Bank,—Farson, Leach & Company, $5,000 isn't there?

A. Yes sir.

Q. That note that was given for $10,000 bore eight per cent interest, didn't it?

A. On the Cadiz Bank, eight per cent.

1469 Q. And at that same time the bank,—or your Gas company had a certificate of deposit on the Capital National Bank for $25,000 bearing 6% interest, as shown by your entry on your books of July 29th, '81, that's true?

A. Yes sir, I think so.

Mr. THOMAS: That is all with the understanding that we can have access to the books.

Redirect examination.

By Mr. Rose:

Q. Was this Gas company financed in any degree out of the Capital National Bank funds, or by the Capital National Bank?

A. No sir, only by Mr. Mosher and Mr. Thompson.

Q. Who was an officer of the company.

A. Yes, sir.

Q. Your notes to other payees were charged to the bank when the funds came in from time to time?

A. Yes sir.

Q. And funds at time were derived from the negotiations of notes for larger sums were they?

A. Yes, sir.

Q. You spoke of Mr. Mosher negotiating notes. Do you remember about the loans from the Penn Mutual Life Insurance Company of Philadelphia?

A. Not particular, except I remember that they were pretty large sum.

Q. Do you remember who negotiated those?

A. I rather think Mr. Thompson had more to do with that than Mosher, although I wouldn't want to swear to that.

Q. Do you remember who endorsed the notes?

A. Mr. Thompson did.

Q. Now when large sums came in advance there to prepare for future work what did you do with the funds,—did you leave
1470 them all in open account, or try to get interest on them?

A. Well I think we tried to get interest once or twice; I don't think we had occasion to get much interest; I don't think the sum was large enough, but what we had a place to put it right away.

Q. Were there some large loans made from the Penn Mutual?

A. Yes, sir.

Q. What I wanted to get at was, when you made those large loans until you had an actual call for the disbursement of the funds, did you leave them lie idle in your open account?

A. I think they were nearly always,—I see one place we had loaned out $25,000 but I had forgotten about that. We had taken a certificate of deposit there for $25,000 on one occasion. We used that money and drew it all in $5,000 and $10,000 at a time,—that certificate of $25,000 we drew that at three or four different times.

Q. Your record here is correct as to all those transactions?

A. Yes, sir.

Q. And all made by yourself?

A. Yes, sir.

Q. And at the time you had personal knowledge of the transactions, and knew they were correct?

A. Yes, sir.

Q. Did you make a bona fide deposit for that certificate of deposit, or put the funds in the bank for it?

A. It must have been transferred from one account to the other.

Q. But did the money go into the bank for every credit that you actually used?
A. Yes sir.
Q. Did it always go in?
A. Yes sir.

Mr. ROSE: That is all.

1471 By Mr. THOMAS:

Q. That certificate of deposit of $25,000 was in July, 1891, and that was a year prior to the issuing of any of those bonds, wasn't it?
A. Yes, the bonds I think was sold mostly in 1892, but they were issued in September, 1891.
Q. Didn't actualy get any proceeds until the bonds were sold, did you?
A. I know but we had other sources of getting money without borrowing the money.
Q. How many shares of stock were owned by Mr. Outcalt?
A. Nearly as much, but not quite, as Mosher.

Witness excused.

* * * * * * *

1472 Mr. E. B. STEPHENSON, called as a witness of behalf of the defendants and being first duly sworn testified as follows, to-wit:

Direct examination.

By Mr. ROSE:

Q. Where do you live and what is your business?
A. I live in Lincoln, Nebraska, and my business is I am financial correspondent for the Northwestern Mutual Life Insurance Company of Milwaukee.
Q. Were you city treasurer of Lincoln at the time of the failure of the Capital National Bank in 1893?
A. I was.
Q. State whether or not Mr. Thompson was one of your bondsmen?
A. He was.
Q. At that time were you a man of any considerable pecuniary resources?
A. No; I had some good property, a residence and some Lincoln lots, and some lands in the state.
Q. Did you have a deposit in your official right in the Capital National Bank at the date of the suspension, and if so how much?
A. The Saturday preceding the failure of the bank at the close of business in my office as city treasurer I had $21,560.39.
Q. Now was the subject matter of your liability for that fund mentioned at or about that time, the time of the failure, between you and Mr. Thompson?
A. Yes, sir.

Q. Did you in conjunction with Mr. Thompson take any action in respect to the disposition of your claim against the bank after the failure of the Capital National Bank, and if so state what the transaction was.

1473 A. Well soon after the failure of the bank I called on several of my bondsmen that were bankers in Lincoln, among them were Mr. Thompson, and advised with them as to whether or not I had not best accept an offer of seventy five cents on the dollar for an assignment of my claim against the Receiver of the Capital National Bank; those I called upon were Mr. Thompson, Mr. E. E. Brown, Mr. John H. Ames, Mr. Harvard, and Mr. J. D. McFarland.

Q. I think it will probably not be material what the others advised, but you may state what action was taken by Mr. Thompson, and what course was pursued on his advice?

A. I called on Mr. Thompson, with the others, several times; not less than four times, and advanced what arguments I had in my judgment about accepting the offer of seventy five cents on the dollar for the claim; if I may state the reason for that was the gossip I heard about the streets; I had heard that Mr. Morris Humphrey, one of the Humphreys in the hardware business had a claim of several thousand dollars which he sold to N. C. Brock for seventy five cents on the dollar, and I called upon him, —he was a very careful business man and a heavy depositor there and I felt I could advise with him and did, and he advised me to accept 75c on the dollar; he said if it was his claim he would do it, and I mentioned that fact to the people I talked with. The last time I called on Mr. Thompson I told him I was disturbed and really thought I was right, that I had better accept the offer for the claim, and that if I did I could pay out myself and escape criticism as one would for having public moneys on deposit, and have it tied up in the bank, and apparently lost,

1474 and I really desired to do it. Mr. Thompson, with more anger than he ever displayed before or since in talking to me about anything, said that I ought to have more sense and more patience than to listen to gossip on the street about the failure of the Capital National Bank, and its assets and capabilities for paying out, and that he thought I ought not to suffer that loss; that if the bank's affairs were handled properly there were ample assets there to pay the depositors. As I say after the fourth time talking with Mr. Thompson and the other bondsmen I never again raised the question. About a year or nearly a year after that I became advised there was going to be a pretty serious loss fall on me because the bank wouldn't pay out. The reason for that if I may state,—my reason for it——

Q. And did you then use your own property as far as you could?

A. Yes sir.

Q. And after doing that did you have to have assistance from your bondsmen?

A. I deeded in trust to my bondsmen all the real estate I had, and I raised what cash I could. Mr. Thompson and the rest contributed about—between five and six thousand dollars in cash, and with the credits that the city allowed me on account of clerk hire and interest on deposits that I should have, we balanced the account, and I as-

signed the claim against the Capital National Bank to the city of Lincoln, and the city now has it; but in that manner we paid the whole amount over.

Mr. Rose: That is all.

1475 Cross-examination.

By Mr. Thomas:

Q. You ultimately paid it all yourself?

A. In that manner we paid it all.

Q. Did the bondsmen suffer any loss ultimately on account of your stewardship?

A. I don't know Mr. Thomas, whether or not the trusteeship has been entirely disposed of. The real estate I gave my bondsmen at that time was not considered very valuable; it was during the panic; some of it was sold and some of it has been paid, and some of it has been retained. I am inclined to think there is a quarter section of land that the trustee held and it increased considerably in value, and if so they're entirely paid.

Q. Who was the trustee?

A. Mr. C. D. Mullen, a particular friend of mine.

Q. And is it your belief and impression now that the property you turned over to your bondsmen has been sufficient to reimburse them for all the money they advanced to the city?

A. I think so.

Q. Mr. Stephenson, you are one of the stockholders in the Lincoln Hotel company with Mr. Thompson and Mr. Mullen?

A. Yes sir.

Q. And have been associated with Mr. Thompson for a number of years?

A. Yes sir.

Q. You are one of the largest stockholders in the company aren't you?

A. In the hotel company?

Q. The second largest stockholder?

A. No, I own a quarter interest in it; Mr. Thompson owns a half interest in it.

1476 Q. And you have been interested with Mr. Thompson for a number of years in various enterprises haven't you?

A. I have been in a small way, been in three or four that Mr. Thompson has been a large stockholder in.

Q. And your personal relations with Mr. Thompson and Mr. Mullen has been very close?

A. Exceedingly close.

Mr. Thomas: That is all.

By Mr. Bishop:

Q. Mr. Stephenson, I call your attention to certificate of Capital Stock of the Capital National Bank, No. 27, in the name of R. E. Moore in Exhibit No. X-27, and will ask you to look at the face

of the stock, and also at the assignment on the back of it and state if you know whose signature is upon the assignment.

A. The face of the certificate is signed by R. C. Outcalt and C. W. Mosher, and the assignment on the back of the certificate is made by R. E. Moore.

Q. Are you acquainted with the signature of Mr. R. E. Moore?

A. Yes, sir.

Q. Then turn to similar certificate, No. 82 and observe the face of it and the signature on the assignment on the back and state whose are the signatures, if you know.

A. The signatures on the face of the certificate are those of R. C. Outcalt and C. W. Mosher, and on the back of the certificate that of R. E. Moore.

The COURT: What is the date of the assignment?

Q. That assignment is September 3rd, 1891; they're both on the same date.

1477 Q. Then Mr. Stephenson, I call your attention to six receipts and ask you if you were acquainted with the writing of Mr. Mosher?

A. I was.

Q. Whose writing constitutes the body of those receipts, if you know?

A. I couldn't state positively; it's a long time since I have seen Mr. Mosher's writing that I know of, but my recollection is, and belief is that he did the writing on each of these certificates; it looks like his work, all of them.

Exhibit "AW" identified.

(Six receipts.)

Mr. BISHOP: The defendant Hamer offers in evidence the two certificates numbered 27 and 82.

Received in evidence without objection.

(Originals on next two pages.)

Mr. BISHOP: I offer in evidence Exhibit "AW".

By Mr. THOMAS:

—. Those are not signed by anybody, but simply a rubber stamp signature, isn't it? That is, the words "Capital National Bank, Lincoln, Nebraska," are made by a rubber stamp?

A. Yes sir. As I understand it I was questioned as to the handwriting with a pen.

Q. You didn't refer to the signature?

A. I didn't understand the question to cover the signature.

Q. Well the facts are in each case, as to each of these six papers that are identified as Exhibit "AW" they're simply a rubber stamp signature, that is, the words "Capital National Bank, Lincoln,

1478 Nebraska" are made by a rubber stamp?

A. Yes sir.

Q. And of course it is impossible for you or anyone else to say

who placed the name "Capital National Bank, Lincoln, Nebraska" on that purported receipt?

A. No, I don't undertake to say who did that.

Q. Were you acquainted with Mr. Mosher during his life time?

A. Yes sir.

Q. Did you ever have any business with him so you are familiar with his writing, other than his signature?

A. Yes sir, I have seen letters, and oh,—I think I used to—he was quite energetic in politics and I think I have seen resolutions and things of that sort, and he used to address letters to the state treasurer's office about taxes and things of that sort; I frequently saw his writing.

Q. Calling your attention to receipt dated "10/1-1884" do you think that is Mr. Mosher's writing?

A. Yes, Mr. Thomas, I think it is.

Mr. Thomas: We object to the exhibit offered as incompetent, irrelevant and immaterial; no foundation laid, and not relevant to the issues.

Objection overruled.

Plaintiffs except.

Exhibit "AW" received in evidence.

(Copy follows) p. 1403.

1479 *Certificate of Stock No.* 27.

The Capital National Bank of Lincoln, Neb.

No. 27. 10 Shares.

This is to Certify that R. E. Moore, is entitled to Ten Shares of One Hundred Dollars each of the Capital Stock of the Capital National Bank transferable only on the books of the Bank in person or by Attorney on the surrender of this certificate.

Witness the Seal of the Bank and the signatures of the President and Cashier this first day of Sept. A. D. 1884.

[SEAL.] R. C. OUTCALT, *Cash'r.*
C. W. MOSHER, *Pres't.*

Shares $100 Each.

Endorsed: For value received the undersigned hereby sell assign and transfer unto —— —— — Shares of the Capital stock of The Capital National Bank of Lincoln, Nebraska, and do hereby constitute and appoint —— —— my true and lawful attorney irrevocable, for and in my name and behalf to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said Bank.

In witness whereof I have hereunto set my hand this 3rd day of Sept. 1891.

R. E. MOORE.

[In pencil across face:] Cancelled.

(Here follows certificate of stock No. 82 of the Capital National Bank of Lincoln, Neb., marked page 1480.)

STATE OF NEBRASKA

THE CAPITAL NATIONAL BANK OF LINCOLN, NEB.



No. 82

5 Shares

Cancelled

This is to Certify that R. E. Moore is entitled to Five Shares of **ONE HUNDRED DOLLARS** each of the Capital Stock of **THE CAPITAL NATIONAL BANK** transferable only on the books of the Bank in person or by Attorney on the surrender of this Certificate.

Witness the Seal of the Bank and the signatures of the President and Cashier this 1st day of July A.D. 1886

Seal

R. C. Outcalt Cash.r C. W. Mosher Pres.t

STATE JOURNAL CO. LINCOLN, NEB.

SHARES $100 EACH.

FOR VALUE RECEIVED the undersigned hereby sell, assign and transfer unto_____Shares of the Capital Stock of The Capital National Bank of Lincoln, Nebraska, and do hereby appoint, constitute and appoint

_____

my true and lawful attorney irrevocable, for and in my name and behalf to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said Bank.

IN WITNESS WHEREOF I have hereunto set my hand this 3rd day of Sept. 3,1891.

(Signed)

R. E. Moore.

1481 EXHIBIT A. W., 6 REC'TS.

Oct. 30, 1884.

Received of E. P. Hamer Six Hundred Dollars final payment.
$600.00.

CAPITAL NATIONAL BANK,
Lincoln, Neb.

10/1, 1884.

Received of E. P. Hamer Five Hundred Dollars for stock.
$500.

CAPITAL NATIONAL BANK,
Lincoln, Neb.

Aug. 30, 1884.

Received of E. P. Hamer Five hundred Dollars on stock being 80%.
$500.00.

CAPITAL NATIONAL BANK,
Lincoln, Neb.

7/31, 1884.

Received of E. P. Hamer Five Hundred Dollars 3rd assessment.
$500.00.

CAPITAL NATIONAL BANK,
Lincoln, Neb.

June 30, 1884.

Received of E. P. Hamer Five hundred Dollars 10% assessment on stock of —— ——.
$500.00.

CAPITAL NATIONAL BANK,
Lincoln, Neb.

May 31, 1884.

Received of E. P. Hamer Twenty five hundred Dollars being 50% subscription to stock of —— ——.
$2500.00.

CAPITAL NATIONAL BANK,
Lincoln, Neb.

1482 Mr. C. E. YATES called as a witness on behalf of the defendants and being first duly sworn testified as follows, to wit:

Direct examination:

By Mr. BISHOP:

Q. What is your name?
A. Charles E. Yates.

Q. Are you one of the defendants in this action?
A. Yes, sir.
Q. Where do you live, Mr. Yates?
A. Lincoln, Nebraska.
Q. How long have you lived there?
A. Since '77.
Q. Continuously?
A. Yes sir.
Q. What has been your business up to a short time ago?
A. Railroad man.
Q. What was the character of your business, what did you do?
A. Superintendent of the Telegraph for the Burlington.
Q. When did you begin to work for the Burlington railroad?
A. I started in '63 in Burlington, Iowa.
Q. At what sort of work?
A. I started in as operator and freight clerk at Ottumwa, Iowa.
Q. When you came to Lincoln what kind of work did you do?
A. Dispatcher, and Superintendent of Telegraph.
Q. Did you remain Superintendent of Telegraph for the Burlington until 1896?
A. Until 1905.
Q. Did that cover the period that Mr. Thompson was superintendent?
A. Yes sir.
1483 Q. And the construction of the lines that he has referred to?
A. Yes sir.
Q. What in a general way was the character of your work as superintendent, and as to having to be away from home to do that work.
A. I superintended the construction of new lines and repairs and at one time had charge of the operators, but that got to be too heavy and I gave that up.
Q. How about your work requiring you to be away from home?
A. I was away about three fourths of the time.
Q. Were you interested in the Capital National Bank at Lincoln?
A. Yes sir.
Q. Were you a stockholder in that bank?
A. Yes, sir.
Q. When did you become a stockholder in that bank?
A. I have got a little memorandum here,—I think it was June 1st 1884.

(Witness refers to paper.)

Q. What amount of the capital stock of that bank did you take at that time?
A. I took fifty shares.
Q. Did you pay the full par value of that stock at the time it was issued to you?
A. Yes sir, I paid a premium.
Q. Whom did you pay for that stock?

A. C. W. Mosher.
Q. In the bank?
A. Yes sir.
Q. And right over the bank's counter?
A. Well I suppose so; I sent him a check.
Q. On a deposit that you had there?
1484 A. Yes sir.
Q. And the amount of the check at the time?
A. I won't say positive whether it was a check there, or the First National Bank.
Q. The point was you had the funds on hand and transferred them to pay for that stock.
A. Oh yes, yes sir.
Q. Did you ever afterwards acquire more stock?
A. Yes sir.
Q. Of the Capital National Bank?
A. Yes, sir.
Q. When was that?
A. The next was July 1st, 1886; I got 25 shares then.
Q. Was that the time that the capital stock of the Capital National Bank was increased?
A. Yes, sir.
Q. Did you pay the full par value of the stock?
A. Yes sir.
Q. And paid it to the Capital National Bank?
A. Yes sir.
Q. And did you af-erwards acquire any other stock besides that?
A. Yes sir, I have taken it up when it was offered to me. The next was July 9th, '88.
Q. How much stock did you acquire then?
A. I got 33 shares.
Q. From whom did you get that?
A. I don't remember.
Q. What did you pay for it?
A. One thirty five.
Q. And did you actually pay for that stock?
A. Yes, sir.
1485 Q. Did you acquire any other besides that?
A. Yes sir, January 28th, 1889 I bought five shares.
Q. From whom did you buy that?
A. From Mrs. J. E. Baum, Omaha.
Q. What did you pay for that?
A. One forty.
Q. Did you actually pay the full amount of one-forty for that stock?
A. Yes sir.
Q. Did you own any other stock now, besides those?
A. No sir.
Q. Did you retain any or all of that stock up to the time of the failure of the Capital National Bank?

A. I did.
Q. All of it?
A. All of it.
Q. Were you assessed by the United States Government, or the Comptroller of the Currency for your stock holding,—on all of that stock you have described?
A. Yes sir.
Q. What amount was assessed against that stock?
A. Well I had 113 shares, and it was assessed at par, that would be $11,300, and then I had to pay a little interest.
Q. Did you pay the full amount of that assessment to the Receiver?
A. Yes sir.
Q. And interest?
A. Yes sir.
Q. When the Capital National Bank was organized as such I will ask you Mr. Yates, if you took any part in the meetings by which you and the other gentlemen became directors in that Capital National Bank?
1486 A. No sir.
Q. Were you in attendance at the meetings in which the assets of the Marsh National Bank, or the Marsh Brothers, Mosher & Company were discussed, as to whether they should be taken into the Capital National Bank or not?
A. No sir, I wasn't.
Q. Did you have any knowledge then or afterwards of the assets of either of those institutions going into the Capital National Bank?
A. No sir.
Q. Did you know anything about a committee being appointed to look into the matter of assets, consisting of Mr. Holmes, and Stuart and Mosher?
A. No sir.
Q. That matter of the transfer of assets and the starting of the Capital National Bank was not a matter that was discussed in any meeting that you attended?
A. No sir.
Q. That is, you didn't attend the meetings which took up that matter?
A. No.
Q. Did you know at the time of your becoming associated with the Capital National Bank, or subsequently, of an account known as the Donnell, Lawson & Simpson account?
A. No sir.
Q. When did you become a director of the Capital National Bank?
A. Well I don't remember now; it was shortly after I bought the stock; I was made a director while I was out on the road as I remember.
Q. And found it out when you returned?
A. Yes, sir.

1487 Q. That was sometime during the summer of 1884?
A. Yes sir.

Q. Did you ever know, or have any intimation of this account of Donnell, Lawson & Simpson ever being in or counted among the assets, or shown upon the books of the Capital National Bank?

A. No sir, I never knew nothing about it.

Q. Did you have any knowledge at the time you entered the bank or afterwards of paper or bills receivable or assets purporting to be the paper of Marsh Brothers, or any of the Marsh manufacturing companies?

A. No sir, knew nothing about it.

Q. Never knew that any of the paper of those institutions were in the Capital National Bank?

A. No sir.

Q. Did you know at any time of an account going into the Capital National Bank from those older institutions knows as Stock & Bond account, and purporting to represent assets derived from any of those institutions or Marsh Brothers, or of Mosher, Marsh Brothers and Company?

A. No sir, I did not.

Q. In regard to those matters of assets and the books showing assets, what experience did you ever have, Mr. Yates, in keeping books of any institution?

A. I never kept books; don't know anything about it.

Q. Did you ever have any experience in examining or going through a set of books of a bank, or any other such institution?

A. No sir, I couldn't do it.

Q. Did you ever examine into or look over the books of the Capital National Bank while you were connected with that bank, or during its history?

A. No sir.

1488 Q. Had you ever had any education in bookkeeping, or keeping accounts?

A. Well a certain kind of an account; I couldn't keep no regular books, as double entry or double ledger and so forth.

Q. Never had any of that?

A. No sir.

Q. Would it have been possible for you with your experience during the time you were connected with the Capital National Bank to take up its set of books and ascertain the condition of its accounts or of any of its assets or liabilities from the books themselves?

A. No sir, couldn't do it.

Q. Did you know of an individual deposit ledger or book kept in that bank?

A. No sir, never saw it.

Q. Did you know of a general balance book kept in that bank?

A. Never saw it, no sir.

Q. Did you know of the cash journal, or cash book?

A. Didn't know anything about it.

Q. What then would you say as to your ability, if you had under-

taken to go through the books of the bank to ascertain either its assets or its liabilities?

A. I couldn't do it.

Q. There was an account also under the name of Exchange account, which was kept in the Capital National Bank, and said to have resulted in losses; did you know anything about that account, or what constituted it, or of any losses arising from it?

A. No sir, I did not.

Q. When you became a director of that bank who were elected officers of the bank, as president and cashier?

A. Why the election was made before I—well I wasn't
1489 present but I understood that Mr. Mosher and Outcalt was elected president and cashier.

Q. When you first became interest- in that bank and went to it to see about its business, who were acting as president and cashier of the bank?

A. Mr. Outcalt and Mr. Mosher.

Q. Had you any acquaintance with either of those men?

A. Well not very much; I knew them by sight.

Q. Which one did you know better?

A. I knew Outcalt.

Q. You knew Outcalt better?

A. Yes sir.

Q. Did you know anything about the standing and reputation of those men at that time?

A. Well only from hearsay, that's all.

Q. Did you make inquiry to find out?

A. Why Captain Phillips recommended Outcalt to me.

Q. What was the standing and reputation of Mr. Mosher and Mr. Outcalt in the community at the time you became associated with that bank?

A. First class.

Q. Their personal reputation you mean?

A. Yes sir.

Q. For honesty and good character.

A. Yes sir, good character.

Q. What was their reputation as to being men of affairs and having money?

A. Well they were counted quite wealthy.

Q. Both of them?

1490 A. Yes sir, and good business men.

Q. Did you know Professor Stuart and Mr. Holmes, who were on the discount committee of the bank?

A. Yes sir, I knew them.

Q. Did you know them at the time you became associated with the bank?

A. Yes sir.

Q. What was their standing for character and probity, and as to being men of affairs and of wealth in that community?

A. None better in the city; they stood high.

Q. Did you attend the meetings of the directors of the Capital National Bank; explain how that was, and when.

A. When I was in town, if I was notified or heard that there was a meeting I always attended.

Q. Where were those meetings held?

A. Why in the bank parlor there, as you might call it, of the Capital National Bank,—the front room.

Q. Which room do you mean by the front room?

A. The one that faced on "O" street.

Q. At the north end of the banking room?

A. Yes sir.

Q. Did you attend a good many of the meetings of the bank?

A. I always attended every one when I could; when I was in town.

Q. At what time of day were those meetings held?

A. Always held at night.

Q. All of the directors' meetings you ever attended were at night?

A. Yes sir.

Q. And what do you mean by that?

A. Why they would convene about seven or eight o'clock.

Q. After the evening meal?

A. Yes sir.

1491 Q. Did you attend any meetings of the directors where dividends were declared?

A. Yes sir.

Q. What was the plan or method by which you arrived at declaring dividends, and upon what showing were the dividends declared?

A. Why Mosher would pass a paper showing the earnings and expenses, and would take out a certain amount for a surplus and the balance would be passed to dividends, and then a motion would be made what to do with it; a motion would be made declaring a dividend of a certain percent.

Q. Was a dividend ever declared at any meeting which you attended where that showing wasn't made?

A. No sir, it was always made.

Q. Was there a dividend declared at any time when there wasn't a showing of net earnings out of which to make a dividend?

A. No sir.

Q. Was there ever a dividend declared, that some amount wasn't passed to surplus?

A. Always passed to surplus.

Q. Did you ever at any of those meetings have any intimation of any facts other than what was made to you by the officers of the bank as to the earnings?

A. No sir.

Q. State whether you had any belief in those reports of the condition of the bank, and that net earnings were really in ex-

1492 istence and something to pass to surplus at the times of those dividends?

A. It was believed or else the directors wouldn't have made it.

Q. I am asking you what your belief was.

A. I wouldn't have made it.

Q. What was your belief as to the net earnings

A. That the report was true.

Q. What was your attitude towards Mosher and Outcalt throughout your entire connection with the bank as to belief in their honesty and integrity and the truthfulness of the statements they showed you at dividend periods, and as to their conduct of the bank's business?

A. I believed they were all right; I believed everything they said was true.

Q. Had you anything or any intimation to discredit their statements, or their conduct of the business of the bank?

A. No sir.

Q. Did that confidence in their honesty and integrity exist througout the existence of the bank?

A. Up to the time the bank failed, yes sir.

Q. When were you ever advised of any discredit, or anything that would throw discredit upon them?

A. Never heard anything.

Q. Until the failure of the bank?

A. No sir.

Q. Now during the existence of that bank did you sign any of the reports, which were made to the Comptroller of the Currency?

A. Those that were brought down and attested by Mr. Mosher and Outcalt, I signed.

1493 Q. Were you ever present at a meeting that you remember, where any of those reports were discussed before they were made?

A. No sir, never.

Q. The reports which you signed or attested, did you ever sign or attest any of them in the bank yourself?

A. No sir; they were always sent to my office.

Q. How were those reports signed, or otherwise authenticated at the time they were brought to you for attestation?

A. Why a notary would attach his seal to Mr. Mosher'- and Mr. Outcalt's signature-, and sometimes there would be two or three names ahead of mine.

Q. Did you ever sign or attest a report which was not already sworn to by either Mr. Mosher or Mr. Outcalt?

A. No sir, never.

Q. What reliance if any, did you put in the truthfulness of the statement on account of its being sworn to by the managing officers of the bank?

A. Why I had confidence in both of those gentlemen, Mosher and Outcalt.

Q. What influence did that have upon your attesting the report?

A. Why it made me sign it; I had confidence in them or else I wouldn't have done it.

Q. Did you ever go through the books of the bank, or take any part in observing them in the bank room where the clerks operated

upon them or where the business of the bank as to bookkeeping and handling its papers was being carried on?

A. No sir, I didn't; I never was behind the counter.

Q. Where the clerks and tellers and workmen of the bank were at work.

A. No sir; I never examined a book.

Q. What reason was there for that?

1494 A. Well I had confidence in the people that was in there, and I knew nothing about the books.

Q. And wouldn't be able to ascertain from them if you did do that?

A. Oh, no. No sir.

Q. Did some of the directors of the bank live in Lincoln?

A. Yes sir, they all lived there.

Q. So that their business was there constantly?

A. Yes sir.

Q. Was it know- to the rest of them that your business was that of a railroad man and required to be out on the line?

A. Well I should judge so; everybody knew that I was a railroad man and what my duties were.

Q. Did you at any time during the existence of the bank and up to the time of its failure know or have any intimation that any statements or items contained in any reports given to the Comptroller of the Currency, and attested by you were untrue in any respect?

A. No sir.

Q. Did you ever take any part in making or causing to be made any of the entries upon the books of the bank directly yourself?

A. No sir.

Q. Did you ever have any knowledge or intomation that any of the entries made upon the books of the bank were untrue?

A. No sir.

Q. And did not represent the actual transactions of the bank?

A. No sir.

Q. What knowledge, if any, did you have of Mosher and Outcalt borrowing money from the bank?

A. I didn't know anything about it; never heard of it; if I had I would have raised a row.

1495 Did you borrow from the Capital National Bank at any time?

A. I made some small loans there, yes sir.

Q. And do you remember when, or what years that those loans were made?

A. No sir, I don't.

Q. What if anything was done by you to pay those loans to the Capital National Bank?

A. I paid them as soon as I could to stop the interest; I paid them within a month or two.

Q. Well was there any of the loans that you ever made at the Capital National Bank which you did not pay?

A. No sir.

Q. In full.

A. No sir.

Q. Did you know of Mr. Holmes one of the directors borrowing as high as seventy thousand dollars from the bank?

A. No sir, I never did.

Q. When you speak of Mosher and Outcalt borrowing; did you know that they borrowed above the ten per cent of the capital of the bank?

A. No sir, I knew nothing about it.

Q. That is what you refer to when you say you didn't know of their borrowing?

A. Well borrowing in a large amount.

Q. Now it has been shown in evidence here about some transactions carried on by E. W. Mosher, in loans made in York and Hamilton counties,—transactions in which his paper was taken into the bank. Did you know anything about those loans, or the transactions of E. W. Mosher?

A. No sir.

Q. Did you ever know of his paper being taken into the
1496 bank?

A. No sir.

Q. Or his being given credit there?

A. No sir.

Q. So that the E. W. Mosher business you didn't know about as it occurred?

A. No sir.

Q. There has another transaction been shown in the testimony here of Mr. Small, and notes of Small taken into the bank; did you know about the loans made to Mr. Small, or any of his credits in the bank?

A. No sir.

Q. That transaction you didn't know about as it occurred, nor afterwards?

A. No sir, knew nothing about it.

Q. There was a letter from the Comptroller of the Currency dated February 16th, 1892, which mentioned some of these items, and that letter purports to bear your signature. Do you remember of having signed that letter?

A. No sir, I don't.

Q. There is a meeting of the directors reported in the minutes of date February 20th, 1892 when that letter was said to have been discussed. Do you have any recollection of being present at that meeting?

A. No sir, I wasn't.

Q. Do you know of the minutes of that meeting, or any others of the directors ever being read over at subsequent meetings?

A. They never were read in my presence.

Q. It has been shown here that there were dealings of the bank in which it is claimed there was a loss, and credits taken to Mosher and Outcalt unjustly, concerning the Relief fund, which the state

furnished to sufferers in the drouth. Did you know anything about the handling of that Relief fund?

1497 A. No sir.

Q. Or anything about the disposal of that fund, or how it was withdrawn from the bank?

A. No sir.

Q. Did you know that any of the dealings in that fund resulted in credits to Mosher and Outcalt, either justly or unjustly?

A. Knew nothing about it.

Q. There is shown to have been handled in the bank paper of the Western Manufacturing Company, signed by E. Hurlbut. Did you know of a Western Manufacturing Company?

A. Well I knew of the so-called company down there that Mr. Welsh was with, and a man by the name of Barton; he was there first and Welch took his place, but I never knew anything about it personally.

Q. Where do you mean,—at the penitentiary?

A. Yes sir.

Q. That was an actual company that did business?

A. Yes sir, oh, yes.

Q. A manufacturing company.

A. Why Welch used to make barrels. Whether he made anything else or not I don't know; I never was down there.

Q. Did you ever have any knowledge or intimation of the existence or operation of a company known as the Western Manufacturing Company, in which Mr. Hurlbut was manager?

A. No sir, I knew nothing about it.

Q. And Mr. Charles W. Mosher was president?

A. I knew that one company, but I didn't know who the president was.

Q. Well did you know of a company of which Mr. Mosher was president, and which was said to have begun its business on a capital of $25,000 borrowed from the Capital National Bank?

1498 A. No sir, I never knew anything about that.

Q. Did you ever know or have any intimation of paper or notes or other obligations signed by that company, by E. Hurlbut, Junior, as general manager or otherwise, being taken into the Capital National Bank and carried as assets of the bank?

A. No sir, knew nothing about it; I never knew Mr. Hurlbut.

Q. You never knew him?

A. No sir.

Q. Mr. Yates, did you keep a deposit in the Capital National Bank, personally?

A. I did.

Q. How long,—for what time?

A. Why ever since I was connected with the bank as a stockholder.

Q. Up to the time of its failure?

A. Yes sir.

Q. How much money did you have on depopsit at the time of the failure of the Capital National Bank?

(Witness refers to paper.)

A. I had $3,063.90,—no, excuse me. I had $3187.94.

Q. Was that account a continuous one throughout the existence of the bank?

A. It was, yes sir.

Q. Increasing and decreasing with the transactions in your own business?

A. Yes sir.

Q. When had you put any money in the bank just before its failure?

A. Why a very few days before.

Q. What day was it?

A. Why it was on the 16th.

Q. Of January?

A. Yes, sir.

Q. 1893?

A. 1893.

1499 Q. What amount did you put in the bank on that day?

A. I put $3,063.90.

Q. And that remained there until the failure of the bank?

A. Yes sir.

Q. Would you have retained your stock and made deposits in that bank throughout its history from the time you became connected with it, if you hadn't had confidence in the integrity and honesty of the management of the bank by Mr. Mosher and Mr. Outcalt?

A. No sir.

Q. Did you know anything about the plan to increase the capital stock of the Capital National Bank referred to in the testimony here as an effort to raise the capital to one million dollars?

A. Well only when I was in the bank there once,—I guess it was a directors' meeting, why they sprung the proposition.

Q. Who did that?

A. Why I suppose Mosher,—he was always talking.

Q. What was your attitude on that proposition of increasing the capital to a million dollars?

A. I was opposed to it.

Q. What was your reason for being opposed to it?

A. Why there was no demand for the money; didn't think they could loan it to good advantage; I didn't think we could loan it in Lincoln.

Q. At any meeting of the directors or officers of the bank that you attended was that matter ever discussed and authorized by anyone?

A. Not in my presence, no sir. At that meeting it was set down on.

1500 Q. What meeting do you refer to?

A. That I was present about increasing the capital to one million dollars.

Q. Was that a meeting of the stockholders?

A. Why I suppose so.
Q. A stockholders' meeting.
A. Yes sir, and it was opposed and nothing was done.
Q. You say at that meeting it was denied.
A. Yes sir.
Q. And no proceeding or action was taken to authorize or permit any such campaign as raising the capital to a million dollars.
A. No sir.
Q. Were you against it at that meeting?
A. I was.
Q. And did you ever attend any other meeting when that question was up?
A. No sir.
Q. Either a formal meeting of the board of directors or stockholders or otherwise?
A. No sir.
Q. State what, if anything, you ever did to countenance or authorize, permit or sanction the sending out of correspondence, or any representations looking towards the increasing of the capital stock of the Capital National Bank to one million dollars, or any other sum.
A. I didn't know it was done.
Q. And you had no part in any such?
A. No sir; I didn't know it was done.
Q. Did you ever send or permit anyone else to send any letters or prospectus or any literature looking towards the increasing of the capital stock of that bank?
1501 A. No sir.
Q. To a million dollars or any other sum.
A. No sir.
Q. This is said to have occurred in 1890 or 1891. Did you ever see or know of the existence of any letter or prospectus or literature being sent out or handled for the increase of the capital stock of that bank?
A. No sir.
Q. What did you ever do to authorize Mr. Mosher or anyone else acting for the bank, or for you, to send out any such literature or statements of any kind concerning the increase of the capital stock?
A. I never authorized him to do it.
Q. Nor knew of it?
A. No sir, nor knew of it.
Q. It has been said here by Mr. Jones that late in September or early in October of 1890 that he met in the offices of the Capital National Bank at Lincoln, Mr. Outcalt and Mr. Walsh and yourself with regard to his taking stock in the Capital National Bank growing out of that proposed increase of the stock. Did any such transaction ever occur with you Mr. Yates?
A. No sir.
Q. Were you ever present at the time stated, or at any other time?

A. No sir.

Q. When Mr. Jones came to report to you and the men named that he had decided not to purchase any stock, referring to the stock of the Capital National Bank?

A. No sir.

Q. And were you ever present when he reported that he had decided not to purchase the stock, and the three men present, including yourself were talking and trying to induce him to

1502 change his mind and to make the purchase of stock?

A. No sir.

Q. Did you or anyone else, in your presence, ever make any such statements concerning his purchase of any stock in the Capital National Bank?

A. No sir.

Q. And did you, or anyone in your presence, try to induce him to change his mind and to purchase the stock in the bank?

A. No sir.

Q. Did any meeting ever take place in the Capital National Bank when Mr. Mosher and Outcalt, and Jones and yourself were present?

A. No sir.

Q. Or, Mr. W*la*sh in the company?

A. No sir.

Q. In September or October of 1890 did you know, or had you ever known Mr. Jones?

A. No sir.

Q. Have you seen him here in court during the trial now?

A. He was pointed out to me here, the first time I ever saw him.

Q. Did you see him during the trial of this case in 1902?

A. No sir, he was sick then; they took his deposition down to the house; I didn't go down; I didn't see him.

Q. Did you have any acquaintance with or ever have any conversation with Mr. Jones up to the time of the failure of the bank at all?

A. No sir.

Q. And didn't know him at all?

A. No sir.

Q. Did you ever hear any such conversation with regard to Mr. Jones taking stock or trying to induce him to take stock with any person in the bank at any time?

1503 A. No sir.

Q. In the presence of Mr. Mosher, and Outcalt and Walsh, or whoever the person was, and yourself?

A. No sir.

Q. When you were here at the former trial or at any other time in the progress of this litigation, did you see the letters which are said to have been written to the Comptroller of the Currency and signed by you and the rest of the directors?

A. No sir, I did not.

Q. So you have had no opportunity to identify the signature

of yourself, or the other directors on either of the letters that were sent to the Comptroller?

A. No sir.

Q. Either that of February 23, 1892, or of September 19, 1892.

A. No sir.

Q. Do you remember the location of the room in which the Capital National Bank did its business?

A. Yes, sir.

Q. And the way the room was divided up?

A. Yes, sir.

Q. Have you noticed the plat that Mr. Thompson used in his testimony here?

A. No sir, I didn't.

Q. Do you remember which way, or where in the banking room was the lobby, the part of the room open for the public?

A. Well they had two openings.

Q. What part of the room was open to the public; whereabouts was it?

A. Well one on "O" street and one on Eleventh street.

Q. Those were the entrances, you mean?

A. Yes sir, the principal opening was on "O" street.

1504 Q. At the diagonal corner of the building?

A. Yes sir.

Q. And where was the other entry?

A. What they called the back entry on Eleventh street.

Q. Farther south from the main entry?

A. Yes sir.

Q. Now what part of the room did those entries go into?

A. Why they went into the lobby.

Q. That was open for the public?

A. For the public, yes sir.

Q. What was there on the west side of that lobby?

A. On the west side was the clerks.

Q. Do you mean the railing, and the desks in the bank?

A. Yes, sir.

Q. With the windows at which business was done.

A. Yes.

Q. How far did that grill and the windows extend south with regard to the entrance on Eleventh street?

A. It was a short room; I should judge it went back there——

Q. Did the desk and the lobby go as far back as the entrance from Eleventh street?

A. Yes sir.

Q. Any farther?

A. No sir, not by my memory.

Q. About even were they?

A. Yes sir.

Q. Now immediately south of that Eleventh street entrance and going off from the lobby what other room or arrangement was there?

A. Why a little room there for the safety deposit boxes, or men that patronized them.

Q. Where was the door that entered that little room?

A. Right in the lobby.

1505 Q. Went from the lobby into the little room.

A. Yes, sir.

Q. And what was there on south of the little room?

A. Why there was a little room there with a desk and a chair, and then came the safety deposit boxes.

Q. And that ended the bank room?

A. Yes, sir.

Q. What did you say there was in that little room entering off of the lobby?

A. Why there was a little table and chair for people that wanted to get their boxes out and open them there securities,—to have things kind of handy.

Q. About how large was that little room?

A. Why it was a small room I should judge about six by seven.

Q. Feet?

A. Yes sir.

Q. Was there room in there for a meeting of four or five or six men?

A. Not unless they moved out the furniture and stood up, no sir, there wasn't.

Q. What was the purpose of that little room?

A. Why it was Mosher's scheme to have a line of safety deposit boxes, and it would help the bank, and it was a very nice thing to give to customers free of rent.

Q. How did they get into it?

A. Each person had a key.

Q. Key to what?

A. To the door which went into this room that went into the safety deposit boxes.

Q. A key from the lobby into the little room?

A. Yes sir.

Q. Did that door lock?

1506 A. Yes sir.

Q. Automatically?

A. Yes sir.

Q. Now during your experience with the bank did you ever attend, or know of there being a meeting of the officers or stockholders, or others interested in the bank, being held in that little room?

A. No sir, it would be impossible.

Q. Where were the meetings of the people interested in the bank held?

A. On the north end.

Q. Did you ever attend or know of a meeting being held in that little room at which Mr. Thompson was present?

A. No sir.

Q. Did you know that the statements which you attested in sub-

stance were reported or published in the newspapers at about the same time the report was sent to the Comptroller?

A. No sir, I didn't.

Q. You didn't know that that was required, nor done?

A. No sir.

Q. Now state what, if anything, you ever knew during the time you were a director of the bank, of printed slips purporting to contain or represent the assets and liabilities of the Capital National Bank, ever being published or sent out from the bank to any of its correspondents,—the Jones National Bank, or any of the plaintiffs here, or other people?

A. I knew nothing about it; didn't know it was done.

Q. State what, if anything, you ever knew about business cards being made purporting to show the assets and liabilities of the Capital National Bank, and its officers and directors, being published or sent out to any of the people in the state, or the correspondent banks of the Capital National Bank?

1507 A. I knew nothing about it.

Q. Did you ever take any part in preparing or authorizing the preparation of any such statements or cards?

A. No sir.

Q. Or in sending them out?

A. No sir.

Q. Did you ever know that it was done?

A. No sir.

Q. State what if anything you ever had to do with, or knew about such cards or statements being published in any of the German papers or Lincoln?

A. Knew nothing about it.

Q. Do you read German?

A. No sir, I don't.

Q. Mr. Yates, referring to these printed copies of what seemed to be the statements of the assets and liabilities, and to the cards, was there ever any meeting when you were present that the printing and sending out of those cards was under discussion or authorized or permitted?

A. No sir.

Q. Did Dr. Hamer ever attend any meeting or be present at any time when that question was up?

Q. When you were present?

A. No sir.

Q. Did you ever see or know anything about the letter of the Comptroller of the Currency to the bank, or to Mosher, of date September 8th, 1891?

1508 A. No sir, not that I remember of.

Q. Mr. Yates, did you know that the Jones National Bank, or the Staplehurst Bank, or the Utica Bank, or Thomas Bailey were depositors in the Capital National Bank at the time of the failure, or at any time?

A. No sir.

Q. Now did you know who examined the books for the Federal government during the time you were interested in the bank?

A. K. K. Hayden was one; whether Mr. Owen was there or not I don't know, and then there was Mr. Griffith.

Q. About how long a time was Mr. Griffith the examiner for that bank?

A. Well for several years; up to the time of the failure; when he started in I don't know, but he relieved K. K. Hayden. He was with the State National Bank as cashier.

Q. Where did Mr. Griffith live?

A. At Wahoo.

Q. What opportunity did you have to see him?

A. He was all over the state, and I used to see him quite often on trains.

Q. State what inquiry you ever made of him, and what he reported to you concerning the bank to you?

A. Why I would ask him how the Capital National Bank was and he answered me.

Q. What did he report to you?

A. That it was in good shape, and a fine bank.

1509 Q. Was that more than once that you ever inquired of him?

A. Oh several times, and by the way I was interested in a bank down there at Wilbur and he examined that bank.

Q. Was there any time that you ever inquired of him concerning the Capital National Bank that he intimated to you that it wasn't in good condition?

Q. What, if any, intimation did Mr. Griffith ever give you of any bad condition, or any criticism on the condition or conduct of the bank?

A. Why that the bank was a good bank; he never criticised it at all.

Q. Do you remember whether you made inquiry of Hayden to-?

A. Why it may be that I did, but Mr. Hayden at that time lived in Omaha, and when he came to be cashier of the State National he lived below me, but of course then he wasn't examiner. I didn't meet him so often as I would Mr. Griffith.

Q. Now Mr. Yates, were you at home on Sunday, January 22nd. 1893 after the bank closed its doors on Saturday afternoon?

A. I was.

Q. Now explain what you had to do with the business of the bank on that Sunday, and when it occurred.

A. Well I had Mr. and Mrs. F. E. White of Plattsmouth visiting us,—they were old friends of ours, and somebody at the bank phoned to the house and said there would be a meeting between four

1510 and five o'clock, as I remember, and I went up there.

Q. A meeting of what?

A. Of the directors.

Q. Where did you go?

A. To the Capital National Bank.

Q. As well as you remember who was present at that meeting?

A. Mr. Griffith, and Mosher and Outcalt, and I guess all of the directors; I don't know whether Mr. Thompson was there or not, but Cap. Phillips and Professor Stuart and Mr. Hamer and myself; I think that's all.

Q. Referring to Mr. Thompson's absence; do you remember that he wasn't there; remember of his absence in Indiana, in Terre Haute?

A. Well I had forgot that.

Q. When you say Griffith was there, what Griffith do you mean?

A. Why the bank examiner.

Q. What was the question before the meeting?

A. Why Griffith I think opened the ceremony, you might say. He says "This bank is $160,000 short" he says, "and if you can make it up you can open up on Monday, and if not it will be closed."

Q. What was said at that meeting about closing the bank or raising $160,000?

A. Why I says, Mr. Outcalt how is it,—I says, talking to Dick, I wanted to know what he meant by that, if we could raise $160,000 the bank could continue to run, and he says "We can raise it", but Mr. Mosher says "It's impossible" that is that it would take more than $160,000 to lift it out, and then when Griffith made
1511 this explanation,—he started off with the remark that the bank was completely bu-ted, why everybody there was just paralyzed,—very much surprised.

Q. What did you propose to do about raising the amount, or were you willing to help to raise it?

A. I was willing to help raise it; I was always willing to put in to save the good reputation and to save the bank, and to save the city.

Q. What was Dr. Hamer's attitude on that question?

A. Why they all agreed to it.

Q. What did Griffith say could be done with the bank if $160,000 could be raised?

Q. Now what was Mosher's remark about the bank going on if the $160,000 could be raised?

A. He says "You can't do it". By that remark we all understood it would take a great deal more than that; that the bank was looted and it was impossible.

Q. Well what was done then with regard to trying to raise it or what to do with the bank?

A. Why when Mosher made that remark somebody, I don't know who it was, made a motion to adjourn.

Q. Was there any move taken to turn the bank over to the examiner?

A. I suppose so, yes, but I don't know as to that, but when we couldn't raise $160,000 why then the receiver was in possession.

1512 Q. He was already in possession?

A. Yes sir, he was already in possession.

Q. Not the receiver but the examiner.

A. The examiner, yes sir.

Q. What was your feeling and condition when that was reported to you that the bank couldn't go ahead?

Q. Mr. Yates, how long did you know Dr. Hamer, and when did you become acquainted with him?

A. I must have got acquainted with Dr. Hamer along about '80.

Q. What sort of a man was he physically?

A. Why light and delicate: not very strong.

Q. What was his standing as a man of character and honesty in Lincoln at the time you knew him, and during the existence of the Capital National Bank?

A. He stood very high: everybody liked him.

Q. Something has been said about the executive or discount committee of the bank in the testimony here. Who was that discount committee during most of the history of the bank?

A. Professor Stuart and W. W. Holmes.

Q. Operating with Mosher?

A. Yes sir.

Q. When, if at any time, was Dr. Hamer appointed, or put in the place to act on that committee, if you know?

A. Why I think about a year,—I don't remember whether I was present at that meeting when he was put in to take W. W. Holmes' place.

Q. That was sometime during the last year of the bank's existence?

1513 A. Yes sir.

Q. Do you know whether he ever accepted that position and acted?

A. Oh, I have seen him there and they said he had taken Mr. Holmes' place.

Q. It was said there?

A. Yes sir.

Q. He never said so?

A. No, he never said so to me.

Q. You don't know whether he did take the place actively?

A. No sir.

Q. Now calling your attention to a certificate of the capital stock of the bank No. 119, in the name of E. P. Hamer, and marked as Exhibit "ax", I will ask you whose signatures are at the bottom of that?

A. C. W. Mosher, president, and R. C. Outcalt, cashier.

Q. Do you recognize those signatures?

A. Yes sir.

Mr. BISHOP: The defendants offer in evidence Exhibit "ax".

Exhibit "ax" received in evidence.

(Copy on next page.)

(Here follows Certificate of Stock, marked Exhibit "ax," at page 1514.)

Ex a+

STATE OF NEBRASKA

THE CAPITAL NATIONAL BANK OF LINCOLN, NEB.



No. 179

15 Shares

This is to Certify that E. P. Hauser is entitled to Fifteen Shares of **ONE HUNDRED DOLLARS** each of the Capital Stock of **THE CAPITAL NATIONAL BANK** transferable only on the books of the Bank in person or by Attorney on the surrender of this Certificate.

Seal

Witness the Seal of the Bank and the signatures of the President and Cashier this 5th day of Sept. A.D. 1891

R. E. Outcalt Cash.r C. W. Mosher Pres.t

STATE JOURNAL CO. LINCOLN, NEB.

SHARES $100 EACH.

1515 Q. Mr. Yates I hand you a bunch of receipts, marked Exhibit "AY," consisting of ten sheets, and will ask you whose signature, if you know, is attached to each of those receipts?
A. K. K. Hayden, Receiver.
Q. Do you know Hayden's signature?
A. Yes sir, I am well acquainted with it.

Mr. BISHOP: We want to substitute copies for these. We offer in evidence the ten receipts, marked Exhibit "AY."
Mr. THOMAS: Plaintiffs object as immaterial, irrelevant and no foundation laid.
Objection overruled.
Plaintiffs except.
Exhibit "AY" is received in evidence.
(Copy at next page.)

1516 *Copy of Exhibit ay, Consisting of Ten Sheets.*

2988.

Receiver's Office. Capital National Bank of Lincoln, Neb., K. K. Hayden, Receiver.

LINCOLN, NEBR., Ap'l 18, 1897.

Received of E. P. Hamer fifty eight Dollars ($58.) on account of stock assessment, being payment in full of amount of assessment and interest.

K. K. HAYDEN, *Receiver.*

Same Here. LINCOLN, NEB., M'ch 27, 1894.

Received of E. P. Hamer the sum of One hundred dollars on acc't of stock assessment, the same being applied as interest thereon.

K. K. HAYDEN, *Receiver.*

(Same Here.) LINCOLN, NEB., M'ch 19, 1894.

Received of E. P. Hamer, the sum of two hundred & ninety eight & 50/100 dollars on account of stock assessment.

K. K. HAYDEN, *Receiver.*

(Same Here.) LINCOLN, NEB., Feb'y 8, 1894.

Received of E. P. Hamer, six hundred & seventy five dollars ($675) on account of stock assessment.

K. K. HAYDEN, *Receiver.*

(Same Here.) LINCOLN, NEB., Jan'y 30, '94.

Received of E. P. Hamer on account of stock assessment seven hundred & fifty dollars.

K. K. HAYDEN, *Receiver.*

(Same here.) LINCOLN, NEB., Dec'r 14/'93.

Received of E. P. Hamer the sum of fourteen hundred dollars $1,400—on account of stock assessment of this bank.

K. K. HAYDEN, *Receiver.*

(Same here.) LINCOLN, NEB., Nov. 22/'93.

Received of E. P. Hamer $400.—Four hundred dollars on acc't of assessment on stock.

K. K. HAYDEN, *Rec'r.*

(Same here.) LINCOLN, NEB., November 3rd, 1893.

Received of E. P. Hamer on account of stock assessment $1,385.

K. K. HAYDEN, *Receiver.*

(Same here.) LINCOLN, NEBRASKA, Sep. 5, 1893.

Received of E. P. Hamer, on acc't of stock assessment eight hundred & fifty dollars ($850.)

K. K. HAYDEN, *Receiver.*

(Same Here.) LINCOLN, NEBRASKA, July 10, 1893.

Received of E. P. Hamer the sum of thirty two hundred & Forty one & 50/100 Dollars on account of assessment of one hundred per cent on stock of the Capital National Bank owned by him.

K. K. HAYDEN, *Receiver.*

2539.
700.
2.50

3241.50

Exhibit "AY" Yates 35.

(Copy of ten receipts from Hayden Receiver to E. P. Hamer, here.)

1517 Cross-examination.

By Mr. THOMAS:

Q. How old are you Mr. Yates?

A. I was born November 1st, '37; I will be 74 years old the first of November.

Q. When did you say you went into the employ of the Burlington Railroad?

A. I started in in 1853, in Burlington, Iowa.

Q. And in what occupation were you engaged prior to that time?

A. Before that time?

Q. Yes sir.

A. I was on the New York Central, as ticket agent and operator.

Q. How long were you engaged in that occupation?

A. Oh, I don't know; I worked up to operator and express agent, and operator and freight clerk, and then I was promoted to be operator and ticket agent; I started in about '60 to learn telegraphing.

Q. That's when you started to learn the business of telegraphing?

A. Yes sir, and then I got an office at $20 a month,—$20.84 a month—$250.00 a year.

Q. And you have been engaged in that line of work ever since until you retired a few years ago?

A. Yes sir.

Q. I think you said you were dispatcher of the Burlington at Lincoln for a while?

A. Yes sir.

Q. For how long?

A. I built all the lines west of Ottumwa, Iowa, and when the C. B. & Q. absorbed the B. & M. of Iowa I came to Nebraska
1518 with Mr. Perkins, he was vice-president, and Mr. Morse was superintendent with headquarters at Plattsmouth, and I came out there as dispatcher and superintendent of telegraph,—that was in 1873.

Q. How long did you continue to be dispatcher and superintendent of telegraph?

A. The road then took in what was called the Midland Pacific, running from Brownville to Seward, and my headquarters was moved to Lincoln to operate the road without any extra expenses, so I acted as dispatcher then until the system got so large I couldn't give it proper attention, and I took the matter up and it was decided to turn the dispatching over to the superintendents and let them hire dispatchers, so then I was just superintendent of telegraph of the entire system. I built the lines into Billings, and Denver and Cheyenne, and so forth.

Q. And you continued to be superintendent of telegraph until when?

A. Until 1905.

Q. Now during the period of your residence in Nebraska you have been interested in various banks, have you?

A. Why in two banks; the bank at Wilbur and the Capital National Bank.

Q. Are those the only two?

A. Well I think I was interested in the bank there at Ashland,—I don't remember the name of it now; I was a stockholder only a short time when the man wanted to kind of stuff the deposits and I got out; I don't remember the name of the cashier. I think I got in that bank through Mr. John R. Clark.

Q. When he was trying to stuff the deposits you quit?

A. Well the truth of the matter was they were trying to freeze out Fitzgerald, and I thought if they would freeze out Fitzgerald they would me, and the next bank I got in through Mr. Clark was

the bank at Wilbur: Mr. Tidball I think was the president,
1519 and then I got a little experience there.

Q. What was the name of the Wilbur bank?

A. Well I don't remember now; and then they got in some forged paper.

Mr. BISHOP: That answers the question.

Q. You say they got some forged paper in on you in the Wilbur bank?

Q. You became a stockholder in the Capital National Bank in June '84, did you?

A. I think so, yes.

Q. And you remained a director from '84 until the close of the Capital National Bank?

A. Yes, sir.

Q. You were not present at the meeting when the Marsh National Bank was changed to the Capital National Bank?

A. No sir.

Q. Weren't you present at the stockholders' meeting?

A. Not that I remember of; I don't think I was.

Q. And you didn't know anything about what assets they took over from the old bank?

A. No sir.

Q. Never heard anything about it?

A. No sir.

Q. Never heard about the Donnell, Lawson & Simpson account?

A. No sir.

Q. Nor about any of the Marsh paper?

A. No sir.

Q. Nor any of the Western Manufacturing Company paper?

A. No sir.

1520 Q. Nor any of Mosher's paper?

A. No sir.

Q. Nor Outcalt's paper?

A. No sir.

Q. In fact you didn't know anything about any of the paper that was in that bank?

A. No sir.

Q. Didn't know there was any director's paper in the bank except your own?

A. No sir.

Q. You say you didn't even know E. Hurlbut, Jr.?

A. No sir.

Q. Didn't know that the bank ever had any losses of any kind?

A. No sir.

Q. That never came to your attention in any way?

A. No sir.

Q. Never was discussed at a director's meeting?

A. No sir.

Q. You say you never examined any paper of the bank?

A. No sir.

Q. Never looked at a note.

A. No sir.
Q. Or any of the documents of the bank at all?
A. No sir.
Q. Well then you hadn't very much to do with the directing of the bank had you?
A. Hadn't anything.
Q. I suppose you attended the meetings when it came time for the dividends and voted Aye?
A. Oh, no, there was lots of times they passed dividends that I wasn't there.
1521 Q. But up to the time the bank closed you thought it was a very good bank.
A. Yes,—yes sir.
Q. Had always been a good dividend payer?
A. Well, yes, but not any better than others,—the First National.
Q. And you had never had any intimation of any kind that the bank was in a bad way until that Sunday?
A. No sir.
Q. You thought the bank was getting along prosperously and making money?
A. Yes sir, and in safe, judicious management.
Q. And it continued to pay dividends right along regularly?
A. Yes sir.
Q. And when you attended meeting of the directors, I think you said they were held in the front part of the bank?
A. Always.
Q. Never in the back part?
A. Not when I was there.
Q. You never were in that little back room that has been testified to in your life?
A. No sir.
Q. And never back of the counter in the bank?
A. No sir.
Q. Never at the south end of the bank?
A. No sir, I never went in there.
Q. The only place in the bank you were ever in was the front end,—what they call the "O" street front end, where Mr. Mosher and Outcalt had their desks?
A. Yes, sir.
Q. You never remember of the directors discussing any letter from the Comptroller, you say?
A. No sir, I never was present if they did.
1522 Q. Never heard about any letters from the Comptroller criticising the condition of the bank in any way?
A. Not that I remember of.
Q. Well you think you would remember a thing of that kind, don't you?
A. Oh, yes.
Q. If there had been anything of that kind, you had such a good opinion of the bank,—if there had been any criticism by the Comptroller, it would have impressed itself upon your mind?

A. I should think so.
Q. But you think nothing of that kind ever happened?
A. That is my impression, yes, sir.
Q. And you don't recall of having ever met Mr. Jones?
A. I never met Mr. Jones.
Q. You are quite sure of that?
A. Yes, sir.
Q. To refresh your recollection as to a meeting in the Fall of 1890, I will ask you if you were not at the bank one day when Mr. Jones was there—Mr. H. T. Jones—, and in the course of the conversation you and Mr. Jones were talking to each other, and the subject that came up for discussion was the fact of your lameness?
A. Oh, I don't know about that; I don't remember anything of that kind.
Q. Well it is true that you are a little lame in one limb?
A. Yes, sir.
Q. And Mr. Jones is to-, isn't he?
A. Yes, sir.
Q. And wasn't that discussed between you?
A. That may be. I was talking with this gentleman (Indicating) here; one lame man if he has got a new kind of shoe he
1523 takes pity on a man and tells him about the new shoe.
Q. You don't recall of having such a conversation with Mr. Jones at the Capital National Bank?
A. Oh, I don't recall it; it might be that it occurred because one lame man has no hesitancy about speaking to another lame man, if he has got an improvement.
Q. Did you know that Mr. Thompson had sold his stock in the Fall of '91?
A. No, sir, I did not.
Q. That never came to your knowledge?
A. That never came to my knowledge.
Q. You were present at the trial of this case,—at the former trial?
A. Yes, sir, I was up here.
Q. And you say you didn't get to inspect the original letters of the Comptroller's that have been referred to?
A. No, sir.
Q. Your attorneys did, did they not?
A. I suppose they did.
Q. You remember of the million dollar bank scheme, do you?
A. As I said before, at a meeting the thing was broached and I was very much surprised, and didn't believe in it.
Q. Now do you say that you never attended a meeting when any of the bills receivable—paper of the bank was taken up and looked over and discussed?
A. No, sir, not when I was at the meeting.
Q. You didn't know of any of this Western Manufacturing Company paper?
A. No, sir.
Q. Of which Mr. Hurlbut was manager?

A. No, sir.

1524 Q. Well did you sign any reports of the bank's condition?

A. You mean those statements?

Q. Yes, sir.

A. Why when I was in the office there, if Hal Young or some other employe of the bank would bring one of the statements down, I would see it was signed and attested by Mosher and Outcalt, and in good faith I signed it.

Q. And that's about all you knew about it?

A. That's about all I knew about it; I had my confidence in those people, and in the examiner of the bank.

Q. You never made an investigation yourself, as to what the bank had in the way of assets?

A. No sir.

Q. Never looked over the Bills Receivable?

A. No sir.

Q. Never looked over its assets?

A. No sir. Never was behind the counter.

Q. Never counted its cash?

A. Oh, no.

Q. Never attempted to look over its depositors?

A. No sir, I had my faith in the officers of the bank.

Q. You never made any inquiry of that kind?

A. No sir.

Q. I suppose you had no knowledge whatever of its financial condition?

A. Oh, no.

Q. And of course you were aware of that fact that you didn't know anything about it, of your own knowledge?

A. Oh yes,—yes sir,—but the truth of the matter was Mr. Thomas that I was a pretty busy man, and was out on the road about three fourths of the time, and when I came in I suppose if they wanted anything I would have signed it.

1525 Q. And you didn't know that those reports were being published in the papers?

A. No sir, not to my knowledge; I may have casually noticed it, but I wasn't looking for advertisements, you know.

Q. But then you- eye will catch advertisements in a paper?

A. Oh I may have seen them and I might not have seen them. I wouldn't say.

Q. And what do you say as to whether the bank was carrying a card in the paper?

A. I didn't know anything about it.

Q. You took the daily papers?

A. Yes sir, I took all the daily papers.

Q. And have ever since you have lived there?

A. Yes sir.

Q. Do you say that the bank didn't carry an advertisement?

A. I don't say that. It wasn't done by my notice or consent.

Q. And you don't say that they didn't publish a card in which

they advertised their capital stock, and surplus and the names of all of the directors?

A. No sir, I don't know; I wouldn't say I never saw it.

Q. And your recollection is that you don't remember of any discussion at a directors' meeting in regard to any of the paper?

A. Oh, no.

Q. Never was anything of that kind?

A. Oh, no.

Q. What educational opportunities had you, Mr. Yates?

A. Why just ordinary common school education.

Q. Study bookkeeping when you were a boy?

A. No sir.

Q. Did you ever in any of the positions you have occupied that the railroad has been your employer,—have you had to keep any accounts?

1526 A. I had to, to a certain extent.

Q. To what extent?

A. Why for instance get a Bill of Lading to Judge Thomas one case of sugar, 40¢, and things of that kind; that's railroad bookkeeping.

Q. Your experience has been in railroad bookkeeping?

A. All together, yes sir.

Q. You have had some experience in that line?

A. Yes sir, I have been in several different departments, that is, in the freight department, and ticket department, selling tickets and acting as their agent, and so forth.

Q. And in those departments it necessitated a certain amount of bookkeeping?

A. Oh yes; it is very simple though.

Q. All you have is just the debit and credit entries.

A. Why in the case of sugar, for instance, one case sugar, 100 pounds, 40¢, that's all there is to it. Well then I would send it to the treasurer and make a statement with the remittance.

Q. That is, when you receive the money on freight, that would be entered on your books as a charge to yourself, and when remitted to the treasurer you give yourself credit and charge it up to the treasurer.

A. Yes, sir.

Q. And that has been about the extent of your experience?

A. That's all.

Q. Where were you ticket agent?

A. Fonda, New York.

Q. And where were you in the freight department?

A. Down here, and also at Ottumwa, Iowa.

Q. Now I hand you Exhibit "ai", p. 1140 and will ask you if you have ever seen a statement similar to this one?

1527 A. I don't remember of ever seeing one of these.

Q. Did you ever see anything like that?

A. No sir.

Q. Never did?

A. No sir.

—. Never have seen a statement like that that the banks get out?

A. Not unless some person would just casually say "Here's a statement" and I would look at it and that's all.

Q. Now it's true that you have seen cards like that frequently isn't it.

A. It may be, I couldn't say.

Q. And isn't it true that all the banks get those out?

A. No sir,—I don't know.

Q. And you don't know that you have ever seen anything like that before?

A. Oh, I won't say that; it may be that I have, but as a rule I don't see them.

Q. Didn't your bank, in which you were interested in Wilbur ever send you statements like this?

A. No sir.

Q. What banks are you interested in now?

1528 A. Not interested at all. I have had my experience.

Q. And you have never received from the banks in which you deposited, you have never received any statements similar to this showing their resources and liabilities?

A. No sir.

Q. Never got one?

A. Not that I knew of.

Q. Never knew of any bank in Lincoln issuing anything like this?

A. Not that I know of.

Q. Never knew of the Capital National Bank ever issuing any statements?

A. Not that I know of.

Q. And you didn't even see those published in the newspapers?

A. No sir.

Q. Didn't know anything about them?

A. No sir.

Q. Well do you understand what that statement means?

A. Yes sir, it is the liabilities I suppose, of the United States National Bank of Omaha.

Q. Do you understand the meaning of those statements,—can you read it understandingly?

A. Why to a certain extent; they have got here loans six million; they've got a capital stock of $600,000; Surplus and profits 764 thou-and. Yes I should think to a certain extent I could understand that, but I couldn't figure out what the stock was worth.

Q. Assuming that all the resources were worth what they

1529 purport to be, the face value, couldn't you tell about what that stock ought to be worth?

A. No sir, I couldn't.

Q. Now calling your attention to Exhibit X-988, could you read a statement of that character and understand that?

A. Oh I suppose I could go to work and figure it out, but a thing of that kind (indicating) would be more plain than a thing like this.

Q. Why?
A. Why—oh, I suppose I could take time and figure it out.
Q. What's the difference between the two?
A. One is condensed and that's about all.
Q. One goes into detail a trifle more than the other?
A. Yes sir, a litle more in detail.
Q. And could you understand it if it were in this form (indicating) still more in detail, giving the assets in one column and the liabilities in the other, calling your attention to Exhibit X-1041?
A. It's a good deal like Greek to me Mr. Thomas, because I am no expert accountant.
Q. You have never seen anything like that before have you?
A. No sir.
Q. And you wouldn't have any idea how to figure that out, would you?
A. No sir.
Q. That is, take the first item here where it says capital stock $300,000. Would you know what that indicates?
A. Why that the capital stock was $300,000.
Q. And the United States bonds, $50,000, would you understand what that means?
A. Why yes,—here's the capital and the surplus, that would be $316,000.
1530 Q. And the third item, do you know what that means?
A. I wouldn't know whether that belonged to the bank, or part of this capital business.
Q. That might be a liability you think?
A. Yes, sir.
Q. You know the item of cash?
A. I would understand that was what they had on hand.
Q. Would that mean what they had on hand, or owed it to some body?
A. I should judge that they had it on hand.
Q. What makes you think that?
A. It says cash here.
Q. And it says Bills Receivable $787,531.50. What would you understand by that?
A. I should think that would be the notes payable to the bank.
Q. That would be your inference?
A. Yes, sir.
Q. And in the account, Undivided Profits, in this other column $30.18 what would you understand by that?
A. That the bank was ahead $30.18.
Q. And the Rediscount account $10,000; what would you understand by that?
A. I should think by that the bank had rediscounted paper in New York, or Chicago, or some other place to the amount of $10,000.
Q. And the expense item, you would understand that.
A. The expense account is the expenses of the bank.
Q. And the deposit account?
A. It's the money that is put in the bank.

Q. By the various depositors.

A. Yes sir.

1531 Q. Now Mr. Yates, you never knew that the bank carried any real estate either, did you?

A. No sir.

Q. And didn't know that it carried any overdrafts?

A. No sir, didn't know anything about it.

Q. Or r*d*discounts?

A. No sir.

Q. Where were you the Saturday before the bank failure?

A. I was there in Lincoln.

Q. Were you at the bank that day?

A. Well I don't know; I have got kind of mixed up on the dates; it run- in my mind that I put a deposit in the bank that day, but it must have been the Saturday previous.

Q. When was your last deposit?

A. Why the books here show it was the 15th; but it got in my head that it was the 21st, but they say I am wrong.

Q. At the time you made the deposit, you hadn't any intimation then that there was anything wrong with the bank?

A. Oh, no.

Q. And it was sometime,—a day or two afterward that you found it out?

A. Yes sir, several days.

Q. Mr. Yates, do you recall of having been a witness in the Circuit Court of the United States for the District of Nebraska, in which Kent K. Hayden was the plaintiff and Mr. Thompson, and yourself and others were the defendants?

A. I don't.

Q. I will ask you to examine and see if that is your signature, (Showing writing to the witness.)?

A. Yes sir, that's my signature.

Q. You don't recall of ever having been a witness in that case?

A. No sir, but then I guess that's all straight goods.

1532 Q. The signature on page 87 is your signature?

A. Yes, sir, that's my signature.

Q. I will ask you Mr. Yates, if in the case to which I have referred, if you did not testify as a witness, and that this question was asked: "About how often would you meet with *with* the directors?" to which you answered, "Why if I happened to be intown when they declared a dividend, generally in June and December,—just before a dividend was declared." Do you remember of that question being asked you?

A. I guess if I answered it then it is all right. I don't remember it now.

Q. And the following question was asked "And the purpose and object of your meeting was simply to meet and declare a dividend?" To which you made answer as follows: "Oh, they would talk over matters and things in the bank and charge off a certain amount of paper and say how the loans was and if they made a loss it would be charged off."?

A. I guess that's correct.

Q. You think you so testified at that time?

A. Yes, sir, oh, yes.

Q. And following that wasn't this question asked, "Do you mean to say that of your personal knowledge any bad debts were ever charged off prior to 1892?" To which you answered, "Yes, sir, there had been; I supposed they were charged off, they said they would meet with a loss." Was that question asked and did you so answer at that time?

A. I must have answered it that way, but I must have got excited or rattled.

Q. And was the following question asked you, "Can you remember of any having been charged off?" to which you answered, "I never saw the books, I supposed they had been, we talked the matter over the way they had done in different banks I have been connected with. Of course I did not go to work and see them

1533 charged off."

A. That's correct.

Q. The next question, "Can you give any that were mentioned at any of those meetings?" Answer: "It is so long ago Mr. Lambertson, I could not do that." Question: "Was you attention called to any large losses?" Answer: "Why we talked the matter over there about the Small loan and Mosher was inclined to regret that he did not submit to the loss; he sued the man; I think it was something like $15,000, and he regretted that he had not submitted to the loss instead of putting any more money into it. Phillips knew all about the land and thought it would pay out."

A. Yes, sir. Then I am mistaken about this other. I don't remember this at all, but if I was there and said that I said it.

Q. You can look over it and see if it is your signature?

A. I take your word for it.

Q. You think you may have known something about that paper then?

A. I should judge by that I knew something about it.

Q. Now you remember Mr. Yates of being a witness at the former trial of this case, don't you?

A. Yes, sir, I was here.

Q. Now I will ask you if at that time some questions were not asked you concerning meetings of the directory, and what was done, and concerning the investigations of the assets and things of that character, and if at that time this question wasn't asked you, "I am asking you at a meeting when you were there, whether inquiries were made of this committee, and whether they reported what they had done?" To which you answered, "Yes, sir." Then the further question was asked, "Now I will ask you to state what was the character of such investigation and report with reference to the character of the assets?" to which you answered: "There was general discussion at the meetings in regard to the paper, and

1534 they would always take up each piece of paper and comment upon it, and claimed it was al- right." Did you so testify at the former trial?

A. I should judge so, yes, sir.

Q. Then your memory doesn't serve you well when you say now that wasn't done?

A. Well you see this was long ago. This was eight years ago. I don't intend to mislead you in any way, shape or manner.

Q. I believe you said in your examination this morning that you would have raised a row if you had known that Mosher and Outcalt were borrowing money?

A. What I understood by that was if I had understood that they were borrowing such large amounts of money as was reported here at the trial.

Q. Did you know anything about the loans that were being made to E. W. Mosher, or under the name of Ed Mosher?

A. No, sir, I didn't know E. W. Mosher.

Q. And you didn't know that the bank was loaning any money through him over in York and the western counties?

A. No, sir. All I knew about E. W. Mosher, I saw him one day in the bank, and I says to some gentleman, "Who is that gentleman in there with Mosher," and he says, "That's Mosher's brother," and that's the first time I ever saw him, and the last time, I guess.

Q. Now Mr. Yates, do you recall of a case in the District Court of Lancaster county in which Henry Gerner a stockholder of the Capital National Bank was plaintiff, and Mr. Mosher and Mr. Thompson and you and others were defendants?

A. Yes, sir, I knew we had such a case.

Q. And you were a witness in that case?

A. I should judge so.

1535 Q. And you remember of Mr. Rose, now in this case, cross-examining you in that suit?

A. I don't know; he made it kind of warm for us, I guess.

Q. As I understand you to say that up until just about the close of the bank you hadn't any intimation of anything wrong at all?

A. No sir.

Q. And supposed the bank was flourishing as usual?

A. Yes sir. Mr. A. P. S. Stuart traded his stock off to Mr. C. J. Ernst, now assistant treasurer of the Burlington, and he came to me and asked what the stock was worth, and I said it was worth a good $1.25. I don't know what time it was Mr. Stuart sold his stock, but it was only a short time before the bank failed.

Q. Well up to the last of the year 1892, you had never had any intimation of any reverses of the bank, or that it had suffered any losses?

A. No sir.

Q. Never had been anything lost that you ever knew of?

A. Not that I ever knew of.

Q. You didn't know that the capital had been impaired?

A. No sir.

Q. Well didn't you know that the bank had passed a dividend during the year 1892, or was that true?

A. Well I don't know,—Griffith or somebody told me,—I guess it was Mosher that they hadn't been attending to business very

close; that they had outside business and hadn't attended to business.

Q. But so far as you know you always got your dividends?

A. Oh, it was paid, sure.

Q. And you didn't know where the money came from that paid it?

A. No, sir, but I supposed everything was legitimate.

1536 Q. Well at this Gerner case, to which I have referred in which Mr. Rose cross examined you, didn't he ask you: "You knew that the bank had passed one dividend?" to which you answered "Yes sir." Then the following question was asked you, "You knew previously it had dropped its dividends down", to which you answered "Yes sir". Do you remember that?

A. I suppose if I answered that way, it was al- right.

Q. Well it is true that at the director's meeting—isn't it true, Mr. Yates, that the bank hadn't declared any dividends in December, 1892?

A. I don't remember.

Q. And isn't it true that you knew that the undivided profits of the bank,—the undivided profit account had been wiped off?

A. No sir.

Q. And that part of the six months paper had been cancelled or supposed to have been cancelled?

A. Not that I remember of?

Q. But you knew there was no dividend to be declared for six months ending December 31, 1892?

A. I didn't know it until they had a meeting there,—why I don't know,——

Q. Now calling your specific attention to this testimony, I will ask you if in the trial of the Gerner case you were not asked by Mr. Rose the following questions, to which you made the following answers:— Question—"You knew that the bank had passed one dividend." Answer—Yes sir. Q. "You knew previously it had dropped its dividends down?" To which you answered "Yes sir." And that the undivided profit account had been wiped off"? To which you answered "Yes sir, to a certain extent" And part of the six months paper had been in that way cancelled?" Answer—

"Yes sir, the same as banks as doing today." Question—

1537 "You knew those facts?" Answer: "Yes sir". You knew there was no dividend to be declared for the six months ending December 31, '92, didn't you?" To which you answered "Yes, sir." "You were present, you said at the January meeting, '93, the stockholders meeting?" Answer—"Yes sir". "And at the directors meeting which was held the same night?" Answer—"yes sir." "What day was that, about January 10th or 9th?" Answer—"I can't fix the exact date." Question—"About January 9th?" Answer—"I should think so". "And about ten days before the bank failure?" Answer—"It must have been about that". Now wa n't there a statement made in the presence of the directors, at the directors meeting at that time, by Captain Phillips that the capital of the bank was impaired $50,000, and didn't he give his figures

and estimates" and you said "I don't remember". "You wouldn't say that didn't take place?" Answer—"No sir, I wouldn't.

Q. Now do you remember of those questions being asked you by Mr. Rose, and you making answers in that way?

A. No sir, but I suppose they're al- right. I don't remember of it now.

Q. But you think you may have testified as I say?

A. Oh, if it is there.

Q. And wasn't the following question asked you:—At the January meeting, immediately after the election of officers isn't it a fact that there was a discussion concerning the impairment of the capital stock of this bank? To which you answered—"Well, I don't remember about it so much,—they said they had some bad paper and they were going to make an arrangement about liquidating it, and raise the money, or something of that kind". Do you remember that?

A. No sir, but I suppose it is al- right.

Wasn't the following question asked you:—"Now you say
1538 when you signed these statements that you have seen here that you believed them to be true' and you said "Yes sir"?

A. Yes sir.

Q. Question—"And you intended when they were published and circulated in the community that other people would believe them to be true", to which you answered "I didn't know,——" Question—"You knew that in actual practice the reports were published in the newspapers?" Answer—"Yes sir, I have seen them in the papers".

A. Yes sir.

Q. Question—You knew that was the usual custom to publish the same reports that were sent to the Comptroller?" Answer—I don't know so much about that—I have seen the reports in the paper".

A. Well I suppose following out the requirements of the law.

Q. Question—"And the reports you saw in the papers contained the signatures of the attestingdirectors?" Answer—"Yes sir". Question—"And copy of the oath of the cashier?" Answer—"Yes sir, I have seen those". Question—All that you saw of this character of reports in the paper, had the same authenticity so far as the attestation of the directors was concerned and the sworn statement of the cashier as those that went to the Comptroller, hadn't they?" To which you answered "Yes sir". Question—"You knew when you signed those statements that they would appear in the newspapers over your signature?" Answer—"No sir, I didn't know about that". Question—"You knew that such had been the case heretofore"? Answer—"Yes sir." "You had seen your signature in the paper before that, hadn't you?" Answer—"I am not certain about that". Question—"You will not say you intended it to be published anyhow?" Answer—"No sir". Question—"You will not say you didn't intend it, will you?" Answer—"No sir."

1539 Q. Do you remember of those questions having been asked?

A. No sir, I don't, but if it's on the record there, why it's alright.

Q. You wouldn't say you didn't so testify would you Mr. Yates?
A. Oh no, no.
Q. And you think now that you did?
A. I should judge so by that.
Q. You remember of Mr. Pose examining you in that case?
A. Yes sir, I remember Mr. Pose.
Q. As you say he made it hot for you.
A. Well he was working for his client al- right.
Q. You remember of being present at that meeting of January 10th, 1893, don't you, Mr. Yates?
A. Why I have a distinct recollection of it, yes sir.
Q. That you were there at that meeting?
A. Yes, sir.
Q. And at that time you voted a proxy of Cal Thompson?
A. I always had Cal Thompson's proxy.
Q. The instrument I had*n* you is Mr. Thompson's proxy?
A. Yes sir, that's it.
Q. And that is the proxy authorizing you to appear for him at the meeting of January 10th, 1893?
A. Yes sir, that's correct.
Q. I think you said you were acquainted with both Mosher and Outcalt before you became a stockholder of the Capital National Bank?
A. Well I knew them casually, I might have met them on the street, but I didn't know anything about them personally, no sir
Q. You knew Mr. Outcalt?
A. I knew him better than I did Mr. Mosher.'
1540 Q. He had been a bookkeeper in another bank there in Loncoln?
A. In the old State National, I think.
Q. You knew him there?
A. Only by hearsay. Mr. Richards told me he had Mr. Outcalt as bookkeeper, and he was one of the finest in the state.
Q. And since I have called your attention to this other testimony you remember of some statements being in the newspapers, don't you, concerning the condition of the bank?
A. No sir, I don't.
Q. Don't remember it, even now?
A. I don't remember of any statements in the newspapers, no sir.
Q. How did you happen to talk to these bank examiners, Mr. Yates?
A. Why I was interested in the stability and prosperity of the Capital National Bank.
Q. It never suggested itself to you to look over the notes yourself?
A. Oh, I wouldn't know anything about it.—I couldn't tell. Those people were paid for it, and I supposed they were tending to business.
Q. And you couldn t have looked over the bank's notes and told anything about them, you think?

A. No sir.

Q. The examiners told you it was fine?

A. Yes sir, a clean, prosperous bank, well managed, and so forth.

Q. And you say you didn't know anything about the director's letters that were written to the Comptroller in answer to some inquiries?

A. Not that I remember of, no sir.

1541 Q. You will not say that you didn't sign those?

A. I will say this, that I wasn't present at a meeting of the directors there, when they canvassed the thing over. It may be like those reports that they would bring the letter down to me and I signed it, but I wasn't present when they had the meeting.

Q. But you wouldn't say that you did not sign those letters to the Comptroller?

A. Well I didn't sign it there. If they had a meeting and they brought that letter to me, and said they had a meeting and wanted me to sign it, I suppose I would have signed it, but I don't have any recollection of signing that letter, or of ever seeing it.

Q. Of course it has been so long ago that you might have forgotten about it, Mr. Yates?

A. Well that might be: of course it is eighteen years ago.

Q. And it is possible that you might have been present and heard those things and forgotten it by this time.

A. Well a thing of that kind, if it had come from the Comptroller, why I would have been alarmed and taken the matter up with my friend Captain Phillips, and we would probably have done something.

Mr. THOMAS: That's all.

Redirect examination

By Mr. BISHOP:

Q. They have asked you about meeting where the paper of the bank was taken up piece by piece and looked over. Was that all the notes and valuable paper of the bank, or only some of it?

A. Only some of it.

Q. And that was by that discount committee?

A. Yes, sir.

1542 Q. And the question was up as to whether somebody was good or not?

A. Yes, sir.

Q. Where their knowledge was not apparently sufficient?

A. Yes, sir.

Q. Did you have any knowledge that the $300,000 of the capital of the bank was spent, or wasted or lost, at the time of the meeting in January?

A. No sir.

Q. Now Mr. Thomas asked you the question if you had ever been in that little room at the south end of the lobby of the bank.

A. Yes sir.

Q. And you answered that you hadn't. Is that true?

A. Oh I have been in that safety deposit room.
Q. And in that little room next to it?
A. Oh yes,—I didn't understand that.
Q. You meant you had never been there at any meeting?
A. Never at any meeting, no sir.
Q. You had a key to that room?
A. I had a key, yes sir.
Q. And used the vault?
A. And used the vault.
Q. And used the furniture in there?
A. Yes sir.

Mr. BISHOP: That's all.

1543 Recross-examination.

By Mr. THOMAS:

Q. Mr. Yates, you say the discount committee would handle this paper, piece by piece,—only a part of the paper of the bank?
A. Well say half a dozen notes,—that's what I mean,—John Jones, Smith or Brown,—that's what I mean.
Q. I thought you said you hadn't any memory of that sort of thing occurring?
A. Well that thing there (indicating) it appears that there I said I did. You see it is a great many years ago, and I tried to forget the whole blamed thing, but the chances are that this discount board took this paper up because there is always more or less bad paper in a bank, and the discount board it's their duty to discuss the matter.
Q. Then according to your memory now, the discount committee went over all the paper of the bank?
A. I don't think all of it.
Q. And if there was any paper that wasn't very good they could bring that up before the board, is that the idea?
A. Yes, and discuss what should be done, for instance, they had made a loan of $500 or $1,000 to John Jones and wanted to know what to do with it.
Q. If they were in doubt as to whether John was good or not?
A. Yes sir, they would charge it off.
Q. Or bring it up before the board.
A. Yes sir, or discuss its pro and con and if somebody said he was no good at all why charge it off.
Q. Well was that the practice that was generally pursued there?
A. Why I guess that is the way it is done with all banks, but I never had any experience before.
1544–1550 Q. Well, I mean with reference to this bank?
A. Well I suppose so.
Q. Are you just supposing so?
A. Well they didn't have very much of that paper, Mr. Thomas.
Q. Which paper?

A. This bad paper, about the discount board taking it up, I don't remember of more than once or twice.

Q. You mean you don't remember of the discount committee making a report more than once or twice?

A. Yes, sir, but in the majority of cases they claimed they had a clean bank.

Q. A good janitor.

A. Yes sir, and good generally; they thought they had one of the best banks in the state, and everybody was proud of being connected with it.

Q. I think you said that since that you have been trying to forget as much of it as you can?

A. Yes sir.

Mr. THOMAS: That's all.

Witness excused.

* * * * * * *

1551 Mr. NORVAL: Plaintiffs now offer in evidence the Cross-Examination of the witness Sanford, as found in the former Bill of Exceptions of this case, Volume 1, page 316.

Cross-examination of witness SANFORD read in evidence.

By Mr. NORVAL:

Q. What is your address at Council Bluffs?

A. My residence address?

Q. Yes, sir.

A. 204 South First street.

Q. And your business address?

A. Box 62.

Q. What is the number of your office where you work?

A. I travel on the road.

Q. Who do you travel for?

A. The Aultman Taylor Machinery Company.

Q. You say you were sent to York by the Capital National Bank?

A. Yes, sir.

Q. To take charge of their property matters at York and vicinity?

A. Yes sir.

Q. And you had charge of all securities and loans and property of the bank that E. W. Mosher had made is that it?

A. Yes sir.

Q. You say his bills receivable a great many of them, had been taken in the name of the bank, on the bank's notes, blank notes?

A. There were a few of them, I couldn't say just how many.

Q. And some had been taken in the name of E. W. Mosher and endorsed to the bank?

A. Yes sir.

1552 Q. And all of them were held by the bank when you were sent out there?

A. Yes sir.

Q. And you went out there for the bank?

A. Yes, sir.

Q. And I believe you said there were a number of judgments there and you didn't do anything with them because they were worthless?

A. Well now I am not much posted on the judgments.

Q. Wasn't that what you testified to?

A. I said in making the inventory of the assets of the institution, that I didn't invoice these judgments, as I didn't consider them of any value.

Q. You were there to investigate and see what condition the bank's affairs were in, and to realize on its assets?

A. Yes, sir.

Q. If there had been any value to the judgments you would have undertaken to have collected them?

A. Yes sir,—they were very small in amount.

Q. And the personal property, the horse ranch you spoke of, and the office furniture, you say they sold for something like $10,000?

A. I think so. I dont think the office furniture brought over $50.

Q. Did you sell that property?

A. What property?

Q. The horses that you say brought about $10,000?

A. No sir, the Receiver sold them after I left the bank.

Q. Do you know what became of the proceeds of that?

A. I wouldn't be in a position to know.

Q. So you are just testifying to that from hearsay, you don't know?

A. Yes sir, that is what I understood they brought.

1553 Q. But you don't know how much they sold for only from hearsay?

A. No sir.

Q. Now the other securities and properties you realized on while you were there you sent to the bank?

A. Yes sir.

Q. You paid first the expenses of taking care of the horse ranch, and so forth, and taxes and so forth?

A. Yes sir.

Q. And if you didn't have enough money you would draw on the bank for it?

A. Yes sir.

Q. Where was E. W. Mosher during that time?

A. He was in York.

Q. I believe you stated that these lands and things were accumulations of loans made by Ed Mosher for the bank?

A. As I understood it, yes sir.

Q. At any rate you were sent out there by the bank?

A. Yes sir.

1554 Mr. NORVAL: Plaintiffs now offer in evidence the Cross Examination of the witness Dorgan, as found in the Bill of Exceptions of this case, commencing on page 1125.

Cross-examination of Witness DORGAN read in evidence.

By Mr. NORVAL:

Q. Did you make out the deeds when this land was turned over to the bank?
A. No sir.
Q. Did you record them?
A. No sir.
Q. Were they delivered to you?
A. I think some of them passed through my hands.
Q. About how many of them?
A. I couldn't say.
Q. About how many?
A. I don't remember,—a good many.
Q. Do you remember any particular piece of land that the deed was delivered to you, or passed through your hands?
A. No sir.
Q. Now you say this money was given to Ed Mosher to loan for the bank?
A. No, I didn't say that.
Q. What did you say,—what did you testify to in that regard?
A. I said the money was advanced to Ed Mosher for farm loans.
Q. Who advanced it to him?
A. The Capital National Bank.
Q. Who sent him the money?
A. The Capital National Bank.
1555 Q. What individual?
A. I couldn't say.
Q. Did you send it to him?
A. No sir.
Q. Did you see the man who sent it?
A. I believe I have.
Q. Were you there when it was sent?
A. Well, I should say Yes.
Q. Was it sent in currency?
A. I don't know.
Q. Was it sent in gold?
A. I don't know?
Q. Paper money?
A. I don't know.
Q. Was it sent by draft, or Bill of Exchange?
A. Well I think that is the way the most of it was sent.
Q. Some of those ways?
A. No,—the last.
Q. By Bill of exchange?
A. I expect so.

Q. You don't remember do you?
A. Well I wouldn't be positive.
Q. Were you a clerk in the bank at that time?
A. I had charge of the Collections for the bank.
Q. Were you a clerk in the bank?
A. Well I don't know,—I worked for the bank for twelve or fourteen years.
Q. What book did you keep?
A. When I first went to work for the bank, I had charge of the City collections.
Q. I am asking you what book of the bank you worked on?
A. I didn't work on any.
1556 Q. Were you in the teller's cages any time?
A. Yes sir, a good many times.
Q. Did you work in the cage?
A. Yes sir.
Q. And you say that Mosher gave his notes for the money that was sent, that is Mosher gave his notes for the money that was sent in that way?
A. Yes, sir.
Q. Who were those notes sent to?
A. Well sometimes I would bring them in, and sometimes they were sent in.
Q. You would go out there and get it?
A. If I was out there, and he made a deal I would bring in the notes.
Q. What notes do you mean, the notes Mosher gave for the money?
A. Yes, sometimes Ed would send in a note for five or six thousand dollars to his brother, or to the Capital National Bank and tell about a loan that he would want to make.
Q. Would that note come to you?
A. No sir.
Q. You don't know what became of the note?
A. Only in a general way.
Q. Do you know in a specific way?
A. No sir.
Q. Do you know what became of the notes that were sent in, that is if he had loaned the money in York county, and taken notes from the borrower, do you know what became of those notes?
A. Yes sir.
Q. What became of them?
A. They went to the Capital National Bank.
Q. Who took them there?
A. I couldn't say.
1557 Q. Did you take any of them there?
A. I don't know; I wouldn't say Yes or No.
Q. You have no distinct recollection now of having taken any, have you?
A. I wouldn't say Yes nor No to that; I suppose I have taken some.

Q. You may have at sometime, but you have no recollection, is that it?

A. Yes sir.

Q. And do you know what became of the note after it came down to the bank?

A. No sir.

Q. Don't know what was done with it, after that?

A. No sir.

Q. Don't know how it was entered on the books, or whether it was entered or not?

A. I might have known at the time.

Q. What is your recollection now?

A. I have no recollection about it.

Q. And you don't know what was done with the notes of Ed. Mosher so far as the bank is concerned?

A. No.

Q. Do I understand you to say that Mosher borrowed money from the Capital National Bank to loan on real estate for the Capital National Bank, or for Ed. Mosher, what were these mortgages given for?

A. Mosher was loaning money in York county for the Capital National Bank, and in order to get the money he would give a note for five or ten thousand dollars, and as his brother would guarantee the note then Ed could get the money in advance of the loan that was made on a farm. And when the loan was completed, the mortgage and notes went to the Capital National Bank.

1558–1564 Q. And what became of his note?

A. It was taken up, I suppose, of course,—I don't know what became of his note.

Witness excused.

* * * * * * *

1565 Mr. THOMAS: We offer now to read in evidence the following portions of the testimony of Ellis P. Hamer given at the trial of the case of Kent K. Hayden, Receiver, vs. David E. Thompson, et al., in the Circuit Court of the United States for the District of Nebraska, the testimony taken, I think, during June of 1897.

* * * * * * *

Mr. ROSE: The defendant Thompson objects to that as incompetent, irrelevant and immaterial, and not binding upon the defendant Thompson.

Mr. BISHOP: The defendant Hamer objects to any and all of the testimony as incompetent, immaterial and not binding upon the administrator, and not related to the issues in this action, nor upon matters connected with this action, and the defendant Yates objects as incompetent and immaterial, and not a matter bind-

1566 ing upon or in any way affecting him as a defendant.

The COURT: Let the testimony be read, and the parties have their exceptions.

Mr. THOMAS: Beginning at the top of page 184, ELLIS P. HAMER, being called on behalf of the respondents and duly sworn, as hereinafter certified, questioned by Mr. Dewees, testified as follows:

Q. What is your name?
A. Ellis P. Hamer.
Q. How old are you?
A. 73 years old.
Q. Are you the same Ellis P. Hamer who was a director in the Capital National Bank of Lincoln?
A. Yes, sir.
Q. When did you become connected with the Capital National Bank?
A. 1884.
Q. How much stock did you take in the bank?
A. I had 50 shares in the first instance.
Q. Did you subscribe for it?
A. I subscribed for it. Then there was an increase in the capital and I got 25 shares more, and then in '90 I believe I got 15 shares more, paying $1.25 a share. 90 shares in all.
Q. What did you pay for the previous shares?
A. Well that was from the bank direct. Well $100 a share.
Q. What kind of business were you engaged in besides this?
A. Well I had various things. I loaned some money, making some farms, building some houses; making some gardens, doing work of various kinds.
Q. Did you practice medicine?
A. No I never practiced medicine for pay since I have been in Lincoln.
1567 Q. Did you continue your connection with the bank until the time of its failure?
A. Yes sir.
Q. And did you attend the meetings of the directory while you were a director?
A. Usually.
Q. What was the process of declaring dividends. What would you and the directors do with reference to that?
A. Well the amount, the gross amount earned by the bank was looked up and given, and various expenses, clerk hire, rent and so forth were deducted from that and then there was sometimes—well I think always, a remnant from the previous declaration of dividends added to that and then the remainder was—there was a dividend declared from the remainder.
Q. Do you remember the bank sustained losses occasionally or any bad debts that came into the bank? If so, what was done with those?
A. Why yes, there was some bad debts,—well as far as I know they were stricken from the account.
Q. Now you may state what you did as a director in reference to this bank and its assets,—its business?

Mr. BISHOP: The defendant Hamer objects to that as incompe-

tent, immaterial, and not related to the issues in this action, and not binding upon the administrator.

Objection overruled.

Defendant Hamer excepts.

A. Well after the decease of Mr. Holmes I was on what was called the finance committee, and Professor Stuart and I looked over the —we examined the notes taken by the bank, the bills receivable, to see what condition they were in, what our judgment was in regard to their soundness and so forth, and we had general supervision over that matter. That is, if we saw anything there that we were hardly satisfied with, we investigated it and we usually found that
1568 there was some collateral somewhere that frequently maybe these that we were suspecting were not just what we thought they should be, maybe they seemed perfectly safe.

Q. What bank did you do business with during the time you were a director?

A. I did business with the Capital National Bank.

Q. Up to the time it failed?

A. Yes, up to the time it failed.

Q. When did Mr. Holmes die?

A. May 1891, about that.

Q. Well what did you do when you found there was some inquiry or some criticism or question about some matter in the bank on the part of the Comptroller of the Currency?

Mr. Bishop: The defendant Hamer objects as incompetent, immaterial, not binding upon the administrator, and not related to the issues in this action, nor upon matters connected with this action, and the defendant Yates objects as incompetent, immaterial and not a matter binding upon him in any way, or in any way affecting him as a defendant.

Objections overruled.

Defendants Hamer and Yates except.

A. Well I went to the bank and I had considerable—well I had a talk with the officers, chiefly with Mosher the talk was, and I criticised him somewhat for not attending to it more closely, and indicated that there was too much other matters, collateral matters that he was attending to, and he said that he was now clear of the manufactory,—well I think I spoke of the penitentiary more particularly, the business at the penitentiary, and he said that he was out of that, and indicated to me that there was but little outside of the banking business that he was connected with and said that the banking was his business and that he was wanting to follow that up properly and that these outside affairs he would indicate he was about through with, was the substance of it.

1569 Q. He had already sold out the penitentiary contract to Mr. Dorgan had he not?

A. He said so, yes. That is my understanding.

Q. Well, you may state whether you investigated particularly as to the matters spoken of or referred to by the Comptroller of the Currency?

A. The points spoken of by the Comptroller of the Currency?

Q. Do you remember what they were?

A. Well these loans here were spoken of as being excessive and that they were beyond the limits ordered by the law, or compatible with the law governing national banks.

Q. Did you write to the Comptroller then about it?

A. Why yes, we did.

Q. You may state what you did in reference to ascertaining the condition of the assets of the bank; whether you found out and investigated all that you could of the assets so as to know the real truth of the assets, while you were a director?

A. Why yes, as far as my limited knowledge of that kind of thing would admit, I thought I did. But I had the feeling that I did not comprehend the manner of keeping books to look up closely. I never had any experience with that kind of bookkeeping, nor any other very much. My bookkeeping was a simple affair as far as the doctoring business was concerned.

By Mr. BISHOP: We will offer in evidence Question No. 1048.

Mr. THOMAS: That's objected to on the part of the plaintiffs as hearsay, and a self serving declaration, and not an admission adverse to the interest of the witness.

Objection overruled.

Plaintiffs except.

(Question No. 1048 read by Mr. Bishop, as follows)—

1570 Read by Mr. BISHOP:

Q. Well if you found any paper that you suspected or at least didn't feel satisfied about, what would you do then?

A. Well it was Mosher that usually we went to for an explanation of the paper, and we would inquire in regard to the paper and as I speak of, if there wasn't collateral there and we didn't think it should be, why he made an explanation to me in regard to the paper, and we found often-times some collateral that was not attached to the paper, at least he said there was collateral, and I think he many times produced the collateral.

Cross-examination read by Mr. THOMAS as follows:

Q. I hand you what purports to be a copy of a letter written by you to the Comptroller of the Currency under date of February 23rd, 1892. You may read it over and see whether you wrote such a letter?

A. Well yes, I suppose so, yes sir.

Q. In that letter you say the manner of conducting the Capital National Bank of Lincoln, Nebraska, for a length of time has not been satisfactory to you?

A. Yes, sir.

Q. In what respect hadn't it been satisfactory?

A. Well there was loans. Now the loan of E. W. Mosher—Ed Mosher, I didn't think that was the proper way to do, and I think there was others that had got money in a similar manner. My theory was to keep the matter concentrated here and not send money

out west and let them put it into somebody else's hands to loan. That was what I objected to. That kind of thing As I say, I had a talk with them and I probably promised more at the close of that because I was in favor of making a very thorough investigation. I always felt rather delicate about looking up the bank books because I knew I didn't know very much about them.

1571 Q. Your idea was it wasn't good banking to send a lot of money out into York county to be invested there at the discretion of some one else?

A. Why yes, I didn't think that was proper.

Q. And in a similar way this money had been loaned to Small had it not, out at Fairfield?

A. Yes I understand that the Small loan was a direct borrow by Small. That is the way I understand that.

Q. Now how was this money loaned through E. W. Mosher at York and to him? Just give your best understanding of it.

A. My understanding of it was that there was money supplied to him by the officers of the bank, and he loaned it to farmers and took their notes.

Q. And the Capital National Bank took whatever loans or notes he sent in to them?

A. That was my understanding.

Q. How long before you wrote this letter had this method of making loans been going on?

A. Well I don't—I didn't know how long.

Q. You don't know how long they had been doing that?

A. No I don't know.

Q What else was unsatisfactory to you at the time you wrote this letter?

A. Oh I don't know that there was anything particular only I thought they ought to center the business here and do it in a proper and just manner and build up the character and repute for doing business properly and give the bank some character in that direction, as bankers, as a goodly bank. I don't know that there was anything other than that particularly.

Q. Well you were dissatisfied with the way Mosher was engaged in other business,—he had so many irons in the fire?

A. I spoke to him about the other business round about,—outside business.

1572 Q. Now what other paper of the bank were you dissatisfied with, if any?

A. Oh, I don't know that there was any.

Q. Did you know this Western Manufacturing Company paper was in the bank?

A. I knew there was some.

Q. Signed by E. Hurlbut, Jr.?

A. Yes sir, I think so.

Q. Did you know there was any of it in the bank after 1888 when the Western Manufacturing Company number one sold out to Western Manufacturing Company number two?

A. You see I didn't get commingled with that very much until after Mr. Holmes' death. I went in there frequently before his death and looked over the securities, but I didn't look it up very minutely at that time, and it was only,—Mr. Holmes died in 1890 or '91. Well now if you was speaking of Hurlbut notes before that, I wasn't so very observing of them previous to that time.

Q. Did you ever see any of them after that.

A. Well it seems to me so. It seems to me I saw some there. I have some recollection of it, it may have been previously to Mr. Holmes' death. As I say I went in there and looked over the notes and so forth.

Q. Mr. Hamer, did you know that there was such a large number of these Western Manufacturing Company notes in the bank at any time, running up over $200,000 to $235,000 at the failure of the bank?

A. At the time of the failure of the bank? No, that is rather in excess of what I was aware of.

Q. Now at the time you wrote this letter and at the time you had this meeting, about how much paper of the Western Manufacturing Company was there in the bank, or rediscounted by the bank, which it had endorsed?

1573 A. I don't know.

Q. What is the amount of the Western Manufacturing Company's paper that was in the bank at any time within your knowledge?

A. Well I didn't have a very distinct recollection of this manufacturing company's paper I didn't have any reckoning on that.

Q. Do you really know whether you ever saw any of it?

A. Well I don't know that I ever said positively that I did. It seems to me that I saw that paper.

Q. Did you ever investigate the company to see who it was or what it was, or did you think it was the one that was managed by Mr. Welch?

A. I knew what it was,—well I reckoned Mosher was at the head of this Hurlbut company that was my reckoning of the matter.

Q. Now in this letter to the Comptroller you say "Your letter is a move in the right direction. It indicates that the directors should take a more positive position in the management, which I for one shall do." Now in what respect had you failed to take a positive position prior to that?

Mr. Bishop: The defendand Hamer objects as incompetent, immaterial, not binding upon the administrator, and not related to the issues in this case, nor upon matters connected with this action.

The defendant Yates objects as incompetent, irrelevant and immaterial, not a matter binding upon or in any way affecting his as a defendant.

Objections overruled.

Defendants Hamer and Yates excepts.

A. Well there was these movements of circulating the money out

in the country, and his attention was not concentrated, as I thought, upon the bank sufficiently.

1574 Q. When these dividends were declared they were made upon the faith of what Mosher stated to be the condition of the bank were they not?

A. Oh, I couldn't say it was wholly on that, he made the statements but then as I thought, we had some knowledge of the condition of affairs.

Q. Your knowledge of the condition of the bank was obtained from Mosher and Outcalt was it not, largely?

A. Partially.

Q. Wasn't it largely?

A. Well, no, I don't know as I could say it was largely.

Q. Did you make any figures yourself as to the earnings or did you simply take Mosher's statement?

A. Well it was considerably Mosher's statement in regard to that, as I have indicated. I hardly knew enough about the books to make a reckoning so as to verify this statement of his.

Q. Did you count up the expenditures and the losses and inspect the books of the bank for the purpose of verifying this statement of his?

A. Well I have reckoned up expenses some and had reckoned up expenses as far as losses was concerned. I don't know that I got down to the foundation of that. I made some reckoning.

Q. Isn't it true that the bank never until 1892 charged off any losses on the books of the bank?

A. Well I can't say.

Q. You can't specify any bad debts or losses that were charged off can you?

A. No I couldn't I believe.

Q. Did you ever examine at any one time all of the bills receivable and all the paper in the bank?

1575 A. Well I supposed so. We thought we were examining them all.

Q. Did you ever compare the bills receivable in your hands with the books of the bank to see whether you ever had it all?

A. No.

Q. Did you ever look over the paper itself or did you just simply take the book which listed the bills receivable and run over the book?

A. Oh we took the bills receivable themselves.

Q. But you never made any comparison of the books to see whether all that was on the books was given to you for examination?

A. No.

Q. Did you or your committee ever examine the bank, count the cash, add the bills receivable and balance up the books of the bank to see whether they were correct as represented to you at the time you made dividends or at any other time?

A. We never counted the money.

Q. You never counted the money?

A. No. We never balanced up the books. I had seen the books, I suppose the chief books there, but I never balanced up the books.

Q. Did you ever compare the account with the eastern correspondents that your bank had with the balances and account kept by them to see whether your books were correct?

A. No.

Q. Did you ever examine the interest paid account to see the expenditures?

A. That is what was paid to other banks and so forth?

Q. And paid for interest, yes.

A. No, I don't know that I ever looked that up.

Q. Did you ever examine the interest received account showing the amount of interest received?

1576 A. Why yes, I have seen that, and the expenses and the various books but I didn't make any reckoning of that matter.

Q. Did you ever see any of this collateral that you have referred to here. Did you ever see any collateral that was deposited in the bank to secure bills receivable?

A. Why yes, I saw collateral.

Q. Whose collateral did you see?

A. Well at this time I don't know that I could tell but the notes—there was collateral with many of the notes, but I couldn't tell now whose notes they were.

Q. Did you ever see any collateral in there to the notes of C. W. Mosher?

A. I don't know whether I did or not.

Q. You have no memory of having seen any collateral of his, at the present time?

A. I suppose not.

Q. You were on the finance committee were you not?

A. Yes sir, part of the time.

Q. And you and Professor Stuart made a special examination of the paper of the bank?

A. Yes sir.

Q. When was it that you had this meeting for the purpose of considering the condition of the bank and answering the Comptroller's letter?

A. Why it might have been.—let's see. That is the 24th day of February, 1892. Well it must have been thereabouts.

Q. And where was that held?

A. Well I believe it was the Burr block. I don't distinctly mind whether it was the Burr block or the Richards block, but where I was in the building would indicate to me that it must have been the Burr block.

1577 Q. Why was it held away from the bank?

A. I don't know why.

Q. Isn't it a fact, Mr. Hamer, that you thought the bank was in rather a critical condition at that time?

A. No, there was not that feeling. That wasn't the reason. I don't know why. I don't remember any reason why it was there.

Q. How long were you in session that day?

A. Oh, not very long.

Q. And what did you discuss at that meeting?

A. Well we discussed.—that is when I was appointed on this committee. They had made some plans,—there was no finance committee and one of the things done was to say that I should serve on the finance committee.

Q. Did you discuss this E. W. Mosher matter at that meeting?

A. Oh, I don't know. I don't remember the particulars.

Q. Did you discuss the Small loan at that meeting?

A. I don't know.

Q. Did you know of the loss in the Sherman County Bank?

A. I knew there was trouble there with a loan.

Q. Did you know that there had been a loss through Donnell, Lawson & Simpson?

A. Why I knew something of it, yes.

Q. What did you know of it?

A. Well I didn't know anything definite of that, particularly.

Q. Did you know that there was a large amount of paper, some of it out from '87 and '88 down through the history of the bank, the totals of which amounted to $141,000 that was outstanding in the hands of various agents and banks for collection at the close of the bank, and part of it had been out prior to the payment of said dividends?

1578 A. Did that include the Small loan?

Q. No.

A. No, I was not aware that there was that much.

Q. Did you know that a good many of these notes that were taken through E. W. Mosher and that were obtained through the Marsh Harvester Company, as well as other notes overdue, were outstanding in the hands of E. Hurlbut Jr., and George Sanford and others for collection?

A. I didn't know that E. Hurlbut was trying to collect. Sanford was connected with this Ed Mosher affair to some extent. That is, he was looking up the lands, he was valuing the lands and learning what was against them, to decide whether it was more valuable than the loan and so forth, and all that kind of thing.

Q. Now did you think it was right, Mr. Hamer, while this Small matter was tied up in litigation involving some $50,000 from 1886 up to the failure of the bank, in view of this loss or tying up of the capital or money of the bank by reason of the failure of Donnell, Lawson & Simpson in the amount of $29,000 and in view of the losses and tying up of the funds of the bank by the failure of the Sherman county Banking Company, amounting to some 20 odd thousand dollars, and in view of the overdue paper on hand and the amount outstanding in the hands of collecting agents, and in view of the amount of money that was tied up in this E. W. Mosher business, or that was tied up in lands taken by him, did you think the bank was justified in declaring and paying dividends?

A. I don't know as I am banker enough to decide just what

amount a bank might lose and still declare a dividend. I don't know——

Q. Suppose the bank had suffered a loss of $25,000 during the year and the earnings were $25,000,—the net earnings ex-
1579 cept for that loss. Would you think the bank ought to pay a dividend?

A. No, I don't.

Q. Did you know that there were certificates of deposit outstanding in excess of the amounts that appeared upon the books of the bank?

A. No, I didn't know it.

Q. If you had known that fact would you still be in favor of declaring a dividend?

A. I would not be in favor of declaring a dividend if there was nothing to declare them from,—no profits.

Q. Did you know that there were erasures and fictitious entries and false entries in the certificate of deposit register.

A. I have heard it so said.

Q. Did you know it prior to the failure of the bank?

A. No.

Q. Did you examine or inspect those books or the certificates themselves, or the stubs of the certificates on which you have noticed the discrepancies or erasures, prior to the failure of the bank?

A. No.

Q. Suppose that the bank had earned in any one year $30,000 and one of the officers had stolen out of the bank $30,000 and concealed the fact, would you, if you had known of that fact, been in favor of paying a dividend just the same?

A. Why no, I wouldn't think it was proper to declare a dividend.

Q. If you had known that there were hundreds of thousands of dollars of outstanding certificates of deposit that were not entered upon the books of the bank, but which would have increased the liabilities of the bank that much more, would you have thought it proper to have declared a dividend, if you had known that fact?

1580 A. No.

Q. I call your attention to two reports made to the Comptroller of the Currency by the Capital National Bank purporting to have been signed by you, dated September 30, 1892 and September 25, 1891, and I will ask you if you signed those?

A. Yes sir.

Q. Did you read those over before you signed them?

A. Yes sir.

Q. Did you ever verify them by the books of the bank?

A. Well no, not entire.

Q. Do you know whether those figures that are on here now were on there then, showing the amount of overdue paper, bad debts, and loans in excess of the limit prescribed by law?

A. I suppose I knew that those were in excess and I suppose I knew it when I signed it, but my understanding of that is that it started with a smaller affair and then run up to these amounts.

1581 Mr. THOMAS: Plaintiffs offer in evidence Exhibit "AU" as found in the case of Hayden Receiver vs. Thompson et al., in the Circuit Court of the United States for the District of Nebraska. The Exhibit being found at page 106 of said transcript.

Exhibit "AU" received in evidence as follows:

"Farmers & Merchants Insurance Co.,
"Lincoln Electric Light Company,
"Lincoln Gas Company,
"D. E. Thompson, President.

Office Comptroller of Currency, Oct. 24, 1892.

LINCOLN, NEBRASKA, October 21st, 1892.

"Hon. A. P. Hepburn, Comptroller of the Treasury, Washington, "D. C.

"DEAR SIR: I have yours of October 18th and am surprised that "as yet you have not received an answer to your letter of August "31st. This letter of yours was answered after something more "than two weeks' delay; the delay being caused by the illness of "Mr. C. E. Yates, one of the directors, making it impossible for "him to come down town and Mr. Mosher, President of the bank, "delayed sending the letter to him, expecting, he said, that each "day he would be able to come out. The letter was signed by my- "self on presentation and I think was also presented to and signed "by every director of the Bank, was mailed, so I am told, and should "have reached you about a month since. Is it not possible that as "the letter did not come to you promptly as it should have done, "when it did reach you it was in some way misplaced and is now "in your office? If not, then it must have been lost in transit which "would be an unusual occurrence.

"I assure you that I, as a director of the Capital National Bank, "regret very much that there should have been any delay what- "ever in the answering of any communication from your depart- "ment and have only to say now that if our letter is not in your "possession and you will send a copy of yours of August 31st it "will receive a prompt reply.

"Yours Respectfully,

"D. E. THOMPSON."

1582 Mr. THOMAS: Plaintiffs now offer in evidence Exhibit "AT".

Exhibit "AT" received in evidence as follows:

"D. E. Thompson, Lincoln, Neb.

May 29, 1890.

"Mr. Jones, Congressional Committeeman, Seward, Neb.:

"This will be handed you by Mr. C. E. Llewellyn, who has charge "of rural delivery service for this district. There are to be two lines "established in your county, and running from your town. Mr. "Llewellyn is generous enough to say that we may have the choos- "ing of the carriers for this service. I have asked him to present

"this letter to you and consult you about the matter. It is quite "possible that you may get some political help out of the judicious "choosing of these carriers.

"Yours truly,

"D. E. THOMPSON."

1583 Mr. THOMAS: Plaintiffs now offer in evidence Exhibit "AZ" as found in the transcript of testimony in case of Kent K. Hayden vs. David E. Thompson, and others, at page 535 thereof.

Mr. ROSE: Each of the defendants object to this as not admissible against any of these defendants; incompetent, irrelevant and immaterial.

Objection overruled.

Each of the defendants excepts.

Exhibit "AZ" received in evidence as follows:

"Washington, D. C.
F. J. B.
S. M. C.

Office Comptroller of Currency, Jul- 12, 1889.

L. 2988.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., July 6, 1889.

Mr. C. W. Mosher, President Capital National Bank, Lincoln, Nebr.

SIR: Your memorandum on office letter of 17th ultimo is received and in reply you are respectfully requested to inform me of the date of acquirement of the real estate taken from J. W. Small of Fairfield, Nebr., for debt.

Respectfully yours,

J. D. ABRAHAMS,
Deputy Comptroller."

DEAR SIR: Acquired on May 30/1886.

Yours Resp'y,

C. W. MOSHER, *P't.*

1584 Mr. THOMAS: We offer in evidence Exhibit *"3a"* which is found attached to Exhibit X-946.

Mr. THOMAS: Is there any question as to the signature of Mr. Mosher on there?

Mr. ROSE: I have no doubt but that it is the signature of Mosher, in fact I think it is.

Mr. BISHOP: I wouldn't know whether it is or not.

Mr. ROSE: Each of the defendants object as incompetent, not importing any notice to any of the present defendants,—there being no question as to the genuineness of the signature.

The COURT: Let the exhibit be received.

Each of the defendants excepts.

Exhibit "3*a*" received in evidence as follows:

"In reply to above would answer that we have $14,000 of paper under that head".

Yours Resp'y,

C. W. MOSHER, *P't.*"

1585 Mr. THOMAS: Plaintiffs now offer in evidence Exhibit "3*b*" being part of Exhibit X-947.

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial; not binding upon the present defendants, and not importing notice or knowledge.

Mr. THOMAS: There's no objection on the ground that it is not the handwriting of Mosher?

Mr. ROSE: It appear- obvious that it is the handwriting of Mosher, in his own hand.

Objection overruled.

Each of the defendants except.

Exhibit "3*b*" received in evidence as follows:

"DEAR SIR: Above notes have been charged off since last state-
" ment.

" Yours Resp'y,

"C. W. MOSHER, *P't.*"

1586 R. E. MOORE, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows,—

Direct examination.

By Mr. BISHOP:

Q. State your name and place of residence.

A. R. E. Moore; I live at Lincoln.

Q. How long have you lived there, Mr. Moore?

A. I came there in the Spring of '71; forty years ago in a little while.

Q. What is your business,—your general business, Mr. Moore?

A. Negotiating farm loans mainly for eastern companies.

Q. Were you acquainted with the Capital National Bank, and Mr. Charles W. Mosher and Mr. Outcalt who ran that bank?

A. Yes, sir.

Q. How long were you acquainted with the bank and with them?

A. Well I knew them before the bank started; I knew of the bank during its existence; probably thirty years.

Q. Did you know Dr. E. P. Hamer, in his lifetime, Mr. Moore?

A. Yes, sir.

Q. How long did you know Dr. Hamer?

A. I don't know that I knew him only what time he lived in this city; I don't know just what time he did come here; I think 25 or 30 years ago.

Q. And up to the time of his death?

A. Yes sir.

Q. Were you a stockholder in the Capital National Bank?
A. I was at one time, a small stockholder.
Q. About when did you acquire your stock?
A. Well I acquired the principal part of it at the time the Capital National Bank was formed.
1587 Q. And did you sell any of your stock to Dr. E. P. Hamer?
A. Yes sir, sold it all to him.
Q. How much did you sell to him.
A. $1,500 worth.
Q. That would be fifteen shares of the capital stock?
A. Yes sir, I suppose so.
Q. And at what time did you make that sale to Dr. Hamer, Mr. Moore?
A. Well I have no memorandum to show the exact time, but I think from eighteen to twenty months before the bank failed.
Q. Calling your attention to your own certificates and the new one that was issued to Mr. Hamer was about September 3rd. 1891.
A. Well I have no means of fixing the date at all; I suppose it was something like that.
Q. Here is Exhibit "AX" which has been introduced in evidence which is a certificate of fifteen shares of the Capital stock of the Capital National Bank issued to Mr. Hamer, dated September 5th, 1891. Now referring to that exhibit does it recall the transaction or the date?
A. I couldn't say that it does particularly; I know it was something like that time before it failed.
Q. It was about that time?
A. Yes sir.
Q. There are two certificates, Numbers 27 and 82; one for ten shares and the other for five shares, bearing your signature among the papers of the Capital National Bank, introduced in evidence here and the assignment on the back was dated September 3rd, 1891; would that be about the date of your sale to Dr. Hamer?
A. I would suppose so; I would suppose it would be the exact date.
Q. Did you execute the assignment on the back of those certificates?
1588 A. I don't really recall, but I suppose I did.
Q. That would be the ordinary transaction?
A. Yes sir.
Q. Now explain the circumstances, and your conversation with Mr. Hamer and the sale of those shares to him.
A. Well the Doctor came into the office one morning,—into our office, and it was about the time some of the stock had sold for $1.45 and I told him I heard some of the stock of that bank had sold for $1.45, and the Doctor said it was worth it, and I asked him if he wanted to buy mine at that price. No, he said he wouldn't give that price, but he would give $1.25, and I told him he could have mine, so I sold him the stock and he paid me right then and there for it.
Q. He paid you in full, the $1.25?
A. Yes sir, he paid me——
Q. Paid you in full.

A. Yes sir, paid me $1,875.

Q. Now Mr. Moore, were you acquainted with the reputation and standing of C. W. Mosher and R. C. Outcalt at the time of the formation of the Capital National Bank and from that time on up to the time of its failure in this community as to their reputation for honesty and probity and capacity for the transaction of the banking business?

A. I think so.

Q. What was their standing and reputation in those respects?

1589 A. Well I think it was quite good.

Q. What was the reputation and standing of the Capital National Bank from the time you became associated with it up to the time of its failure?

A. As far as I know it was regarded a good bank; the directors were good men; strong men.

Q. Mr. Moore, it has been shown in testimony that there was some move taken by Mr. Mosher, the president of the bank, to increase the capital, it is said, to one million dollars. Do you remember anything about that move?

A. I recall some talk about it.

Q. Explain where that talk occurred, and as near as you can, when?

A. Well I should say from my best recollection that I had heard Mosher and Outcalt talk a little about it informally at first, and then I was present at a meeting when it was talked about—a meeting of the stockholders and directors.

Q. Do you remember about when that was?

A. Well it was before I sold my stock.

Q. Do you remember anything about who was present, or took part in that meeting?

A. Some.

Q. Was Mr. D. E. Thompson at that meeting?

A. Yes sir, he was at the meeting I refer to.

Q. What if any expression of opinion, or position did Mr. Thompson take in that meeting?

A. Well Mr. Thompson didn't, in the conversation with me, seem to favor the increase to a million dollars.

Q. Was that at the meeting?

A. That was at the meeting, yes sir.

1590 Q. What was Mr. Thompson's expression on that matter?

A. Well, they had been talking about making the capital from $300,000 to a million at this meeting and it seems to me it was W. W. Holmes asked me what I thought about it, and I says "Well while we are making a big bank, let's make it a million" and that seemed to stir them some and Mr. Thompson said that I didn't take the stock when I could get it, and now I wanted to put it up to an unprofitable figure, when I had the money to take it and the others didn't, and I said I didn't care anything about the matter and it was dropped.

Q. At that meeting or at any other time when this question was

up was any action taken authorizing the increase of the capital stock from $300,000 to a million, or any other such sum?

A. Not to my knowledge.

Q. No such action was taken that you were aware of?

A. No sir, not that I was aware of. Or any other sum did you say?

Q. Well to a million dollars in particular.

A. I think it was increased to $300,000, but I never knew of any action authorizing a million dollar capital, nor more than $300,000.

1591 Q. Did you know of any record or memorandum to that effect authorizing an increase of the stock to one million dollars?

A. I never knew of any. There might have been but I never knew of it; never heard of it.

Q. Do you remember where the meeting you speak of took place, Mr. Moore?

A. It was in the front room of the banking room of the Capital National Bank in this city, that is my recollection.

Q. That was the "O" street front of the banking room?

A. That is my recollection.

Q. So far as you have attended the meetings of the directors or stockholders of the bank, Mr. Moore, where were they held,—what part of the banking room?

A. Well, I never attended any at any other place than that front end of the bank,—the "O" street end, but I don't think I was ever at more than two of them.

Mr. BISHOP: That is all.

Cross-examination.

By Mr. THOMAS:

Q. You say Mr. Moore, you were a stockholder from the time the Capital National Bank was organized until September, 1891?

A. Until I sold my stock to Dr. Hamer.

Q. And that you think was in September, 1891?

A. I think it was, from the date of these certificates.

Q. And this meeting to which you have referred concerning the organization or increasing the capital stock to a million dollars, when was that?

A. Well I couldn't fix the date; it must have been before I sold the stock; I wouldn't think it was such a very great length of time; I never attached much importance to it and I couldn't really fix the date.

1592 Q. And why did you sell your stock?

A. Why did I sell it?

Q. Yes sir.

A. Well I sold it because I thought it was a fair price for it, and I could use the money.

Q. Notwithstanding that Mr. Hamer told you at the time that other stock sold for $1.45?

A. Yes sir, notwithstanding that. I wasn't a very great enthusiast for bank stock; never was.

Q. You sold this for $1.25?

A. Yes sir, I did.

Q. And for no other reason than you have given?

A. No other reason that I know of.

Q. Now at the time this million dollar bank was talked of wasn't it suggested that you take $25,000 of it and you become vice president?

A. Not to my knowledge; it wasn't suggested to me; not at that time.

Q. When was it?

A. That was when they first started the bank; it was suggested to me at that time, when they first started the Capital National Bank.

Q. In 1884?

A. Well they tell me that is the date it was organized; I have no memorandum to recall dates; I know it was a great many years ago.

Q. Do you recall of ever having had a conversation with Mr. Harry T. Jones in November, 1910, in your office in Lincoln?

A. Yes sir.—I think that is the date.

Q. In that conversation did you not say to him that at the time the million dollar bank was talked of they came to you and asked you to become its vice president and take $15,000 worth of the stock in the new bank with the million dollar capital?

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A. No, I didn't say at that time, I said when they started the bank they wanted me to.

Q. No, I mean when they wanted to increase the stock?

A. No sir; I couldn't have made a mistake like that; that was when they started the bank.

* * * * * * *

1596 Q. Now you say you attended meetings of the directors of the Capital National Bank?

A. Yes sir, I think so.

Q. How many?

A. Well I don't recall of over two, and I am not absolutely certain of but one; I think they were held in this Capital National Bank room.

1597 Q. Were you ever in the back room?

A. I have been in it, yes.

Q. How big was it at that time?

A. Oh, it was quite small; I don't know the exact size.

Q. 12 x 14?

A. I should hardly think as large as that.

Q. 10 x 12?

A. I would think that was nearer the size; it may have been a little larger, I couldn't say.

Q. Who was present at this directors' meeting which you attended?

A. My recollection is that was denominated Stockholders and

directors' meeting, and that is why I was there; I was merely a stockholder and I recall of being present, I think Mosher, Outcalt, Thompson and Holmes, and Professor Stuart; I don't recall any other parties.

Q. When was that meeting held?

A. I don't recall the exact date.

Q. About when?

A. I think it was perhaps '89, '90 or '91, somewhere in there.

Q. Do you recall of anything that took place at that meeting?

A. I recall this conversation with Thompson.

Q. I mean at the directors' meeting.

A. I don't think I stayed at the directors' meeting; I think when the stockholders' meeting was out I left.

Q. Were you ever at a directors' meeting.

A. I think I was at a directors' meeting when they showed some notes.

Q. What were the circumstances of that?

A. All I recall about it is their showing a lot of notes and commenting on them.

1598 Q. Who was present at that meeting?

A. I recollect Mr. Mosher being there, and I think Professor Stuart was there maybe, and Mr. Holmes; it's a great many years ago and I didn't charge my mind with it.

Q. Who else do you remember of being there?

A. I wouldn't be positive of anybody but Mosher.

Q. Was Dr. Hamer there?

A. I couldn't say, but I think he was.

Q. Mr. Yates there?

A. I have no recollection of ever seeing Mr. Yates in a directors' meeting, but I might.

Q. Was Mr. Thompson there?

A. I don't have a positive recollection of but the one meeting that I spoke of.

Q. I thought you said you had no recollection of being at more than one directors' meeting?

A. I don't have a positive recollection of but the one meeting that I spoke of where the increase of the capital stock was discussed.

Q. Any other meeting?

A. Well I think I was at another one, but I am not very positive about that, where the notes were discussed.

Q. What else was done besides discussing the notes?

A. I don't recall anything else.

Q. Any dividend declared?

A. I don't know, I don't remember; I think I just dropped in.

Q. Who was discussing the notes?

A. Well the different members of the board, Mr. Mosher would produce the notes and speak of them, and they would comment on it, that it was all right or something of that kind.

Q. Who was the commenting to,—the other members of the board or directory, you mean?

A. No, it was just kind of an informal talk.
1599 & 1600 Q. That meeting was held in the front of the bank?
A. Yes sir; I think that was the only place I ever saw a directors' meeting.
Q. Are you sure you never attended a meeting in the back room?
A. I surely have no recollection of it.

* * * * * * *

1601 Sister IDA, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination.

By Mr. ROSE:

Q. Sister Ida, where do you live?
A. I live at Tabitha Home at present.
Q. Is that east of the city of Lincoln?
A. Yes sir.
Q. What sisterhood is it of which you are a member?
A. The Lutheran.
Q. How long have you been connected with the Tabitha Home near Lincoln?
A. It will be two years next May.
Q. Are you acquainted with Walter T. Scott, the old gentleman about seventy years old, and lame?
A. Yes sir.
Q. Where have you known him?
A. As an inmate of the Tabitha Home.
Q. He lived there at the Home sometime—he was there when you came?
A. He was there when I came.
Q. Are you acquainted with his reputation for truth and veracity in and about the Home where he lived there for sometime?
A. Yes sir, I am acquainted with it.
Q. And what is that reputation, good or bad?
A. —.
Q. I will say in any about that community where he lived for a period of ten years, are you acquainted with his reputation for truth and veracity. Answer by Yes or No.
1602 A. Yes.
Q. Now what is his reputation for truth and veracity in that community, good or bad?
A. Bad.

Mr. ROSE: That is all.

Cross-examination.

By Mr. THOMAS:

Q. What is your full name?
A. Sister Ida Koucker.

Q. How long was Mr. Scott out there after you come to the Tabitha Home?

A. He was there ever since I have been there until he was dismissed.

Q. He was there when you came to the institution?

A. Yes, sir.

Q. Wasn't he drawing a salary?

A. No sir.

Q. How do you know?

A. Not to my knowledge.

Q. Are you running that institution?

A. No sir.

Q. Then how do you know what his arrangements were?

A. I keep the record of the books for the Home and our Superintendent keeps the record of the salary.

Q. Isn't it true that Mr. Scott has recovered money for salary from that institution?

A. Not since I am there.

Q. If he has you didn't know about it?

1603 A. If he has I didn't know about it.

Q. Isn't it true that he sued them for his wages out there and got a judgment and collected it?

A. I don't know anything about that?

Q. Who did you ever talk to concerning Mr. Scott's reputation?

A. Well I talked to the sisters out there.

Q. Which one?

A. Sister Christina.

Q. How long has she been there?

A. For two years.

Q. Talked to her when?

A. I don't recall.

Q. About how long ago?

A. I can't say.

Q. Well is it a week or a month or a year or two years? When did you talk to her?

A. Just before I left home I talked to her, but not about Mr. Scott.

Q. When did she tell you anything about Mr. Scott's reputation?

A. When I first came she spoke of Mr. Scott's reputation.

Q. In what regard?

A. That he was bad.

Q. What did she say about him?

A. He had to be watched.

Q. In what way?

A. I don't care to answer that in public.

Q. But I want you to answer that. What did she say about his truthfulness?

A. She didn't speak of his truthfulness.

Q. It had reference to some other matters did it?

A. Yes sir.

1604 Q. And isn't it true that he had some trouble out there on account of marrying a young lady there at the Home?
A. He had some trouble.
Q. He married a young lady out there and the Home was very much opposed to it?
A. No, the Home wasn't opposed to it.
Q. That was the cause of the trouble wasn't it?
A. No sir.
Q. What was the cause of the trouble?
A. Well he was a bad man.
Q. Who else did you talk to besides this sister?
A. I don't speak of such things to other people.
Q. Who else spoke about it?
A. She and I.
Q. She and you—she was the only one you talked to?
A. Yes sir, and I don't speak of those things.
Q. She is the only one you talked to about it, is that true?
A. I said it was.
Q. Where is the Tabitha Home located?
A. East of the city.
Q. How far?
A. I don't know the exact distance.
Q. Approximately.
A. I suppose from here, about two or two miles and a half.
Q. Isn't it four or five miles?
A. I don't think so.
Q. What is your class of work out there?
A. I have charge of the old people and the children.
Q. Does your work confine you pretty closely to the Home?
A. Yes sir.
1605 Q. You don't get to town very often?
A. Very seldom.
Q. You are out there nearly all the time?
A. Nearly all the time.
Q. You don't talk with any one else outside of the Home?
A. Certainly.
Q. I say you don't get much opportunity to talk with people outside of the Home?
A. Well, people come and visit there and I talk sometimes.
Q. But they don't talk about such matters as you have testified to here today?
A. No sir.
Q. And never have talked to you about Mr. Scott?
A. No, I never speak about Mr. Scott.
Q. And no one but this sister ever spoke to you about him?
A. Oh — have spoke about him, but not about his truthfulness.
Q. Not once.
A. Not about his truthfulness.

Witness excused.

1606 Mr. W. H. MENDENHALL, called as witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination.

By Mr. ROSE:

Q. What is your occupation?
A. I am engineer out there.
Q. Out where?
A. Tabitha Home.
Q. How long have you been employed at Tabitha Home?
A. Well sir, it is on two years.
Q. Do you know Walter T. Scott?
A. Yes, sir.
Q. How long have you known him?
A. Close to two years; he was there when I came.
Q. He was at the Home?
A. Yes sir.
Q. Did you see him frequently and talk to him while he remained at the Home?
A. Yes sir, while he was there I seen him pretty near every day.
Q. And are you acquainted with his reputation for truth and veracity in the community there where he has recently lived?
A. Well some, not exactly.
Q. What I mean is, are you acquainted with how he is regarded in that community as being truthful or a liar,—that's what I mean,—his general reputation in that respect for truth and veracity?

The COURT: Answer by Yes or No.

A. Yes sir.
Q. What is his reputation, good or bad?
1607 A. It is bad.

Cross-examination.

By Mr. THOMAS:

Q. When did Mr. Scott leave Tabitha Home?
A. Well it has been over a year I guess.
Q. Since he has been gone?
A. Yes, sir.
Q. How long was he there while you worked there?
A. I should judge about five months.
Q. During that five months that Mr. Scott was out there who did you ever hear say anything about his reputation for truthfulness?
A. Well I never heard anybody come to me and say anything about his truthfulness.
Q. Can you think of anyone that ever said anything to you about his truthfulness during the five months that Walter T. Scott was out there while you were out there?
A. Well no one only the gardener; the gardener there didn't seem to have much stock in what he said.
Q. What did the gardener say to you?

A. Well he was just telling me what Mr. Scott had told him; he said he didn't believe it.

Q. What is the gardener's name?

A. Mark Rathbun?

Q. What did he tell you?

A. Well they were talking about making garden.

Q. I asked what the gardener said about Scott's reputation.

A. He was telling me about Scott telling him he was a
1608 gardener, and Rathbun claimed to be a gardener and of course Scott was trying to get ahead of Rathbun, and Rathbun said he didn't believe he was as good a gardener as he was.

Mr. THOMAS: That's all.

Witness excused.

1609 Mrs. R. A. WHITE, called as a witness and being first duly sworn, testified as follows:

Direct examination.

By Mr. ROSE:

Q. How long have you lived in and about Lincoln, Mrs. White?

A. Since 1890.

Q. When you have lived here in Lincoln what was your occupation?

A. I was teaching in the city schools.

Q. In the public schools of the city?

A. Yes, sir.

Q. Did you have any official relationship, or connection with the Tabitha Home?

A. Yes sir.

Q. What was it?

A. I was a member of the Board of Trustees, and secretary of the Board of Trustees.

Q. Where do you live, just at the present time?

A. York, Nebraska.

Q. Are you acquainted with Walter T. Scott?

A. Yes sir.

Q. How long have you know- him, and where have you known him?

A. I have known him for about ten years, and I became acquainted with him in Tabitha Home, when he came out there.

Q. Do you remember the circumstances of his coming there?

A. Yes sir, it was sometime after the failure of the Mosher bank; I don't remember the exact year.

Q. Did he come there as an inmate or as an employe?

A. He came as an inmate.

1610 Q. And are you still acquainted with him?

A. I know him but I haven't seen him for several years.

Q. Didn't you see him in Lincoln recently?

A. I seen him about two years ago.

Q. Now you may state whether you are acquainted with his reputation in and about the community of Tabitha Home and here in Lincoln where he lived for a number of years?

A. Yes sir.

Q. But you say you have seen him within two years?

A. Yes sir.

Q. And you have been here frequently in the two years?

A. Yes sir.

Q. Now you may state what that reputation is for truth and veracity, good or bad?

A. It is bad.

Cross-examination.

By Mr. THOMAS:

Q. You say you have lived in York for five years?

A. Yes sir.

Q. How often have you been in Lincoln in that time?

A. I can't state the exact times, but I have been here a number of times.

Q. About how many times?

A. The first years I belonged to the Home I was here on an average of half a dozen times a year, the first years; lately I
1611 haven't been here so often, about twice a year.

Q. The last few years you have only been here twice a year?

A. Yes sir.

Q. And you saw him when last?

A. I saw him at the Long-Moyer case.

Q. What case was that?

A. That was sometime ago.

Q. How long ago?

A. I don't know the exact time; it must have been about two years ago.

Q. Can you tell me what the case was, so I can locate it,—what was the case about?

A. About a girl suing the Home for some wages.

Q. In what court?

A. Here in Lincoln,—Judge Cornish's court first.

Q. And did Mr. Scott sue for his wages to-?

A. No sir.

Q. Didn't he afterwards, or before, sue for his wages?

A. I know nothing about Scott suing the Home for wages.

Q. Now this suit you have in mind was how many years ago?

A. About two years ago; maybe a little longer; I don't know the exact number of years.

Q. And that was the last time you saw Scott?

A. No, the last time I spoke to him,—the last time I saw him was a little bit later, when I was at the Home, but I just saw him.

Q. Now in the last year who has talked to you about Mr. Scott or said anything to you about his reputation for truthfulness?

A. I don't know the last year that anybody talked to me.

1612 Q. In the last two years who has ever said anything to you about his reputation for truthfulness?

A. Mrs. Hiner and I talked about that within two years.

Q. Mrs. Hiner out at the Home?

A. Some time ago, yes sir.

Q. How long has that been?

A. That was when the English Lutheran Evangelical church took charge of it.

Q. Was that the time you had the talk with her?

A. Yes sir.

Q. How long ago has that been?

A. You can look up the records; I can't tell you exactly.

Q. What is your best recollection?

A. I don't know.

Q. When you have been in Lincoln in the last five years what has been your business here?

A. Why to meet with the Board of Trustees first, and consult about the affairs of the Home, and then later,—these last two years I have been here for my own business, not for business of the Home.

Q. Then for the first three years after you went away when you came here it was solely on business pertaining to the Tabitha Home?

A. Yes sir.

Q. And you would just go to the Home and back?

A. I might call on some friends.

Q. And the last two years you have been on some other business?

A. Yes sir.

Q. Now can you tell me one instance where any person ever told you that Mr. Scott's reputation for truthfulness was bad?

A. Yes.

1613 Q. When was it?

A. At the Long-Mayer trial, he told absolute falseness.

Q. I am asking you to tell me who ever told you that his reputation for truthfulness was bad?

A. Well at that time, if I could look up the time of the trial, Mrs. Hiner and Mr. Hiner told me about him lying.

Q. That was in regard to a suit that was had over some wages that some woman claimed the Tabitha Home owed. Isn't that true?

A. Yes sir.

Q. And those parties, Hiner, they were representing the Tabitha Home in that lawsuit?

A. Yes, sir.

Q. And this woman had sued the Tabitha Home?

A. Yes sir.

Q. And Mr. Scott was a witness in that case?

A. Yes sir.

Q. And Mr. Hiner and his wife were opposed to him?

A. Yes sir.

Q. And the woman was sucessful and recovered her wages in that suit?

A. Yes sir.

Q. But you don't remember that Mr. Scott had a similar suit against them?

A. I don't know.

Q. You don't say he didn't?

A. I know nothing about it.

Q. And the jury in that case found in favor of the party claiming the wages?

A. I couldn't help that; I know what he said that was false.

1614 Q. You testified in that case?

A. Yes sir.

Q. And Mr. Hiner and Mrs. Hiner testified?

A. Yes sir.

Q. And you all testified just contrary to what Mr. Scott did?

A. Yes sir.

Q. And the testim-y that you and Mr. Hiner and Mrs. Hiner gave wasn't what Mr. Scott testified to?

A. It was what they asked us.

Q. You didn't agree in your story?

A. Not when he told lies.

Q. Well, the jury found against you didn't they?

A. I couldn't help that; he told lies.

Q. The jury found that you people told the lies and he told the truth didn't they?

A. I couldn't help that.

Q. The jury found against your testimony.

A. No, it found against him at first and then he appealed it and finally they made a settlement so I don't know whether the jury found against us.

Q. The jury found that there were some wages due?

Q. You don't like Mr. Scott do you?

A. No sir. I will answer why——

Q. I don't care for that.

1615 A. I have no personal dislike, no.

Q. He married a woman that was living out at the Tabitha Home, didn't he?

A. I heard so by the papers that he did.

Q. You didn't know anything about it?

A. Not lately. I know that he was an immoral person when I was there; that he lied and allowed himself familiarities for which he was reproved, and which made him very angry; for that reason he became angry at that Home. I know that po-itive, and a man that is as immoral as Scott, how could anyone like him; I have no personal dislike.

Q. Then your testimony is based upon the fact of his immorality?

A. And untruthfulness; his lying.

Q. You are basing that upon your own opinion of Scott?

A. My own individual talking, and what I saw of him; it is based upon my acquaintance with him, and what I have seen when I was at the Home and from personal observation; hearing and seeing.

Witness excused.

1616 Mr. W. A. SELLICK, called as a witness on behalf of the defendants and being first duly sworn testified as follows, towit:

Direct examination.

By Mr. ROSE:

Q. You are a citizen of Lincoln?
A. I am.
Q. At present representative of this district in the state Senate?
A. Yes sir.
Q. Formerly practiced law here in Lincoln?
A. I did.
Q. And what is your present business?
A. I am manager of a wholesale mercantile establishment.
Q. How long have you lived in Lincoln?
A. Twenty six years next March.
Q. Are you acquainted with W. T. Scott, a lame man, formerly employed as bookkeeper in the Capital National Bank?
A. Yes sir.
Q. How long have you known him?
A. Practically all that time; my acquaintance with him began soon after I moved to Lincoln.
Q. And acquainted with him still?
A. Yes sir.
Q. In recent years have you been connected with any investigations in which Mr. Scott was interested or concerned in any way?
A. Why I hardly know to what you refer.
Q. With which he had any connection as a witness or otherwise?
A. Only in this way. I was a member of an investigating committee appointed by a charitable society here to investigate Tabitha Home, if that is what you refer to. In that investigation, if
1617 I remember rightly, Scott was a witness for the Home, and that is the only instance I recall that would be responsive to your question at all.
Q. What was the style of your firm in 1887?
A. Sellick & Lane.
Q. Where was your office at that time?
A. On the south side of "O," between Eleventh and Twelfth; my recollection is it was 1127, but I would not be quite sure of that number. It was about midway between Eleventh and Twelfth on the south side of "O" street.
Q. Did you have any business at or about that time with this Mr. Scott?
A. Yes sir, he was a client of mine.
Q. Was he ever at your office at a time when R. C. Outcalt was there?
A. Yes sir, once.
Q. I want to ask you if in or about the year 1887, this Mr. Scott came to your office with what purported to be some forged promissory notes, purporting to have been carried by C. W. Mosher as assets

of the Capital National Bank, for your inspection, and if while he had such alleged forged notes in his possession R. C. Outcalt came into your office; spoke to Mr. Scott reproachfully and took the papers referred to, and with Mr. Scott left your office?

Mr. BURR: I would like to ask the witness a question, if the Court please, to see if he was not attorney at that time——

The COURT: You may do so.

By Mr. BURR:

Q. You spoke of him being a client of yours at that time?
A. Yes sir.
Q. Was he then visiting you as a client?
A. He used to come there to consult me as attorney.
1618 Q. And the relation of client and attorney existed between you upon the subject then being discussed by you and he?
A. Yes sir.

Mr. BURR: Then Your Honor, we object to the testimony because it is a privileged communication, not only of the witness, but of Mr. Scott and all the parties here, and cannot be inquired into, because of the relation of attorney and client, and because the communication whatever it may be was confidential.

Mr. THOMAS: And for the reason it is an effort to impeach on an immaterial matter, and at a different time and place than was mentioned in the testimony in this case; no foundation laid as against Mr. Scott.

Mr. ROSE: May I ask another question before Your Honor passes on the objection?

The COURT: Yes sir.

By Mr. ROSE:

Q. In the matter in which you were professionally advising with Mr. Scott who were Mr. Scott's adversaries, if anyone?

A. It is difficult to answer that by names for the reason that there were no cases involved, that is, I mean no suit. I would say that Mr. Outcalt was the man who was considered as the party in interest opposed to Mr. Scott at the time, but in the sense of being adverse, as we understand in a lawsuit, there was no lawsuit at that time.

Q. Was it in respect to the affairs of the Capital National Bank, was that the subject of it?
1619 A. Yes sir.

Q. Now then I renew the former question to which objection was made.

(Question repeated.)

Mr. BURR: Well Senator, was this man there as a client and were you advising with him?

A. Yes sir.
Q. And the relation of attorney and client existed at that time?
A. Yes sir.

Q. And the evidence which you would now give would be relating to the matter about which you were interrogated as his counsel?

A. Yes sir.

Q. Do you desire to disclose this communication?

A. I wouldn't feel that I had a right to without his consent. My position in the matter I want to state frankly is, I have no desire to withhold any information in my possession that would be helpful to either of these parties, but I would prefer not to trespass upon the grounds of professional courtesy without the consent of Mr. Scott in this matter.

Q. I will say in respect to my question that I did not wish the witness to disclose any confidential communication, but I asked him whether at the time when Mr. Outcalt, as the cashier of the Capital National Bank and the adversary of Mr. Scott, was present with him in the office of the witness, the incident which I have related of Mr. Outcalt's picking up alleged forged notes took place in the presence of Mr. Outcalt and Mr. Scott.

1620 Mr. THOMAS: That is objected to as a privileged communication, and an attempt to impeach a witness on an immaterial matter; no proper foundation laid, and the impeaching question not having been called to the attention of the witness Scott.

The COURT: The Court is of opinion that the impeachment is wholly upon an immaterial matter and not within the issues of the case, and that under the statement of Senator Sellick any communication which he would now give would be privileged, and for that reason the court sustains the objection.

Each of the defendants excepts.

Mr. ROSE: We offer to prove by the witness Sellick that in the year 1887, Walter T. Scott, who has testified in this case as a witness on behalf of the plaintiffs, came to the office of the witness, on "O" street between Eleventh and Twelfth, in connection with a controversy between himself and the Capital National Bank, and brought with him for the inspection of the witness some documents purporting to be forged promissory notes executed by Charles W. Mosher, and carried for a period as assets of the Capital National Bank, and that while Scott was so in witness' office R. C. Outcalt the cashier of the Capital National Bank entered the office; reproached said
1621 Scott, picked up the notes that said Scott had brought in and departed with the notes and said Scott from the office,—excluding in the offer of proof any communication of a privileged character, or any communication or transaction other than such as took place in the presence of both R. C. Outcalt and said Scott.

Mr. THOMAS: I am willing to admit that Mr. Scott was in the office of this witness, with some notes which purported to have been forged by Mr. Mosher and that Mr. Outcalt did step into that office, and as Mr. Rose said reproached Mr. Scott, and grabbed the notes and went out. Now we will admit that but we still insist it is immaterial and an attempt to impeach on immaterial matters and a privileged communication.

By Mr. THOMAS:

Q. Wasn't this occurrence several years before Mr. Scott quit the employ of the bank?

A. My memory is not quite clear as to the exact time; I can fix it though as being in the latter part of '86 or early part of '87. I am unable to fix in my mind the exact date, but I remember where the incident was, and I remember that my office was at that place during those years.

Q. Do you know, Mr. Sellick, that Mr. Scott continued in the employ of the bank after that for some time?

A. My impression is that he did.

By Mr. ROSE:

Q. Now I want to ask you, following their inquiry, what is your knowledge as to whether he concluded an adjustment by
1622 which he gave to the bank a note for $7,644.00 or thereabout, to cover the balance of fraudulent credits entered by Scott to his own account on the certificate of deposit register of the Capital National Bank?

Q. Now Mr. Smith you have expressed a hesitancy about this other matter. I would like to ask you whether you are acquainted with Walter T. Scott's reputation for truth and veracity in this community where he has lived?

A. When, now or then?

Q. Now or then,—or a time reasonably near to the present issues.

A. Why I think perhaps as much so as most anybody would be.

Q. Well what is it, good or bad?

A. I can't say that he would have any general reputation. I have heard his truth and veracity questioned seriously on a certain occasion, but I wouldn't want to testify that he had a reputation one way or the other.

Q. You wouldn't want to testify that he was prominent enough to have a general reputation.

A. No.

Q. I guess you never did swear away anybody's reputation for truth and veracity.

A. I wouldn't want to.

By Mr. THOMAS:

Q. You never heard anybody question Mr. Scott's reputation for truth and veracity?

A. Only in one instance.

1623 Q. Was it in some litigated case?

A. No, it was in this case that Mr. Rose inquired about.

Q. The Tabitha Home matter?

A. Yes, sir.

Q. I mean so far as his general reputation,—you never have heard it discussed anywhere before?

A. Except in that one investigation.

Q. That's the only time you ever heard about it?

A. Yes sir, that's the only time, one way or the other.
Q. And was he your client for a number of years while you were in the practice?
A. Yes sir.
Q. And you had litigation for him?
A. Yes sir.
Q. After the Capital National Bank failed?
A. Yes sir.
Q. You appeared for his wife in some divorce proceedings?
A. I was her attorney in the matter of her divorce.

Mr. THOMAS: That is all.

Witness excused.

1624 Dr. H. B. MILLER called as a witness on behalf of the defendants, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. ROSE:

Q. Where do you live?
A. Lincoln, Nebraska.
Q. What is your business?
A. Physician.
Q. Do you hold a certificate from the State Board of Health of Nebraska to practice medicine and surgery?
A. I do, yes sir.
Q. Do you have any official connection with the Tabitha Home?
A. Physician to it.
Q. Are you acquainted with Walter T. Scott, a lame man, that was formerly an inmate of that institution?
A. Yes sir.
Q. How long have you known Walter T. Scott?
A. I am not positive as to his middle initial, but I know a man they called Walter Scott.
Q. Well a lame man that was out there.
A. For the last five years.
Q. Where did you live during that time?
A. Lincoln, Nebraska.
Q. Where did Mr. Scott live?
A. Part of the time at the Home, and part of the time in the city.
Q. Are you acquainted with his general reputation in the community where he has lived for the last five years for truth and veracity?
A. Yes sir.
1625 Q. What is that reputation, good or bad?
A. Bad.
Q. Have you noticed and observed Mr. Scott and his demeanor?
A. While he was at the institution, yes sir.

Q. Enough to form an opinion as to whether he is sane or insane?

A. I would class the man as a moral degenerate.

Q. I want to ask you if moral degeneracy, if you use the term in the sense of a classification of insanity?

A. Yes sir.

Q. What is your opinion as to whether he is at this time sane or insane?

A. If you will allow me to class that under insanity.

The COURT: You are the man that is doing the classification.

A. Then I should say that the man is suffering from a species of insanity.

1626 Cross-examination.

By Mr. BURR:

Q. Did you ever examine this Mr. Scott?

A. In what way?

Q. As a physician and surgeon?

A. I have examined him as a physician of the Home.

Q. What kind of an examination did you give him?

A. He would refuse to get up in the morning, and lie there and want them to bring his breakfast to him, and I have gone into his room to see whether he was sick, or simply acting as an abnormal person would.

Q. You know, Doctor, that I asked you what kind of an examination you gave him?

A. You know that I answered your question, don't you?

Q. I know you did not. Now answer my question. All the examination you gave him you have stated?

A. Yes sir, all that is necessary for a physician to state, when he says he makes an examination. I went in and made an examination sufficient to convince myself that the man was shamming; that he wasn't sick.

Q. Do you know that we have an insanity commission established in this county?

Q. Well did you ever prefer any charges against him for insanity, so that he might be sent to the asylum, where he would receive proper treatment?

A. Not before any insanity board, no sir.

Q. We have a large insane asylum here, don't we?

Mr. ROSE: Defendants objects as immaterial, and not proper cross examination.

Objection sustained.

1627 Q. You are surgeon of the Lincoln Traction Company, are you not?

A. Yes sir, one of them.

Q. And all persons injured by the Lincoln Traction Company are taken to the Tabitha Home?

A. No sir.

Q. Well all that can be taken there are?

A. No sir.

Q. Don't you remember the lady that was hurt right out here within one block of her home, that you took way out to this home?

Q. How much stock have you got in the Tabitha Home?

A. None at all, sir.

Q. Not interested in it in a financial way, at all?

A. Only that I would like to get about five or six hundred dollars that they owe me; that's the only way.

Q. Well is the traction company going to pay it to you?

Q. Well now, Doctor, I will ask you just once more,—you pass your opinion here as a physician of his being insane. Do you base your opinion on what you have already told the court and that alone?

A. No sir.

1628 Q. Well you told it all, didn't you?

A. I told you that I had observed the man for the last five years, and had been acquainted with him.

Q. Can you tell the Court now what species of insanity he has?

A. Why he is a moral degenerate.

Q. That you call insanity?

A. I call it a species of insanity, yes sir. A normal man wouldn't be that way, an insane person is nothing but an abnormal individual, mentally.

Q. Are you still acting as the physician and surgeon for the Tabitha Home?

A. When they call me, yes sir.

Q. How long have you lived in Lincoln?

A. About six years.

Q. Where did you come from here?

A. Came from Alliance here, the last time.

Q. Did you practice the medical profession up there?

A. About seven or eight months; I was staying there in the winter.

Q. Where were you before you went to Alliance?

A. Came from Cumberland, Maryland.

Q. How long were you at Cumberland, Maryland?

A. Twelve years.

Q. Where did you take out your—get your first diploma?

A. Philadelphia.

Q. Did you ever examine this man, or have him examined—with any other physician?

A. No sir, not that I recollect.

Q. Who have you heard talk about his reputation, his general reputation for truth and veracity?

A. Well the people in charge of the institution and the inmates of it, mostly.

1629 Q. Were you a witness in the two lawsuits they had, suing the Home for services?

A. No sir.

Q. Were you there at that time?

A. No sir.

Q. You knew that Scott and some lady sued them for their services out there, didn't you?

A. I did not; never knew that they were sued.

Q. Didn't you know, Doctor, that that it what caused the trouble out there, because Scott and this woman sued them for services?

A. That had nothing to do with the trouble as far as I know; I advised the people in charge of the institution to get rid of him as quickly as possible; that's all I know about it; I supposed that was the reason he left.

Q. You say you didn't even have any knowledge of the *sout* out there?

A. No sir.

Q. Did you have knowledge of the suit that Hiner the principal brought?

A. No sir.

Q. Have you stated then all the persons you knew that you had heard talk about his reputation for truth and veracity?

A. Oh, it would probably take me a couple of hours to think of all that — have told me.

Q. Suppose you think hard for a couple of minutes and
1630 then tell us who it was, name the individuals that you have heard talk about his general reputation for truth and veracity in that neighborhood, or in this neighborhood.

A. You want the names of all of them that I can remember. The superintendent,——

Q. You mean Mr. Hiner?

A. No sir.

Q. Who is the superintendent?

—. Rev. Colon, Sister Ida.—that is the matron in charge of the old folks; the former matron and her husband, Mr. and Mrs. Fredericks; the one before that, Mrs. White. I don't remember whether she was matron, or secretary of the institution, and various men that they have had working there at different times.

Q. No, no, give the names.

A. I don't remember the help that they had out there Mr. Burr, there has been so many changes there in the last five years. There has been about thirty inmates out there in the last five years and they come and go.

Q. And is that all you remember now?

A. That's all I think of.

Q. Do you know the name of the matron in charge of the old folks?

A. I gave that, Sister Ida.

Q. Then Mrs. White and Mrs. Fredericks?

A. There were two different German ladies there at different times.

Q. Now Doctor, give the Court the name of some individual not connected with the Tabitha Home that you have heard talk of this?

A. That thinks he wouldn't tell the truth you mean?

A. Yes sir.

A. Who says his reputation is bad. Mr. Malone, Mr. Rhody,
1631 Police Matron, Mrs. Doyle, the various police officers; I don't know their names,—I have spoken to several of them and in a casual way quite a number of people that I probably wouldn't remember their names, but I have never had anybody tell me that I have asked the particular question that knew him, that would say he was truthful.

Q. You have asked all those people have you?

A. Some of them I asked and some of them voluntarily told me.

Q. Do you know how it came up?

A. Yes, sir.

Q. You asked the Police Matron you say?

A. Yes sir.

Q. And these several police officers, you don't remember their names?

A. No sir.

Witness excused.

1632 Mr. WILLIAM C. RHODE called as a witness on behalf of the defendants, and being first duly sworn, testified as follows, towit:

Direct examination.

By Mr. ROSE:

Q. What is your business and where do you live?

A. Health officer here; I live in the city of Lincoln.

Q. How long have you been health officer?

A. Been in the Health department something like 22 years.

Q. Are you acquainted with a lame gentleman named Walter T. Scott, who used to be a bookkeeper in the Capital National Bank?

A. Yes sir.

Q. And in recent years has lived at Tabitha Home, east of Lincoln?

A. Yes sir.

Q. How long have you known him?

A. Twenty five years or more, perhaps.

Q. Are you acquainted with his general reputation in the community where he has lived for truth and veracity?

A. Yes sir.

Q. What is Mr. Scott's reputation for truth and veracity, *go* good or bad?

A. It isn't very good.

Q. Well is it good or bad?

A. It is bad.

Cross-examination.

By Mr. THOMAS:

Q. Who requested you to come up here and testify?

A. Why Mr. Yates.

1633 Q. Who else?
A. And Mr. Mullen.
Q. Who else?
A. That was all.
Q. When did they speak to you?
A. Several days ago.
Q. Since they have spoken to you you have been going around and talking to a few people to find out about Mr. Scott's reputation, have you?
A. No, I didn't have to do that.
Q. You haven't talked to anybody in the last two or three days?
A. Oh, I have heard talk about it.
Q. Have you talked with anybody in the last two or three days, yourself?
A. I talked to the Doctor about it.
Q. The doctor who was on the stand?
A. Yes sir.
Q. And talked to Malone, did you?
A. Yes sir, I talked to Malone.
Q. When did you talk to them?
A. Oh, within the last few days.
Q. And Mr. Mullen and Mr. Yates asked you to go and see them, did they?
A. No sir, they didn't.
Q. Did anybody ask you to go and see them?
A. No sir.
Q. Nobody suggested it to you?
A. No sir.
Q. You just went to them and asked them about Scott's reputation?
A. I heard them talking about it, and I butted in.
1634 Q. And you talked with them about it?
A. Yes sir, we talked about it,—yes sir.
Q. In the last two or three days.
A. Yes sir.

Mr. THOMAS: That is all.

Witness excused.

1635 Mr. FRED FOSTER called as a witness on behalf of the defendants, and being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. ROSE:

Q. Where do you live, Mr. Foster?
A. Lincoln, Nebraska.
Q. What is your business?
A. Lawyer.
Q. What if any official position did you hold last year?
A. Deputy county attorney of Lancaster county.

Q. How long have you lived in Lincoln?
A. About thirty years off and on; 25 years out of that 30 I guess.
Q. Do you know Walter T. Scott?
A. Yes sir.
Q. How long have you known him?
A. I have known him by sight for several years; personally just a few months.
Q. And in the last few months have you had any business that brought you in contact with him?
A. Yes, sir.
Q. Was that after you had occasion to make any special investigation as to him?
A. Yes, sir.
Q. Now are you acquainted with his present reputation in this community where he lives for truth and veracity?
A. Yes, sir.
Q. What is that reputation, good or bad?
A. Bad.

1636 Cross-examination.

By Mr. THOMAS:

Q. Did I understand you to say you are a lawyer?
A. Yes sir.
Q. Are you related to Elmer Stephenson?
A. Yes sir.
Q. In what way?
A. Nephew by marriage.
Q. Pretty warm friends?
A. Why, yes sir.
Q. A friend of Mr. Mullen's?
A. Yes sir.
Q. They asked you to testify here, didn't they?
A. They did not.
Q. Who did?
A. Mr. Mullen did.
Q. Were you interested in the prosecution with reference to bringing about an annulment of the marriage of Mr. Scott to some woman of Tabitha Home, that he married?
A. Yes sir.
Q. That's the litigation to which you refer?
A. Yes, sir.
Q. And that's the first time you knew him when you had occasion to go into this litigation?
A. Yes, sir.
Mr. ROSE: You looked up representations he made as to his age at that time, and certain other matters to-, didn't they?
A. Yes sir.

Witness excused.

1637 Mr. CLAUDE WILSON called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination.

By Mr. ROSE:

Q. Where do you live and what is your business?
A. Lincoln, Nebraska; attorney at law.
Q. How long have you lived in Lincoln?
A. It will be thirty years this coming Thanksgiving.
Q. Did you know Walter T. Scott, a lame man that used to be bookkeeper at the Capital National Bank, and more recently for a term of ten years was out at Tabitha Home?
A. I didn't know anything about his connection with the Capital National Bank, but I know a Walter Scott that was formerly in Tabitha Home.
Q. A lame man, an old man about seventy years old?
A. Yes sir, gray hair.
Q. How long have you known him?
A. Well I couldn't say exactly; it hasn't been very long; it has been inside of six months.
Q. In that period of time have you come to know him personally?
A. Yes sir.
Q. Know something about his life?
A. Yes sir.
Q. And conduct?
A. Yes, sir.
Q. Have you known anything about his marriage?
A. Yes sir.
Q. And about a suit for annulment of his marriage?
A. Yes sir.
Q. Talk to persons about it?
A. Yes sir.

1638 Q. Well now about when did you get acquainted with him?
A. It was the day after his marriage; I couldn't tell what date that was; that has been from three to six months ago, and I couldn't fix it much different than that.
Q. And did you know him since that?
A. Yes sir.
Q. And know him now?
A. I certainly know him now, but I haven't seen him for sometime.
Q. Are you acquainted with his general reputation in this community for truth and veracity?
A. I think so; I am, yes sir.
Q. And what is that reputation?
A. I would say it was bad.

Cross-examination.

By Mr. THOMAS:

Q. You say, Mr. Wilson, you didn't know of him except through this incident that grew out of the Tabatha Home marriage?
A. That has been the source of my knowledge, yes sir.
Q. That has been the whole source of your knowledge?
A. Yes sir.
Q. Never heard of him before?
A. Never heard of him before.
Q. Outside of that incident you hadn't heard of him?
A. No.
Q. Now, Mr. Wilson, you say you are an attorney here in town?
A. Yes, sir.
1639 Q. And you are acquainted with the leading attorneys?
A. I think I am.
Q. I will ask you if it is not true that you have heard of leading attorneys, that stand at the head of the bar, you have heard people question their integrity and truthfulness?
—. ——.
Q. I will ask you if you haven't heard people claim that even Brother Rose's reputation wasn't good?
A. I couldn't say about that.
Q. Have you not heard people talk about him and other lawyers?

The COURT: In what particular way did Scott's reputation for telling the truth come in question in your litigation there?

A. Well now in order to go into that I would have to go into some professional communications with Scott, but from what Scott told me and from what I afterwards found out, I found out that he wasn't even telling me the truth.
Q. You were his attorney?
A. Yes sir, I was his attorney.
Q. Then you base your statement on what he told you?
A. No, I started from that, but since that time I have found out a good many more things.
Q. The basis of your testimony here is what you know about him personally?
A. Yes sir, personally, and from what other people have told me since that time.

By Mr. THOMAS: Plaintiffs move to strike out the testimony of the witness because it appears that the statements were made to him as confidential communications, as between attorney and client.

1640 Mr. THOMAS:

Q. He came to you as a client?
A. Yes, sir.
Q. And you tell the court now that he misstated things?
A. Yes sir.
Q. You think that is a professional way to treat a client?

A. I wouldn't tell you what he told me, but I tell you that I found out things that he told me were not true. I think when a client comes to me and tells me things and I find out that those things are absolutely false, I am not betraying any professional confidence when I do that.

Q. Did that ever happen to you before?

A. Yes sir.

Q. And isn't it frequently the case that a client tells you things that you find out afterwards are not true?

A. Not frequently.

Q. Do you try very many lawsuits?

A. I try all I can get.

Q. Do you try very many?

A. Yes sir.

Q. Don't you know that it frequently happens to you that your own clients tell you things that you find out are not true?

A. Often times clients tell *my* something that the other side disproves but that is many times not a question of veracity, but when a client tells you something that you find out to be absolutely false afterwards, then there is no guesswork about it.

Witness excused.

1641 Mr. THOMAS: Plaintiffs offer in evidence Exhibit "a-4" being a notice appearing in the Lincoln Daily Call of the issue of Friday Evening, October 7th, 1892, purporting to be a report of the condition of the Capital National Bank of Lincoln, Nebraska, at the close of business September 30th, 1892.

Mr. BISHOP: Each of the defendants objects as incompetent, irrelevant and immaterial; not relating to any of the issues in this case; not referred to nor made a cause of action in the petitions. Thompson and Yates specifically and separately object for the reason that the report does not purport to have been attested by them or either of them, but do not object on account of the identity of the paper, The Evening Call, nor the fact that it was a paper in general circulation at the time it purports to have been published, to wit, October 7th, 1892.

Objection overruled.

Each of the defendants excepts.

The Exhibit offered is received in evidence.

(Copy follows):

1642 EXHIBIT a-4.

Lincoln Daily Call, Friday Evening, Oct. 7, 1892.

Report of Condition of the Capital National Bank at Lincoln, Nebraska, in the State of Nebraska, at the Close of Business September 30", 1892.

Resources.

Loans & Discounts		757,762.79
Overdrafts, secured and unsecured		3,971.48
U. S. Bonds to secure circulation		50,000.
Stocks, Securities, etc		7,551.45
Due from Approved Reserve Agents		84,163.35
Due from other National Banks		7,442.92
Due from State Banks and Bankers		2,355.47
Banking house, furniture and fixtures		5,770.
Other real estate and mortgages owned		38,617.93
Current expenses and taxes paid		8,079.84
Checks and other cash items		3,359.23
Exchanges for Clearing house		19,544.74
Bills of other banks		1,265.
Fractional paper currency, nickels and cents		341.90
Specie		27,038.
Legal tender notes		15,047.
Redemption Fund with U. S. Treasurer, 5% of circulation		1,250.
Total		1,033,561.11

Liabilities.

Capital Stock paid in		380,000.
Surplus fund		6,000.
Undivided Profits		11,978.
National Bank Notes outstanding		45,000.
Individual deposits subject to check	271,958.80	
Demand certificates of deposit	138,932.44	
Cashier's checks outstanding	1,119.00	
Due to other National Banks	96,113.01	
Due to state banks and bankers	132,269.41	
		640,612.75
Notes and bills rediscounted		26,967.67
		1,033,561.11

STATE OF NEBRASKA,
Lancaster County, ss:

I, C. W. Mosher, Cashier of the above named bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *Cashier.*

Subscribed and sworn to before me this 6" day of October, 1892.

[SEAL.] HAL C. YOUNG,
Notary Public.

Correct. Attest:

E. P. HAMER,
A. P. S. STUART,
R. O. PHILLIPS,
Directors.

1643 Mr. H. W. HEBBARD called as a witness on behalf of Plaintiffs, and being first duly sworn testified as follows, towit:

Direct examination.

By Mr. NORVAL:

Q. Where do you reside?
A. Lincoln, Nebraska.
Q. What is your business?
A. Newspaper man.
Q. Connected with what newspaper?
A. State Journal and News.
Q. And have you with you the files of the State Journal showing the regular publication of the State Journal for the period from July 1st to September 30th, 1887?
A. Yes sir.
Q. You may state if this is one of the regular files of the State Journal?
A. Yes sir.
Q. And is the current publication of the Journal of the date it purports to be?
A. Yes sir.
Q. I will ask you if the statement, or what purports to be a statement of the condition of the Capital National Bank published in the issue of the Daily Nebraska State Journal under date of August 6th, is contained in this file?
A. Yes sir, the statement is there.

Mr. NORVAL: We now offer in evidence Exhibit "a-5."
Exhibit "a-5" is received in evidence.
(Copy follows.)

1644 EXHIBIT "A-5."

Nebraska State Journal, Saturday, August 6, 1887.

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business August 1, 1887.

Resources.

Loans & Discounts		908,623.31
Overdrafts, secured and unsecured		6,231.69
U. S. Bonds to secure circulation		50,000.
Other stocks, Bonds and mortgages		15,281.
Due from approved Reserve Agents		75,189.86
Due from other National Banks		42,048.82
Due from State Banks and bankers		5,624.17
Banking House furniture and fixtures		5,650.
Other Real Estate and mortgages owned		2,192.88
Premiums Paid		6,200.
Checks and other cash items		45,349.70
Bills of Other banks		1,570.
Fractional Paper currency, nickels and cents		91.28
Specie		34,975.50
Legal Tender notes		16,108.
Redemption Fund with U. S. Treasurer, 5% of circulation		2,250.
		1,217,386.21

Liabilities.

Capital Stock		300,000.
Surplus Fund		16,000.
Undivided Profits		3,447.66
National Bank notes outstanding		45,000.
Individual checks subject to check	454,253.97	
Demand certificates of deposit	119,864.68	
Due to other National Banks	201,760.43	
Due to state banks and bankers	77,059.47	
		852,938.55
		1,217,386.21

STATE OF NEBRASKA,
Lancaster County, ss:

I, R. C. Outcalt, cashier of the above named bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 5th day of August, 1887
[SEAL.] J. W. MANVELL,
Notary Public.

Correct. Attest:
W. W. HOLMES,
D. E. THOMPSON,
C. W. MOSHER,
Directors.

1645 Q. Now I will ask you if you find in the files of the Nebraska State Journal the card or advertisement of the Capital National Bank during that same period?
A. Yes sir.
Q. And for how long was it a continued advertisement?
A. It was continued from day to day.
Q. I will ask you to state if this file of this paper is now in Court?
A. It is.
Q. And is the Nebraska State Journal a paper published at that time and of general circulation in this state?
A. Yes sir.
Q. I will ask you if Exhibit "a-6" is the notice that was continuously published in the State Journal at that time, of the Capital National Bank?
1646 A. Yes sir.

Mr. NORVAL: Plaintiffs offer in evidence Exhibit "a-6."
Exhibit "a-6" received in evidence.
(Copy follows.)

"Capital National Bank,
Lincoln, Nebraska.

Capital ..... $300,000.

C. W. Mosher, President.
H. J. Walsh, Vice President.
E. C. Outcalt, Cashier.

Directors.

W. W. Holmes, R. C. Phillips,
D. E. Thompson. E. P. Hamer,
C. W. Mosher, C. E. Yates,
A. P. S. Stuart.

Accounts Solicited.
Banks, Bankers and Merchants."

1647 Q. I will ask you if the form of the notice was changed during that period?
A. Not during the period that I examined the book.
Mr. ROSE: What period does that cover?

A. To the end of the quarter,—September 30th.

Mr. Rose: Of course Your Honor we object to this as immaterial.
Objection overruled.
Each of the defendants excepts.

Q. You may state if Exhibit "a-7" is the same advertisement as "a-6".

Mr. Bishop: It shows for itself.

Q. Was it published in the Nebraska State Journal of September 2nd, 1890?

A. Yes sir.

Q. And was that same notice continued to be published in the Nebraska State Journal during the period from 1887 to 1890?

A. I think it is, yes sir.

Q. You may state if you have in your possession the regular files of the Nebraska State Journal from July 1st to December 31 1890?

1648 A. Yes sir.

Q. You may state if the State Journal has succeeded to the Lincoln Evening News?

A. Yes sir, the State Journal owns the News now.

Q. And you may state if that paper was published in Lincoln the date—and the year it purports to be, 1890?

A. Yes, sir.

Q. You may state if there was any notice published by the Lincoln Evening News,—advertising card of the Capital National Bank of Lincoln, Nebraska, during that year?

A. Yes sir.

Q. You may state if the notice as published in the Lincoln Evening News for the year 1890 was similar in character, or the same as that published in the Daily Nebraska State Journal,—Exhibits "a-6" and "a-7"?

A. As near as I can see it is the same Ad'.

Q. And did that continue during the year?

A. I think so, yes sir.

Q. Now, Mr. witness, I will ask you if the book I now present you is the files of the Daily State Journal from July 1st to September 30th, 1890?

A. Yes, sir.

1649 Q. And you may state whether that is the regular files and records of the publication of the Nebraska State Journal for that time?

A. Yes sir, it is.

Q. Calling your attention now to Exhibit "a-8" I will ask you to state if that was published in the regular issue of the State Journal of date September 2nd, 1890?

A. Yes, sir.

Q. This article or advertisement—was it published in the regular issue of the Daily Nebraska State Journal on September 2nd, 1890?

A. Yes, sir.

Q. And at that time the Nebraska State Journal was a paper pub-

lished in the city of Lincoln, and in general circulation in the state?

A. Yes sir.

Mr. NORVAL: We offer in evidence Exhibit "a-8."

By Mr. BISHOP:

Q. Mr. Hebbard, you had no part in obtaining these advertisements or cards?

A. No sir, not that I recall now.

Q. And you don't know by what means they got into the paper?

A. Not absolutely, no.

Q. And you don't know who furnished them to the paper?

A. No.

1650 By Mr. NORVAL:

A. They were paid for by the Capital National Bank as current advertisement?

Mr. BISHOP: The defendants object to that as leading, suggestive, and calling for a conclusion of the witness.

Q. How were they paid for?

A. The bills were made out and sent to the Capital National Bank, and the money came back; I never collected them myself.

Q. Just as every other advertisement?

A. In the regular course of business, yes sir.

By Mr. BISHOP:

Q. You had nothing to do with them yourself?

A. I had something to do with making the bills out and receiving the collections when they came back, but I wasn't the collector at that time.

Witness excused.

1651 Major J. D. WOODS called as a witness on behalf of the Plaintiffs and being first duly sworn testified as follows, to-wit;

Direct examination.

By Mr. NORVAL:

Q. Where do you reside?

A. Here in Lincoln.

Q. How long have you lived in this city and vicinity?

A. I have lived in this city and county about 28 years and a half.

Q. What official position, if any, have you held in this county, in the past?

A. I was county clerk here four years.

Q. And as county clerk you may state if you remember the incident of the filing of certain chattel mortgages, or bills of sale in your office on or about the 23rd day of January, 1893,—the chattel mortgage from C. W. Mosher to D. E. Thompson—that is Mosher and his wife?

A. Yes sir, I recall of filing them.

Q. You may state who presented the instruments to you for filing?

A. There were two sets filed; the first ones by Charlie Mullen, and the second by William Dorgan.

Q. State to the court what time of day the first one was presented there for filing, and by whom presented.

1652 A. To the best of my recollection it was about 7:30 in the morning; it wasn't quite light yet. I had a little extra work to do at the office and was there a little earlier than we usually open the office,—we usually opened at 8 o'clock, but they weren't filed until 8 o'clock.

Q. Who brought the first one there?

A. Charlie Mullen.

Q. You may state whether or not that was a printed or typewritten instrument?

A. It was typewritten.

Q. About how many pages, if you remember?

A. Well I can't just tell now; there was two or more pages I should judge.

Q. Now you say it was a typewritten instrument. How was the date placed in the instrument purporting to give the date of the instrument; was it typewritten or written in ink?

1653 A. You see there was two instruments, one——

Q. I am speaking now of the first one.

A. Well there was a bill of sale from Mr. Outcalt and a chattel from Mr. Mosher. Now, one of them—my recollection is—it has been a long time ago; one of them was, I think it was dated about December 24th, and the other probably the 28th.

Q. The question is was the date placed in there with the typewriter, or pen and ink?

A. Pen and ink.

Q. The rest of the instrument, except the names and matters of that kind was all typewritten, is that right?

A. Yes sir, it was typewritten except the signatures and dating, yes sir.

Q. Well what did Mr. Mullen say when he came to have that instrument recorded, if anything?

A. Well he wanted them filed, and to keep them from the eyes of the public; he wanted them copied into the regular register and the original returned to him, which was done later.

Q. You said something a moment ago about keeping them from the public,—what did he say?

1654 A. He said he didn't want the public to have them.

Q. Now you may state what appearance the date on the instrument showed as to whether it had been there since the purported date, or whether it had just been made, from the appearance of the ink.

A. The ink of the dating of the two instruments, under the impression I had then and now that it was all Arnold's ink, which doesn't color black for sometime, all that was fresh done—the

datings, and not with the same parties whom signed it, or with the same ink.

Q. Now you may state if there was a duplication of those instruments brought there to you to be filed the same morning?

A. Yes sir, there was exact duplicates of both instruments fetched there in probably thirty minutes afterwards; it might have been a little sooner or later, but not far from that time.

Q. And the second one was written in typewriting to-, was it?

A. Yes, sir.

Q. And was that dated at all?

1655 A. No sir, they were not dated, neither one of them.

Q. And who brought the second duplication to you?

A. Mr. William Dorgan.

Q. And did you have any conversation with Mr. Dorgan at that time as to filing the same, or as to whether any other instruments had been filed of the same character that morning, and if so what was it?

A. I told him that there had been exact duplicates of what he had filed there,—been filed by Mr. Mullen and showed them to him; he looked at them a moment and he said he always obeyed orders and was told to file them and was going to do it. So he filed them.

Q. You may state, Mr. Wood, if you could tell from the ink at that time, its color or apparent freshness, whether it had been recently made or had been made for some time,—those brought by Mr. Mullen?

1656 Q. You may state with reference to the signatures from their appearance, as to whether they had been recently made, or had been written for sometime?

A. They had been written for sometime, the signatures had, with a different ink all together, and with a different pen.

Q. You may state if you are acquainted and have been for a number of years with one Watler T. Scott, that was formerly an employ of the Capital National Bank,—a lame man?

A. Why I used to know Mr. Scott, when he was in the bank there. I haven't seen him for some time.

Q. Well you may state——

A. I don't really know that I would really know him if I was to meet him now, but I used to know him quite well.

Q. You know the person I am inquiring about?

A. Yes sir.

Q. You may state if you are acquainted with his general reputation for truth and veracity in this vicinity?

A. Why I never heard his truth and veracity disputed by anyone.

Q. Never heard it questioned by anyone?

A. I never have, no. As I say I haven't seen Mr. Scott or met him for sometime.

Q. You have lived in this city now for about 28 years, and never heard it questioned?

A. In the city and near about here.

* * * * * * *

1657 Cross-examination.

By Mr. Rose:

Q. Mr. Woods, when did you take your office as county clerk, first?

A. Well now it was either the 5th or 6th of January, 1892.

Q. Prior to that time where did you live?

A. I had lived out southeast of town here on a farm.

Q. Where did you live at the period of time when you knew Scott as a bookkeeper of the Capital National Bank?

A. While I lived out on the farm. I used to occasionally have business through that bank.

Q. That is when you were on the farm?

A. Yes, sir.

Q. Had you had any acquaintance with him since he retired from his office as bookkeeper in the Capital National Bank?

A. Oh, I have seen him a number of times, but no business acquaintance with him.

Q. When do you think he retired from the bank?

A. Well now, I have seen the man a great many times since the bank closed up, but had no business with the man.

Q. Was he working at the bank up until the time of its failure?

A. Well I don't really know that he was,—I couldn't say.

Q. Had you seen him in the bank while you were holding the office of county clerk?

A. Well I couldn't say that I had.

Q. Had you seen him in the Capital National Bank subsequent to 1887?

A. That I couldn't say.

Q. You didn't have very much acquaintance with him when he was in the bank, did you?

A. I used to see him there quite often, but I never had any deposits of anything through that bank, but I used to go there with my neighbors.

1658 Q. How did you happen to see Mr. Scott, if he was keeping the books?

A. Well my first acquaintance with Mr. Scott was through a dispute with Mr. Mosher in reference to some notes that I gave for some land down there. Mr. Mosher disputed my word and so did Mr. Outcalt, and I told them to produce the notes, and they finally said they hadn't them.

Q. What year was that?

A. Oh, that was in '83,—that was my first acquaintance with Mr. Scott.

Q. That wasn't at the Capital National Bank?

A. Yes, sir.

Q. In 1883?

A. Well it might have been Marsh's at that time, but it was in the bank which Mr. Mosher run, and it was reorganized into the Capital National Bank not a great while afterwards.

Q. What was Mr. Scott's business after he quit the Capital National Bank?

A. I don't know.

Q. Did you ever have any business with him after he quit the Capital National Bank?

A. No sir.

Q. Did you know that he lived as an inmate of a charitable institution after he quit the Capital National Bank?

A. No sir.

Q. Never knew him at Tabitha Home?

A. No sir.

Q. Never knew what his conduct was there.

A. No sir.

Q. Don't know what he is doing today, do you?

A. No sir.

1659 Q. By what process do you ascertain the age of ink after it has dried on paper, Mr. Woods?

A. Well the Arnold's ink that we used to use you know when it was first put on paper left a greenish cast, and in the course of time it turned darker; that's all I know.

Q. Do you have any process by which you can tell the age of a signature or a date written in Arnold's ink?

A. No sir I can't, nor I don't think you can.

Q. Well, I can't. I just wanted to see whether you could.

A. But I do claim that when first written the Arnold's ink shows a greenish cast, and by age it turns black.

Q. What other kind of ink can you determine the age of?

A. I don't know that I can of any other ink, but you know that Arnold's ink had that peculiarity.

Q. I have seen Arnold's writing fluid, but when a signature was written in some other kind of ink,—how old was the signature of Mosher, or whoever wrote the signature?

A. I don't know.

Q. Was it six months old?

A. It might have been six hours, and it might have been six years for all I know.

Mr. ROSE: That is all.

By Mr. NORVAL:

Q. But it was written with different ink?

A. Yes sir, different ink and different pen.

By Mr. ROSE:

Q. How long does it take ink to dry, after you blot it?

A. It doesn't take long to dry.

Q. How long does it take to dry thoroughly?

A. Not long, but then Arnold's writing fluid is peculiar from any other that is made.

1660 Q. You spoke of this signature being older,—showing age, and I thought you wouldn't stand for that.

A. I said it had been written before that date. You take an ink,

any of those, and it is brighter and clearer than when it gets some age on it.

Q. Have you seen the books kept by Colonel Hale in this bank,—twenty five years ago?

A. No sir.

Q. Could you tell by looking at them that they were kept twenty five years ago?

A. No sir.—nor you either.

Q. You have never made any study of figuring out any way of testing the age of a written instrument, have you?

A. No, I never have; never had any occasion to.

Witness excused.

1661 J. F. BOOKSTROM called as a witness on behalf of the Plaintiffs and being first duly sworn, testified as follows, towit:

Direct examination.

By Mr. THOMAS:

Q. Where do you live, Mr. Bookstrom?

A. Lincoln, Nebraska.

Q. What is your occupation?

A. Plumber.

Q. Are you a member of any firm that is in the plumbing business?

A. Yes sir.

Q. What is the name of that firm?

A. Newberg & Bookstrom.

Q. Where do they do business?

A. Lincoln, Nebraska.

Q. Where is your place of business?

A. Number 200 North Twelfth.

Q. How long have you been in that business in Lincoln?

A. Four years this Spring.

Q. Are you acquainted with Walter T. Scott?

A. Yes sir.

Q. Is he in your employ?

A. Yes, sir.

Q. In what capacity.—what does he do?

A. Bookkeeper, and taking care of the office.

Q. How long has he been in your employ?

A. A year and a half.

Q. And before you employed him did you make any inquiry in regard to his reputation for truthfulness and honesty?

A. Yes sir.

1662 Q. Now tell the court what is the nature of the work he does for you there, besides bookkeeping?

A. Why he takes care of the books, and also the cash and everything,—that is, he writes out the checks, but of course I sign the checks.

Q. And does he take in the money?

A. Yes sir, when it comes in.
Q. And put out the money?
A. Yes sir.
Q. Has the combination to your safe, in which you keep your money?
A. Yes sir.
Q. You spoke of making some inquiry in regard to his reputation. Do you know what his reputation is generally speaking in this community for truthfulness and honesty?
A. Only through what he — been doing for us, is all I know.
Q. You say you made some inquiry before you hired him?
A. Yes sir.
Q. You may tell the court what is his reputation for truth and honesty, whether good or bad?
A. Good.

Cross-examination.

By Mr. ROSE:

Q. You have heard his reputation questioned however, haven't you at numerous times?
A. Yes sir.
Q. Been frequently warned to keep a lookout for him, have you?
A. Yes sir.
1663 Q. And you have kept a lookout for him?
A. Yes sir.
Q. He has been laid off some lately, hasn't he?
A. No, not late-, no.
Q. Well he has been absent, hasn't he, for periods of time?
A. Yes sir.
Q. Did you see how much money he brought back from Seward with him, about last January?
A. I didn't see.
Q. He told you didn't he that he brought thirty dollars?
A. Yes sir.

By Mr. THOMAS:

Q. Now it is true that the other side have been over to see you several times, have they not, about Mr. Scott?
A. They only seen me once.
Q. Who saw you?
A. Mr. Yates, I believe.
Mr. BISHOP: That is the young man?
A. Yes sir.
Q. Is he the only person that has talked to you?
A. Yes, sir.
Q. What did he talk to you about?
A. Just asked me about Mr. Scott's reputation.
1664 Q. Wanted you to testify that his reputation was bad?
A. No.
Q. What did he want you to do?

A. To tell the truth.
Q. Now you say somebody came to you and asked you,—talked to you about watching him?
A. Nobody came to us.
Q. I thought you said somebody came to you and told you to watch him?
A. That was this case with the Tabitha Home.
Q. And that matter was while he was working for you?
A. Yes.
Q. And some parties from the Tabitha Home came to you, or somebody connected with it?
A. Yes sir.
Q. And they're the ones that cautioned you to watch him?
A. Yes sir.
Q. And tried to get you to discharge him?
A. No.
Q. Did anybody ask you to discharge him?
A. No.
Q. Are you sure about that?
A. No, to look out for him.
Q. That is through the Tabitha Home matter?
A. Yes sir.
Q. Came about on account of him marrying a woman out there?
A. Yes sir.
The COURT: You say you have been warned to watch him. Now since you have been watching him what have you discovered?
A. Nothing at all; he is straight.

1665 Mr. E. HALLETT called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows, towit:

Direct examination.

By Mr. BURR:

Q. You live in Lincoln?
A. Yes sir.
Q. For how long?
A. Pretty near forty years.
Q. And what is your business?
A. Jewelry.
Q. Been in that business ever since, I guess?
A. Yes sir, continuously.
Q. Do you know Walter T. Scott?
A. I do.
Q. A man who formerly was bookkeeper for the Capital National Bank?
A. Yes sir, that is where I first knew him.
Q. How long have you known him?
A. Since he was in the bank.
Q. While he was in the bank to-?
A. Yes sir, oh yes.

Q. You got acquainted with him while he was in that bank and have known him ever since, have you?
A. Yes sir.
Q. And during that time and at this time, do you know his general reputation for truth and veracity?
A. Why I never heard anything against him; what little dealings I have had with him he was perfectly straight.
Q. You haven't heard anything against his truthfulness or veracity?
A. No sir.

1666 Cross-examination.

By Mr. ROSE:

Q. Did you know Mr. Scott while he was an inmate of Tabitha Home out here for a period of ten years?
A. No, I didn't know of his being there at all.
Q. You didn't know that he had been out there?
A. I didn't know what he has been doing since he left the bank.
Q. That is since 1887?
A. I think that was in 1892; I think that was somewhere along about '92 when the bank failed.
Q. His own testimony is that he quit the bank in May, 1887?
A. Well maybe he did.
Q. Do you know anything about his domestic life now, or business life?
A. Nothing at all.

Witness excused.

1667 RICHARD H. CORNER called as witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. BURR:

Q. How long have you lived in Lincoln?
A. Since 1873.
Q. Since 1873?
A. Yes sir.
Q. And do you know Walter T. Scott, the man that used to be bookkeeper in the Capital National Bank?
A. I used to be pretty well acquainted with him.
Q. And have you known him all that time down to the present time?
A. Well I haven't known him lately not to be very close acquainted with him, I would see him occasionally.
Q. And are you at this time acquainted with his general reputation in this vicinity for truth and veracity?
A. Never heard anything against him.
Q. Never heard it questioned?

A. Never questioned at all.

Q. If it had been questioned you would have heard it as well as others,—that is his general reputation?

Mr. BURR: That is all.

Cross-examination.

By Mr. ROSE:

Q. Do you know where Mr. Scott lives now?

A. I don't.

Q. Do you know whether he is married now or not?

1668 A. No sir.

Q. Did you know about his living out at Tabitha Home for ten years?

A. I knew he was out there sometime; how long he was there I didn't know.

Q. Did you know of the controversies or the suits his life has brought him into lately?

A. I did not.

Witness excused.

1669 FRANK RAWLINGS called as a witness on behalf of the Plaintiffs and being first duly sworn, testifies as follows, to-wit:

Direct examination.

By Mr. NORVAL:

Q. Where do you reside?

A. In Lincoln.

Q. How long have you resided here?

A. Thirty three years.

Q. What is your business?

A. Well I aint doing much of anything now.

Q. What was formerly your business?

A. I used to be in the livery business.

Q. At what number?

A. Let's see,—it was one—something south Thirteenth—between "O" and "N" on Thirteenth street.

Q. You may state if you are acquainted with one Walter T. Scott, who was a bookkeeper at one time in the Capital National Bank?

A. Ye- sir, I knew the old gentleman for 25 years I guess.

Q. And are acquainted with him now, are you?

A. Yes sir.

Q. You may state if you are acquainted with his general reputation for truth and veracity in the vicinity here where he lives?

A. I never heard a thing against the old gentleman in my life, and I have done thousands of dollars worth of business with him; I backed him in the laundry business once, and he has rented buildings of mine, and I done lots of business with him.

A. Yes, sir.
Q. How long have you lived in this county?
A. Since '73.
Q. Are you acquainted with one Walter T. Scott, formerly a bookkeeper of the Capital National Bank, and now working for a plumbing firm here?
A. I am.
Q. How long have you known him?
A. If my memory serves me right he was on his farm out here when I came here in '73.
Q. On a farm?
A. Yes sir.
Q. But you knew him when he worked for the Capital National Bank?
A. Yes sir.
Q. And you know where he is working now?
1674 A. Yes sir.
Q. And you have known him more or less during that period and seen him from time to time?
A. Yes.
Q. I will ask you to state, Professor, if you know anything of his general reputation for truthfulness and honesty and intergrity?
A. I never heard it questioned,—never heard it questioned. I always looked upon Mr. Scott as a man of integrity and reliability and truthfulness.
Q. And never heard anybody question or doubt it, or call it in question in any way?
A. Not that I remember of.

Cross-examination.

By Mr. Rose:

Q. Mr. Fossler, how intimate an acquaintance have you had with Walter T. Scott?
A. Not very intimate; I knew him as I said when he was out on his farm.
Q. That was when you were a lad?
A. Yes sir, when I was a lad.
Q. When you were a lad out at Wolfe's?
A. No, no; north of town.
Q. How old were you then?
A. I would have to figure up first,—I was 17.
Q. You were a young man then,—a very young man.
A. Yes sir.
Q. You knew him when he was a bookkeeper in the Capital National Bank?
A. I knew him, yes sir; I knew that he was a bookkeeper there at the time.
Q. And you never heard his honesty questioned, with that
1675 institution; never heard him accused of being an embezzler there?
A. No sir, not that I know of.

Q. Didn't know that he was an embezzler there?
A. No sir.
Q. Did you know him when he was in the laundry business?
A. Yes sir, I knew him when he was in the laundry business.
Q. Did you know that he was discharged from the bank?
A. I think not.
Q. Did you know him when he was an inmate for ten years of the Tabitha Home?
A. I think not.
Q. Had you ever known that he was out at Tabitha Home for any long period of time?
A. No.
Q. Did you know of his marrying about the time he left the Tabitha Home?
A. I think so.
Q. Did you know of the suit brought in connection with that marriage by the county attorney?
A. No.
Q. Do you know what his domestic life is now?
A. No.
Q. He doesn't move much in your circle does he,—among the University people, and people of refinement?
A. I only know him as a bookkeeper down there, and he sends me my biils when they work for me.
Q. From the earliest memory you have of him, have you known him as an excessively profane man?
A. No sir.
Q. Never heard that characteristic of him?
A. No.
1676 Q. You don't know much about him for the last ten or fifteen years, do you?
A. As I met him on the street, I knew his as an old acquaintance; that's all.
Q. That is you met him casually, but you haven't kept track of his life or anything of that sort?
A. No.
Q. Except that you know now he has a job with a plumbing firm.
A. I knew he was in the laundry, and I would meet him on the street; that's all.
Q. You don't know anything about the controversies he has had, and what people have said about his conduct and life?
A. No.
Q. You simply have not heard it discussed.
A. No sir.
Q. Have you noticed his name in the press of the city frequently in a derogatory way?
A. No, I can't say that I have; I wouldn't have remembered his initials; if I had seen it I wouldn't have known that he was concerned in anything of that sort.
Q. You don't know whether people have spoken derogatorily of his character for truth, or not?
A. No.

Q. Did you know he was expelled from the Tabitha Home?
A. No.

By Mr. THOMAS:

Q. You know that you never have heard anything against his character.
A. I know that.

Witness excused.

1677 Mr. LEW FRANKLIN called as a witness on behalf of the Plaintiffs and being first duly sworn, testified as follows, towit:

Direct examination.

By Mr. BURR:

Q. How long have you lived in Lincoln, Nebraska?
A. I came here in 1871,—about 39 or 40 years, somewhere in there.
Q. And do you know Walter T. Scott, a lame man?
A. I knew him, yes sir.
Q. Know him now?
A. Yes sir.
Q. About when did you first becoma acquainted with him?
A. Oh, I don't know; it has been quite a number of years; I don't remember.
Q. Did you know him while he was working in the bank as a bookkeeper?
A. Yes, sir.
Q. Do you know where he is working now?
A. Well I heard he was working on "N" street, in the basement in the McBride block.
Q. Have you seen him over there?
A. Well I just see him once in a while; very seldom.
Q. And are you acquainted with his general reputation for truth and veracity in the neighborhood where he lives?
A. I never heard anybody speak about it any otherwise.
Q. Never heard anyone question his truth and veracity?
A. No sir, I never did.
Q. Mr. Franklin, do you know who occupied the old frame building at the corner of Eleventh and "N" street-, when the frame building was there?

1678 A. I was there part of the time.
Q. What was your business?
A. I was in the Tea business.
Q. You remember the time when they moved the frame building and built the Capital National Bank building?
A. Yes sir.
Q. Did you ever go into the bank, and observe the vaults, the two vaults back at the south end of the rooms in there, and about the size of them?

A. Yes sir, I was in there; I went in there quite a number of times to see somebody.

Q. Do you remember which side the safty vault was on, and which side the bank vault?

A. There was a bank vault behind the counter.

Q. Do you have remembrance of the little room that was off the foyer, you might call it,—where the public would go into?

A. Yes sir.

Q. About how large was that room?

A. Oh, I should judge it was 10 x 12 probably,—a small room.

Q. Was there anything in this little room?

A. Why I think a table.

Q. And chairs?

A. Chairs, yes sir.

Q. For people using the vault to use, I suppose?

A. I think so.

Cross-examination.

By Mr. ROSE:

Q. What has been your business for the past ten years?

A. Well I have been identified with a Tea and Coffee company on Thirteenth street,—the Oriental Tea and Coffee company.

1679 Q. Have you got an interest in the business?

A. No sir, only a little working interest.

Q. Did you know Mr. Scott intimately?

A. Oh, I have met him a great many times,—just off and on, to speak to him, and he to me.

Q. Were you acquainted with that business he has been in from time to time in the last ten years.

A. No.

Q. Who told you he was working in — at a plumbing shop, Mr. Burr?

A. No, I knew it because I have seen him going down in there.

Q. How often did you see him while he was at Tabitha Home?

A. Never saw him.

Q. Did you know that he was out there for ten years, at the Tabitha Home?

A. Well I heard he was out there.

Q. Do you know anything about what his life was out there the character of his life?

A. No sir.

Q. How recently have you heard that he was out at the Tabitha Home?

A. Oh I have known it a long time.

Q. Did you know of his marriage after he left Tabitha Home?

A. No sir.

Q. Did you know he was expelled from the Tabitha Home?

A. No sir.

Q. Do you know what reputation he bore while he was out at Tabitha Home for a period of ten years?

A. No sir.
Q. You didn't know about his recent marriage?
A. No sir.
1680 Q. Or the recent suits he has had?
A. No sir.
Q. Never heard it was charged against him that he was an embezzler while he was in the Capital National Bank?
A. No sir.
Q. Never heard that he was charged with marrying an insane patient of the Tabitha Home?
A. No sir.
Q. Never heard of this suit that was of general publicity, brought by the county attorney to annul that marriage?
A. No sir, I did not.
Q. You never had any very intimate acquaintance with Mr. Scott?
A. Oh just to speak,—a speaking acquaintance,—just as I passed him on the street; I used to meet him on the street.
Q. You don t know what mischief he has been in?
A. No, I don't know nothing about that.
Q. Now did you have a box in the safety deposit vault?
A. No sir.
Q. Do you remember of any occasion when you were in that room while it was in operation?
A. No, I went in to see Dick Outcalt.
Q. And that is the only instance you can remember of being in there?
A. Oh I was in there quite a number of times.
Q. You were in the bank several times, but I mean in the customers' room at the entrance *fo* the vaults,—the customers' vault,—how many times were you ever in that room?
A. Oh two or three times probably.
Q. Did you ever see more than one chair in there?
A. Well I know I sat down oñ one I guess.
Q. Well as a matter of fact, wasn't there just one chair in there and only a little table, accommodations for one person only
1681 in that room?
A. Well I can't just remember about that.
Q. Do you know whether the door to that little room was kept locked or not?
A. Well it wasn't when I went in there.
Q. You could go right in without a key could you?
A. Yes, sir.
Q. Are you quite sure what the room was that you went into?
A. Yes sir, I went in to see Dick Outcalt.
Q. Well he didn't stay in that little room?
A. Well he sometimes stayed up in front.
Q. You took him back to that little room to talk to him?
A. No, I didn't take him back.
Q. Did he take you back there?
A. No sir.
Q. Did you have an appointment to meet him there?

A. No sir, I just went in there and asked where Dick was, and they said he was back there.

Q. Did you find the door locked?

A. No sir.

Q. Do you know how wide that room was?

A. Ten or twelve feet.

Q. Along the banking room,—do you know how wide the banking room was?

A. Oh, I should say 25 feet.

Q. Do you know?

A. No, I don't know.

Q. When that bank building was built was the whole Academy of Music block built at the same time, or just the front on Eleventh street?

A. I think it was all built at the same time.

1682 Q. Wasn't there a 22 foot building erected first and then the other building extended from that?

A. Oh, I don't remember now about that.

Q. How wide do you think the lobby was at the south end of the banking room,—outside of the bank counter?

A. Ten or twelve feet.

Q. Do you think it was over six?

A. Oh yes, there was quite a little room there.

Q. Which portion of the room occupied the most space, the part occupied by the clerks or the part constituting the lobby?

A. Why I think the clerks.

Q. You wouldn't say that whole room was over 20 feet wide in the clear would you?

A. Which, the banking room?

Q. Yes sir, the room that was subsequently occupied by the Rock Island ticket office.

A. I should think it was.

Q. Well what do you think was the clear width of that room?

A. I think probably about 20 feet.

Q. And in the division for the public and the work room, the work room occupied the larger portion of that?

A. Oh yes, yes sir.

Witness excused.

1683 It is agreed that *the testimony of* Otto Newberg for whom Walter T. Scott is now employed will testify, and his testimony will be the same as to reputation for truth and veracity of the witness Walter T. Scott, as was given by the witness Bookstrom.

1684 February 16, 1911—9 a. m.

Mr. THOMAS: Plaintiffs offer in evidence, that portion of Exhibit X-21, the first column indicating the names of the assets and liabilities, and the last column on the same double page giving the amounts of the assets and liabilities, under date of Saturday October 1st, 1892; the two columns being identified by the reporter as Ex-

hibit "a-9" and Exhibit "a-10", the offer to include the lead pencil check marks and figures.

* * * * * * *

1685 "EXHIBIT A-9." EXHIBIT "A-10."

SATURDAY, Oct. 1, '92.

Capital Stock	.....	300,000.	[√]*
Surplus a/c	.....	6,000.	[√]*
U. S. Bond a/c	√50,000. √		
Circulation a/c	.....	45,000.	[√]*
Redemption Fund	√ 1,250. √		
Stocks & Bonds a/c	√ 325. √		
Furniture a/c	√ 5,770. √		
B/R	678,773.67√		
Cash	66,595.87√		
Bills of Exch	√ 2,928.38√		
Chemical Nat. Bank	√28,017.33√		
American Exch. Nat. Bank	√19,601.51√		
U. S. N. B.,—Omaha	√16,544.51√		
South Omaha N. B.	√ 390.98√		
Packers N/B So. Omaha	√ 59.34√		
First N/B Kansas C	√ 691.73√		
Schuster Hax N/B	√ 310.94√		
Merchants N/B N. C.	.....	8,089.32	[√]*
First N/B, Beatrice	.....	2,404.37	[√]*
Bank of Cass County	√ 28.26√	√	
Kountz, Nachod & Kuhne	√ 233.29√		
Clearinh House a/c	.....	1,339.09	[√]*
Walsh & Putnam	√ 2,800. √	√	
Undivided Profits	.....	2,681.	[√]*
Rediscount a/c	.....	9,969.67	[√]*
Real Estate	√95,370.47√		
Discount, Int. & Exchange	.....	11,935.94	[√]*
Wages a/c	√ 4,773.32√	√	
Suspense a/c	.....	15.94	[√]*
Interest Paid a/c	√ 7,226.45√	√	
Expense a/c	√ 3,306.52√		
	784,997.57	384,781.14	
Deposit a/c	.....	600,216.43	
		√	
	984,997.57	984,997.57	[√]*
	28,563.54		

[*Erased in copy.]

1686 Mr. THOMAS: Plaintiffs offer in evidence the following portions of the testimony of Mr. Outcalt in the case of Kent K. Hayden Receiver against David E. Thompson and the other defendants in this action, and others, tried in the Circuit Court of the United States for the District of Nebraska, some time during the year 1897.

Mr. ROSE: Each of the defendants object- to the offer of the testimony as hearsay, incompetent, no foundation laid; not taken in any manner authorized by law to entitle it to be received in this case, nor taken in any proceeding had between the same parties nor under the same issues, nor authenticated in any manner whatever to entitle it to be received, and not binding upon either of these defendants, and in a matter and action entirely between other parties.

We admit that the testimony, or purported testimony of R. C. Outcalt in the record presented here in court bears the signature of R. C. Outcalt, written in his own hand at page 790 thereof; said testimony beginning at page 764 and extending to an- including page 790.

Mr. THOMAS: It is not contended on the part of the plaintiffs that the parties to this suit were the same, nor that the issues were the same, and all that is contended is that the Receiver in that case brought an action against the parties in that action who are

1687 the defendants in this action, and that this testimony here pertains to matters which are involved in this action, and we contend that it ought to be admissible as being an admission of Mr. Outcalt, and as such, evidence against the defendants in this action upon the theory that it is an admission of a joint tort feasor.

Mr. ROSE: On that theory our previous admission is that it is the signed declaration and bears the genuine signature of Mr. Outcalt, and we further admit that the record here present is the record of M. Outcalt's evidence taken in the suit referred to and prosecuted in the Circuit Court of the United States for the District of Nebraska.

But with this admission we still insist on the objections that it is hearsay, incompetent, no foundation laid; not taken in any manner authorized by law to entitle it to be received in this case, nor taken in any proceedings had between the same parties nor under the same issues, nor authenticated in any manner whatever to entitle it to be received, and not binding upon either of the defendants, and in a matter and action entirely between other parties.

Objection overruled.

Each of the defendants excepts.

The testimony offered is received and read as follows:

* * * * * * *

1688 Question No. 1543. Where were these books that you kept—where were they kept?

A. Their usual place, you mean?

Question 1544. Yes.

A. That is on my desk in the day time. I suppose in the vault with the other books at night.

Question No. 1545. Were they exhibited to the stockholders and directors?

A. Yes sir.

Question 1546. Were they frequently examined by them?

A. Yes sir, you can see Prof. Stuart's finger marks all along on that book now if you examine carefully.

Question No. 1547. Where were the other books of the bank generall- kept?

A. They were on the other book-keeper's desks in the bank.

Question 1548. Were they generally examined by the stockholders and directors?

A. They had access to them; I don't know that they examined them particularly.

Question 1550. It would take an expert bookkeeper to tell much about their books wouldn't it?

A. Oh no, I don't think so.

Question 1559. Did the bank have a discount committee?

A. No sir, not exactly, as we would understand a discount committee. They had a committee to examine the loans of the bank.

1689 Question 1560. Do you remember who was on that committee?

A. The first committee that was appointed was W. W. Holmes, and A. P. S. Stuart. After Mr. Holmes died Dr. Hamer was put in his place by the Board of Directors.

Question 1561. Did these members of that committee ever examine those loans and look over the bills receivable and paper of the bank?

A. Yes sir, quite frequently.

Question 1562. How did they do that? Was the paper listed or did they look over the paper itself?

A. Well I don't know that they ever listed it, or ever made a complete list. They would take the pocket book in which these were kept and retire to the back room of the bank and go over them.

Question 1563. Did they ever make any report to the Board of Directors as to what the results of their investigation or examinations were?

A. At a directors' meeting?

Question 1564. Yes.

A. I don't remember that it was done at a Directors' meeting, though perhaps it was.

Question 1569. Were the books of the bank and the paper all open to the examination of the directors, and this discount committee?

Question No. 1613. I now hand you a bundle of notes purporting to be signed by the Western Manufacturing Company, E. Hurlbut Jr. Manager, that were executed to the Capital National Bank, amounting to $230,000 and I will ask you if you have ever seen those notes before, and whether they constituted a part of the bills receivable of the bank at the time you were in there?

A. I never saw these notes before. That is before the failure I

never saw these notes that I know of except $35,000. $35,000 of those notes were carried by the Capital National Bank. I don't say those, but notes signed in that way. It is pretty hard to
1690 distinguish. It is probable it was some other notes, but $35,000 of such notes were put into the bank by C. W. Mosher and he spoke to me about it after they were in, and said he was short about that much in his deal between the two manufacturing companies, and he wanted to have those notes carried in the bank. I told him so far as I was concerned I didn't have any objection, but there might be some objection and I thought he ought to speak to the directors about it. I don't remember how long it was before a directors' meeting, but it occurs to me now it was just a short time, and it was brought up by himself, and presented at this directors' meeting and the notes were produced. The directors said if he would endorse those notes they would consider them perfectly good and would have no objection to their being carried. He also stated in that meeting that he had collateral securities for those notes and as fast as they were collected they would be paid.

Question No. 1627. And did you ever notice that these notes of the Western Manufacturing Company to the amount of $755,000 had been issued from time to time?

A. No sir, I would not have seen that amount there if I had looked it up, because many of them must have been renewals. I might have notice- those notes going through the bank and supposed them to have been the original $35,000 worth of notes.

Question 1628. Do you know how long the $35,000 of original notes was in the bank?

A. No sir, they might have been in there some time before he spoke to me about them, or before it was brought to the notice of the directors.

Question 1629. Do you remember how long before the failure of the bank it was brought to the notice of the directors?

A. I think it must have been a year and a half or two years.

1691–1765 Question 1630. Isn't it true that those were put in there at or about the time that the corporation was organized of which Mr. Welch was secretary and treasurer, and about the time that the corporation brought out the old Western Manufacturing Company?

A. My memory is that it was about that time, because his excuse was that that was what it was for.

Question 1632. It may have been further back than you give it, a year and a half of two years before the failure of the bank?

A. That would only make it two years.—yes, it would be three years before the bank failed.

* * * * * * *

1766 Mr. GEORGE DOBSON called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. THOMAS:

Q. Where do you reside?
A. Ulysses, Butler county, Nebraska.
Q. What is your occupation?
A. Banking business principally.
Q. With what bank are you connected?
A. First Bank of Ulysses.
Q. How long have you been in the banking business?
A. Twenty four years.
Q. Were you engaged in the banking business during the year 1893?
A. Yes sir.
Q. Are you acquainted with the defendant Mr. Thompson?
A. Yes sir, I met him a number of times.
Q. Now you may state whether you remember of having met him anywhere during the month of January, 1893?
A. I met him in Lincoln in the Capital National Bank.
Q. About what time during the month, as near as you can recall?
A. It was in '93; I was thinking it was in '92.
Q. Well with reference to the failure of the bank?
A. It was within ten days to the best of my recollection; it was about the Monday before the Capital National Bank failed.

1767 Q. Where was Mr. Thompson at that time?
A. He was in the office of the Capital National Bank then. in the office in the front part of the bank.
Q. What were you doing in the bank?
—. ——.
Q. How did you happen to be in the bank that day?
A. The bank was our correspondent and I was there in Lincoln and I went in to see Mr. Mosher or Outcalt in regard to getting some rediscounts or loans.
Q. Where was Mr. Thompson when you went in?
A. In the front part of the bank, in Mr. Mosher's private office.
Q. Now you may state if you met Mr. Thompson there?
—. ——.
Q. Who was it presented you to him?
A. I was introduced by Mr. Mosher to Mr. Thompson.
Q. You may state what was said by Mr. Mosher in the presence of Mr. Thompson?

1768 A. Mr. Mosher — I was in the bank talking with Mr. Outcalt and as I was going out he motioned for me to come there and he said he wished me to meet Mr. Thompson, one of his principal stockholders, and I shook hands with Mr. Thompson; I had known Mr. Thompson previously however.

Q. Where were Mr. Thompson and Mr. Mosher while you were talking to Mr. Outcalt, when you first went in?

A. They were both standing up in the office talking very confidentially in front of the window looking out on the street.

Witness excused.

1769 Mr. H. T. JONES recalled.

Direct examination.

By Mr. THOMAS:

Q. Have you made an examination of the books in court of the Capital National Bank concerning bills receivable taken into the bank which were executed by various parties in York county and adjourning counties and which the books purport to show to have been negotiated through E. W. Mosher, or Stark & Mosher?

A. I have.

Q. Have you gone through all the discount registers that are here to make a list of such notes?

A. I have.

Q. And did you examine to see whether those notes were taken into and became a part of the bills receivable and assets of the Capital National Bank?

A. I have.

Q. Were the notes to which you refer taken into and became a part of the assets of the Capital National Bank, as shown by their books?

A. They did.

Q. And how do you ascertain that they were taken in as a part of the assets of the bank; what is there to show it on the books of the bank?

1770 Mr. ROSE: You are not offering this as rebuttal evidence?

Mr. THOMAS: Well I think this is proper rebuttal.

Q. Now I hand you *you*, Mr. Jones, Bills Discounted Register of the Capital National Bank, which has been identified as Exhibit X-25 and will ask you if a portion of the notes to which you have referred appear on pages 305-6-7-8-9 and 310 of that register?

A. In part, and then it is carried forward to another place in the book.

Q. Carried from there to page 276?

A. Yes sir.

Q. And does this record show that the makers of these notes reside in York county principally?

A. Yes sir, the majority of them do.

Q. And what appears at the head of the page,—what name?

A. It shows the account of Stark & Mosher notes.

Q. Does it show them to be the makers of the notes?

A. No sir, it shows that the notes were given to them.

Mr. THOMAS: Now I want to exhibit this book to the Court, and it being so voluminous we will offer a schedule of the pages.

(Book handed to the Court.)

Exhibits "11-a" to "15-a" identified.

Q. I hand you exhibits, Mr. Jones, numbered from "11-*a*" to "15-*a*" inclusive and will ask you if those schedules were compiled by you from the books of the Capital National Bank, showing notes negotiated through Stark & Mosher, and E. W. Mosher, which you say entered into and became a part of the assets of the Capital National Bank?

A. Yes sir.

Q. These schedules were taken from the books of the bank which are in court at this time?

A. Yes sir.

1771 Mr. THOMAS: We offer in evidence schedules Exhibits "11-a" to "15-a" inclusive.

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial, and no foundation laid.

Objection overruled.

Each of the defendants excepts.

Exhibits offered are received in evidence.

(Copies follows.)

EXHIBIT "11-A."

Notes, E. W. Mosher.

Date.	Bk. B/R.	Page.	No.	Amount.	Name of maker.
1886, Nov. 2.	"A"	16	15762	502.75	H. M. Woolman.
1885, Nov. 11.	...	19	15920	400.	W. Hice.
Jan. 22.	...	...	15921	500.	D. Meloy.
'86, Nov. 2.	220	...	20986	502.75	H. M. Woolman.
'87, Sep. 14.	...	...	29857	500.	.....
'86, Oct. 18.	...	...	30265	300.	.....
.....	...	...	7	300.	.....
.....	...	...	8	300.	.....
'87, Aug. 26.	"2"	...	35626	300.	Edward Glein.
Sep. 7.	...	150	38450	500.	Thos. Jacobs.
'88, Dec. 8.	...	260	43976	500.	C. E. Nobes.
'87, Aug. 26,	...	275	44700	500.	Edward Glein.
Sept. 7.	...	305	46225	1,000.	Thos. K. Jacobs.
'89, Mat 18.	"3"	110	73007	600.	J. E. Doty & W. Liesle.
May 24.	...	130	75007	2,500.	W. C. Franz.
'90, Mar. 26,	...	153	77191	75.	L. C. Lloyd, et al.
'89 Nov. 6.	...	190	81003	507.50	Lewis S. Lesle.
Dec. 10.	...	200	82003	1,500.	Chas. M. Donivan.
'91, Jan. 26.	...	243	94186	300.	W. H. Barstow.
Feb. 13.	...	...	98	571.50	W. A. Dean.
15.	...	254	95212	185.	W. H. Martin.
19.	...	...	95213	32.25	F. Week & R. Plummer.
May 9.	...	256	305	25.	Robt. Florer.
May 9.	...	256	305	25.	Robt. Florer.
Jan. 27.	...	270	97017	60.	Chas. Green & C. Biggs.

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Date.	Bk. B/R.	Page.	No.	Amount.	Name of maker.
May 1.	...	273	171	21.10	John Nevils.
Mar. 1.	...	...	2	34.35	Will Smith.
Apr. 22.	...	...	3	73.32	H. Harding.
May 7.	...	...	84	67.50	N. A. Dean.
Feb. 19.	...	280	98019	2,125.40	W. M. Daniels.
1773					
Feb. 7.	...	...	98020	500.	W. A. Beverage.
Mar. 5.	...	...	21	83.10	Peter Bohm.
'91, Feb. 19.	"3"	280	98029	2,000.	Wm. McDaniels.
Apr. 10.	...	281	86	28.	H. & J. Fountain.
May 9.	...	282	98126	105.	A. & F. Blodgett.
'90, Sep. 1.	...	290	99012	25.	R. S. Mindand.
'91, Apr. 22.	...	...	42	581.41	A. E. Meager.
'90, Oct. 1.	...	...	43	25.	Chas. Dye.
'91, Apr. 21.	...	...	45	52.	E. Wendalt.
22.	...	...	46	39.20	J. I. A. Frazier.
Mar. 17.	...	...	47	12.	G. Statts.
7.	...	...	48	65.70	J. Catselt.
Apr. 1.	...	...	49	42.10	J. R. Seagrist.
Mch. 20.	...	...	302	20.	W. H. & T. W. Weiswell.
Apr. 6.	...	...	6	13.60	J. P. Richards.
25.	...	...	7	107.40	Wm. Wertbaugh.
11.	...	...	8	50.	John & Mary Meagher.
10.	...	...	9	12.35	C. E. Marble.
25.	...	...	40	69.15	J. W. Donovan.
'89, Nov. 6.	...	315	46417	101.50	Lewis S. Lesk.
"	...	...	18	101.50	" " "
Dec. 12.	...	...	21	1,000.	Mary A. Meager.

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	12.	...	...	49	1,020.	" " "
	12.	...	316	46450	1,403.42	" " "
Oct.	21.	...	...	1	200.	Wm. McDaniels.
	"	...	...	2	200.	"
	"	...	...	3	200.	"
	"	...	...	4	300.	Chas. M. Donovan.
Dec.	10.	...	...	5	500.	"
	"	...	...	6	500.	"
	"	...	...	7	600.	"
	"	...	...	8	500.	S. L. Wright.
1774						
Oct.	21.	...	...	46463	200.	Wm. McDaniels.
Dec.	10.	...	...	64	400.	Chas. M. Donovan.
'91, Feb.	3.	...	319	46612	120.	Adam Faul.
	1.	...	...	13	102.	Edward & A. Morris.
	6.	...	...	14	162.94	Geo. D. Pence.
	7.	...	...	15	578.41	Daniel Maloy.
	7.	...	...	16	578.41	" "
	28.	...	...	46625	102.90	J. W. Kingston & C. E. Merch
	"	...	...	26	68.	Jasper Connett et al.
Mar.	1.	...	...	27	16.50	Robt. Bodman.
	"	...	28	28	46.80	J. W. Rider.
Feb.	7.	...	...	29	51.02	David Maloy.
	"	...	...	630	49.	" "
Mar.	4.	...	...	31	250.	W. H. Browks.
	"	...	...	32	250.	" " "
	"	...	...	33	34.50	John W. Rider.
	"	...	...	34	31.50	" " "
Feb.	7.	...	...	35	49.	David Maloy.

Date.	Bk. B/R.	Page.	No.	Amount.	Name of maker.
Jan. 16.	...	...	46646	1,000.	C. A. & Wm. McDaniels.
Feb. 24.	...	...	47	132.	Eli Nixon.
Mar. 26.	...	...	48	162.75	Soupher & Schall.
Apr. 2.	...	...	49	1,000.	W. H. Barstow.
	B./R.	*Page.*			
Jan. 27.	"4"	8	97017	60.	C. Green & T. Biggs.
May 20.	...	11	171	21.10	John Nevel.
Mar. 1.	...	...	2	34.35	W. Smith.
Apr. 22.	...	...	3	73.32	H. Harding.
Mar. 7.	...	...	84	67.50	N. A. Dean.
Feb. 19.	...	13	98019	2,125.40	Wm. McDaniels.
7.	...	...	20	500.	W. A. Beverage.
Mar. 5.	...	...	21	83.10	Peter Bohn.
Feb. 19.	...	...	29	2,000.	Wm. McDaniels.
Apr. 10.	...	14	86	28.	H. & K. Fountain.
May 9.	...	15	98126	105.	A. & F. Blodgett.
1775					
'90, Sep. 1.	...	18	99012	25.	R. L. Winlland.
'91, Apr. 23.	...	...	42	481.41	R. E. Meagher.
Oct. 1.	...	...	43	25.	Charles Dye.
Apr. 25.	...	...	45	52.	N. Wednalt.
22.	...	...	46	39.20	J. L. A. Frazier.
Mar. 17.	...	...	47	12.	Green & Statts.
May 7.	...	...	48	65.70	J. Catrall.
Apr. 1.	...	...	49	42.10	J. R. Siegrist.
1.	...	22	19243	104.16	Thos. Jones.
Jan. 2.	...	...	4	52.40	Peter Ehler.
"	...	...	5	38.25	E. H. Underhill.

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	July	3.	...	...	6	35.	John Neville.
		6.	...	...	7	85.	S. J. Smith.
	Mar.	20.	...	25	100,135	20.	W. H. & F. H. Weiswell.
	Apr.	6.	...	...	6	13.60	J. P. Richards.
		25.	...	...	7	107.40	Wm. Westbaugh.
		11.	...	...	8	50.	John & Mary Meagher.
		10.	...	...	9	12.35	C. E. Marble.
		25.	...	...	40	69.15	J. W. Donovan.
	July	8.	...	29	100,309	145.	B. F. Wood.
		6.	...	...	10	67.90	E. F. Cavenaugh.
	Apr.	1.	...	...	22	500.00	C. E. Van Dueshen.
	Mar.	10.	...	30	101,016	125.	H. W. & F. E. Palck.
	Jan.	1.	...	...	17	17.70	A. H. Parker.
	Apr.	2.	...	...	26	500.	W. H. Barstow.
'89,	Nov.	16.	...	...	35	101.50	Lewis S. Leach.
'91,	Oct.	17.	...	35	101,283	51.75	Gus R. Nisser.
	May	1.	...	40	102,010	104.	Geo. W. & E. B. Woods.
	Feb.	28.	...	...	37	102.90	J. W. Kingston.
		"	...	...	38	68.	Jasper Connett et al.
	Jun-	23.	...	41	102,056	56.95	E. E. Sutton.
		29.	...	...	57	56.70	May A. Doody.
		19.	...	...	58	100.	Henry Fry.
1776							
'91,	Apr.	25.	...	450	111,007	138.80	N. Wendall.
		14.	...	...	8	40.	Wm. Aldrich.
	Mar.	20,	...	...	9	13.	M. J. Keys.
	Jun-	15.	...	...	15	100.	Elmer Cameron.
	Oct.	7.	...	52	111,127	8.20	Horace Wellington.
		1.	...	80	114005	79.91	David George.

Date.	Bk. B/R.	Page.	No.	Amount.	Name of maker.
6.	...	90	115,001	131.15	Nelson Blue.
Aug. 7.	...	...	115,002	555.80	" "
July 1.	...	306	1024	107.	G. M. Bowers.
Oct. 19.	...	...	36	491.	Thos. Jones.
Apr. 6.	...	...	37	150.	Anna C. & H. Branz.
"	...	...	38	150.	" " "
"	...	...	39	150.	" " "
'92, Sep. 1.	...	310	1221	250.	Mary A. Meacher.
Feb. 13.	...	...	2	453.50	Samuel C. Kline.
July 1.	...	...	3	205.33	Wm. Daiel & R. B. Price.
"	...	...	4	250.	" "
"	...	...	25	250.	" "
"	...	...	6	250.	" "
Jun- 26.	...	...	7	200.	Geo. K. & P. A. Everts.
"	...	...	8	200.	" "
"	...	...	9	300.	" "
"	...	...	30	200.	do.
"	...	...	1	300.	do.
12.	...	...	2	100.	John A. & Sarah A. Johnson.
"	...	...	3	100.	do.
"	...	...	4	136.	do.
"	...	...	35	100.	do.
"	...	...	6	100.	do.
"	...	...	7	100.	do.
"	...	...	8	100.	do.
"	...	...	9	1,100.	do.
July 9.	...	...	1244	150.	L. C. Yolan.

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1777						
'91, Jan.	16.	...	315	46650	122.50	M. C. & A. McDaniel.
	"	...	...	1	36.80	do.
Mar.	20.	...	...	2	64.25	C. A. & J. B. Clabby.
Apr.	2.	...	...	3	1,300.	W. H. Barstow.
Mar.	20.	...	...	4	62.50	C. A. & J. B. Clabby.
	"	...	...	46655	90.	do.
Apr.	25.	...	...	6	142.80	Geo. Barstow.
	2.	...	...	7	500.	W. H. Barstow.
	2.	...	...	8	500.	do.
'89, Dec.	12.	...	...	46671	1,403.42	M. A. Meagher.
	"	...	...	2	200.	Wm. McDaniel.
Oct.	21.	...	...	3	200.	do.
	"	...	...	4	200.	do.
	"	...	...	75	300.	do.
	"	...	...	6	500.	C. N. Donovan.
Dec.	10.	...	...	7	500.	do.
	"	...	...	8	600.	do.
	"	...	...	9	500.	do.
	"	...	...	46680	400.	do.
	"	...	...	1	1,300.	A. Van Tyl et al.
'88, Jun-	1.	...	...	2	400.	M. T. Pennington.
'90, Mar.	1.	...	...	3	250.	do.
	"	...	...	4	350.	"
	"	...	...	85	500.	"
	"	...	...	7	200.	Eli Nixon.
	8.	...	...	1	110.	Eli Nixon.
Apr.	7.	...	...	9	140.	"
	"	...	...	46690	250.	"

Date.	Bk. B/R.	Page.	No.	Amount.	Name of maker.
"	...	...	1	310.	"
'91, Jul- 6.	...	316	46732	373.50	Nathaniel Elliott.
1778					
'93, Jan. 13.	"4"	276	1262	300.	Charles F. Bennard.
"	...	...	3	150.	do.
"	...	...	4	150.	do.
"	...	...	65	150.	do.
"	...	...	6	150.	do.
Jul- 13.	...	...	7	150.	do.
Jun- 13.	...	...	8	150.	do.
"	...	...	9	150.	do.
"	...	...	1270	150.	do.
"	...	...	1	150.	do.
"	...	...	2	150.	do.
"	...	...	3	200.	do.
Total.....				59,726.93	

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1779 EXHIBIT "12A."

Stark & Mosher Notes as Shown by Bills Receivable Register No. 2.

Date.	Page.	No.	Amt.	Name of maker.
1887, Aug. 1.	29	32448	115.25	John Hyland.
Sept. 2.	30	473	240.	A. L. Johnson.
Aug. 31.	...	4	15.70	Philip Kennedy.
Sep. 17.	...	85	315.70	Geo. D. Moore.
.....	...	94	11.	A. H. Campbell.
24.	...	6	52.88	Ed L. Ely.
26.	31	32503	117.20	P. H. Fenger et al.
30.	...	17	240.	First Nat. Bank.
Aug. 1.	...	8	3,500.	I. N. Contsell.
Sep. 19.	...	9	185.50	W. D. Earls.
Oct. 3.	...	32520	700.	M. D. Welsh.
3.	...	1	500.	R. H. Mitchell.
1.	32	60	246.80	L. S. Loomer.
1.	...	32580	89.90	C. H. Young.
15.	33	612	47.60	A. I. Gilmore.
.....	...	3	115.	John Widle.
8.	34	32678	1,800.	Henry A. Mengher.
27.	...	86	53.60	Geo. Everts.
28.	...	7	30.50	Henry Operloh.
29.	...	8	95.70	A. C. Kaheffey.
.....	...	9	159.90	T. M. Galaway.
27.	...	90	127.20	Andrew Striebe.
Nov. 1.	35	32718	90.	E. D. Parsons.
.....	...	9	45.20	F. P. Parker.
4.	...	.....	100.	G. L. Laws.
1.	...	32727	50.	Alfred Swiss.
5.	...	8	65.50	W. Meredith.
7.	...	35	92.20	P. Wilson.
			212.50	Southworth & Forste-Burg.
.....	36	32750		
.....	...	1	300.	C. E. Forsteburg.
16.	...	63	300.	France & Harlan.
1887, Nov. 30.	37	32806	100.	A. R. Fisher.
.....	...	7	60.65	I. E. Phillips.
28.	...	8	45.	S. M. Johnson.
29.	...	9	12.	Wm. Westbrough.
Dec. 1.	...	32828	187.95	S. F. Wood.
2.	...	9	27.20	A. M. Ottis.
1.	...	36	105.20	Dustin Scudder.
7.	...	7	76.	Austin Lindsay.
13.	...	47	102.75	A. D. Freeman.
24.	...	32876	13.55	S. A. Lerseck.
.....	...	7	250.	Wm. Clarke.
Feb. 3.	45	32201	75.	G. Bowersack.
Aug. 22.	...	26	222.10	Peter Kelley.

		27.	...	7	490.	Josiah ePters.
		29.	...	33231	200.	Peter M. Blair.
	Sep.	10.	...	35	125.	Dowell Heaton.
	Nov.	1.	46	33265	100.	Sarah I. Bingham.
		5.	...	92	129.90	I. W. Askew.
		1.	47	33331	213.20	James Powersok.
.....			...	2	334.20	W. B. Ronald.
		12.	...	3	1,013.10	J. W. Underhill.
		17.	...	4	1,081.	M. C. Frank.
		21.	...	33397	92.75	Thos. Blubknor.
	Dec.	1.	49	33423	220.	John Neville.
		12.	...	45	105.10	A. D. Simmons.
.....			...	7	46.60	Julia Corcoran.
		22.	50	33475	44.70	F. Rafferty.
		23.	...	6	36.	S. M. Johnson.
		1.	...	80	697.20	S. W. Sidwell.
1780						
	Dec.	31.	...	9	313.90	J. F. McConaughy.
.....			...	90	12.	Wm. Westbrough.
		21.	50	33491	10.70	C. Wolford.
		30.	...	2	26.70	O. Brown.
		9.	...	3	77.	J. A. Corcoran.
		31.	...	8	92.40	M. C. Frank.
1888,	Jun-	2.	...	9	16.20	Philip Kennedy.
		1.	51	33500	30.50	Herman Osterlok.
.....			...	2	100.	A. R. Fisher.
1887,	Dec.	24.	...	8	310.	J. W. Rulipson.
1888,	Jun-	3.	...	33538	10.25	Wm. Ryan.
		6.	...	9	300.	C. E. Fosterburg.
		11.	52	33555	187.95	S. F. Wood.
		21.	...	80	25.	John Walkup.
.....			...	1	150.90	do.
		1.	...	33591	82.	J. E. Hunt.
		25.	...	2	339.61	Chas. Dangburg.
		30.	...	8	20.75	Jas Neville.
	Feb.	1.	...	9	15.50	C. S. Herser.
	Nov.	1.	60	33950	46.75	F. W. Greenwell.
1887,	Mar.	7.	...	4	157.70	Mike Carry.
		9.	...	5	175.	W. S. Laurning.
	Oct.	27.	61	34012	357.50	S. F. Frazer.
		8.	...	3	2,463.54	Mary A. Meagher.
	Sep.	26.	...	4	101.85	Edward Gleim.
	Mar.	1.	...	15	54.50	David Hilton.
	Nov.	30.	62	34057	22.75	H. M. Jackett.
		28.	...	8	83.20	John Reck.
	Dec.	4.	...	75	47.80	Thomas Rea.
	Nov.	30.	...	6	700.	A. M. Stark et al.
	Dec.	1.	...	81	100.	W. S. Morrison.
		10.	...	7	22.70	Phillip Kennedy.
		1.	...	8	211.50	Wm. Jones.
		10.	...	9	561.20	G. W. Mayo.
1887,	Dec.	13.	63	34111	559.70	M. C. Mitchell.

.....		...		2	20.	J. A. Palmore.
.....		...		3	22.95	James Campbell.
		14.	...	4	73.	Aaron Gabriel.
		15.	...	35	53.	S. D. Joyce.
		24.	64	34169	54.20	Stark & Mosher.
		1.	...	181	1,000.	M. C. Frank.
		30.	...	2	3,500.	do.
1888,	Jan.	5.	...	34199	89.90	C. H. Young.
		4.	...	34232	90.	E. D. Parsons.
		6.	...	3	105.70	James Powers.
1887,	Dec.	25.	...	4	112.50	David Melon.
.....			65	34248	118.30	Robert Fosler.
1888,	Jan.	1.	66	34283	246.80	L. S. Loomer.
		28.	67	34312	21.90	E. Anderson.
		31.	...	34325	5,000.	Stark & Mosher.
		28.	...	6	31.	J. H. Frew.
		30.	...	7	12.	W. Westbrough.
		30.	...	8	91.	C. Burgess.
.....			...	9	20.	John Meredith.
		3.	...	30	118.	James Flynn.
		1.	...	8	105.20	Dustin Schadder.
	Feb.	2.	...	9	300.	France & Harlan.
		15.	68	34361	100.	Sarah I. Bingham.
		29.	...	79	300.	C. E. Forsteburg.
		1.	...	367	82.	J. E. Hunt.
		20.	...	4	102.50	Miller Heller.
		16.	...	61	100.	Sarah Bingham.
		7.	...	34354	10.50	Wm. Walker.
1781						
1887,	Oct.	15.	75	34736	75.	C. N. Turner.
	Nov.	5.	...	7	258.15	R. H. Fair.
		12.	...	8	861.70	Wm. Nolan.
	Dec.	12.	76	34755	50.	H. Naber.
.....			...	6	50.	"
1888,	Jan.	2.	...	83	82.20	Wm. Doody.
	Dec.	31.	...	4	190.	H. Hagenhausen.
	Jun-	1.	...	95	65.50	Wm. Meredith.
		3.	6	.....	65.70	Chas. H. Fisher.
	Dec.	31.	77	34848	76.60	Henry Kistler.
1888,	Jun-	10.	...	9	135.55	Anton Wveff.
		9.	...	34869	159.90	T. M. Galway.
		18.	79	904	110.20	Joseph Sinasall.
		28.	80	55	264.20	John Neville.
.....			...	71	31.90	J. H. Frew.
		31.	...	2	165.	Anson M. Otis.
.....			...	3	110.	I. Contrell.
	Feb.	1.	...	34979	100.	A. R. Fisher.
		6.	...	84	35.75	T. C. Moore.
		4.	...	5	180.	Geisler & Co.
		6.	...	6	250.	E. S. Palston.
		20.	81	35021	221.25	W. Blincow.

		23.	...	26	76.	Austin Tinsley.
		27.	...	35045	250.40	T. F. McConaughy.
	Mch.	3.	82	52	12.	Wm. Weitbrugh.
1887,	Oct.	28.	90	35462	2,372.50	Wm. McDaniel.
	Nov.	12.	...	69	1,192.60	J. W. Underhill.
		28.	...	82	57.75	Fred Southland.
		12.	82	86	926.10	E. Nolan.
	Dec.	27.	...	35492	58.50	H. T. Ilgenfritz.
1888,	Jan.	3.	91	35516	29.20	Sarah M. Bustard.
		26.	...	19	82.20	B. Jenkins.
		27.	...	20	174.20	O. M. Miller.
.....			...	35521	44.	W. S. Wright.
		30.	...	39	46.60	J. R. Corcoran.
	Feb.	1.	92	97	88.	G. & B. Bowersock.
		9.	...	98	148.20	Chas. F. Fisher.
	Jan.	30.	93	35605	77.	Julia A. Corcoran.
	Feb.	13.	...	18	107.	W. M. Smith.
		16.	...	19	55.20	T. P. Owen.
		6.	...	27	243.80	T. H. Carrol.
		16.	...	28	51.	O. C. Lutz.
		13.	94	83	1,013.10	J. W. Nucurhill.
	Mch.	10.	95	35713	37.70	Wilson Patt.
		1.	...	18	90.	E. S. Parsons.
		12.	...	37	129.90	J. W. Askew.
	Feb.	15.	...	35740	1,081.	C. M. Frank.
	Mch.	30.	...	46	410.	"
		29.	...	47	50.	O. P. Sloninger.
		3.	96	35750	300.	France & Harlan
	Apr.	3.	...	56	256.80	L. S. Loomer.
.....			...	57	50.	A. R. Fisher.
		7.	...	35768	250.40	J. F. McConaughy.
		2.	...	81	4,600.	Stark & Mosher.
		10.	...	2	26.25	H. M. Dietrick.
.....			...	3	368.40	Martha & R. Ross.
		4.	...	88	14.75	James Armstrong.
	Mch.	7.	...	89	59.	T. P. Owen.
	Apr.	14.	...	96	73.50	John Peter.
		2.	97	35816	72.35	M. C. Frank.
'87,	Dec.	10.	...	36233	120.	Harmon Metz.
1887,	Dec.	6.	105	36235	142.90	W. E. Churchill.
		16.	...	37	1,338.20	H. B. Gue.
		1.	...	42	700.	M. C. Frank.
.....			...	43	1,000.	do.
1782						
		16.	...	44	120.	H. B. Gue.
'88,	Jan.	31.	106	36268	114.	John Middle.
'87,	Dec.	16.	...	77	435.	H. M. Woolman.
'88,	Feb.	24,	...	83	71.25	J. H. Crawford.
'87,	Oct.	27.	107	36305	127.20	Andrew Srtube.
	Mch.	1.	...	6	83.20	John Rick.
.....			...	7	47.80	Thomas Rea.

'88	Feb.	10.	...	27	57.90	J. Walkup.
	Mch.	6.	...	28	100.	H. C. Graves.
		1.	...	36346	100.	W. F. Morrison.
		8.	...	47	89.80	H. H. Youna.
		10.	108	52	32.90	O. C. Noes.
	Feb.	28.	...	36370	35.50	M. Gunnell.
	Mch.	17.	...	71	118.70	B. F. Willis.
		21.	...	83	219.80	Wm. Jones.
		10.	109	36412	106.40	Chas. Green.
		29.	...	18	100.	O. P. Slougen.
		3.	...	19	1,000.	M. C. Frank.
		15.	...	25	56.15	S. D. Jaynes.
	Apr.	3.	...	36431	36.	S. M. Johnson.
	Mch.	12.	...	42	20.	James Campbell.
		26.	...	43	1,800.	Norcross & Worl.
		24.	110	52	112.50	David Melon.
		29.	...	36490	1,800.	Geo. B. France.
	Apr.	16.	...	94	12.	Philip Kennedy.
		17.	...	45	31.	G. H. Spears.
	Apr.	16.	111	36506	40.	Philip Kennedy.
1888,	May.	1.	111	36523	90.	E. D. Parsons.
		5.	...	38	17.25	B. Farmer.
		17.	112	56	29.10	G. H. Spears.
	Apr.	28.	...	57	37.75	Thos. Jones.
	May.	31.	...	36582	86.50	M. C. Frank.
	Jan.	3.	120	36969	330.	Oscar M. Miller.
		9.	...	71	330.	do.
'87,	Dec.	30.	...	79	300.	John Meradith.
'88,	Mch.	17.	...	96	58.90	W. H. Willis.
	Apr.	6.	...	37042	50.	H. Nabor.
.....		.....	...	43	50.	"
	Apr.	7.	122	59	82.20	Wm. Doody.
	Mch.	24.	...	65	50.	M. C. Horn.
		31.	123	37102	3,500.	M. C. Frank.
	Apr.	1.	...	33	125.	H. Blodgett.
		27.	124	37155	37.70	N. Dart.
		30.	...	61	77.	Julia A. Corcoran.
	May	5.	...	70	112.28	L. H. Donaldson.
		8.	...	83	135.55	Anton Wulff.
	Jun-	1.	126	37253	143.	France & Harlan.
		28.	127	37306	22.15	O. N. Miller.
.....		.....	...	7	102.95	T. H. Walker.
'87,	Dec.	22.	135	37713	75.	J. A. Eaton.
'88,	Feb.	11.	...	17	150.	Daniel A. Rickera.
		13.	...	18	1,450.	Ben Price.
		14.	...	19	550.	Mary A. Meagher.
.....		.....	...	20	650.50	"
		17.	...	21	187.20	John Chaff.
		25.	...	23	192.20	Pitt Wilson.
		15.	...	24	151.25	Dan'l Heaton.
		25.	...	25	82.45	Wm. S. Leaming.
		11.	**...**	**26**	500.	Wm. A. Sharar.

'88,	Apr.	18.	135	37742	323.70	O. N. Kelley.
		30.	...	47	46.60	Julia A. Corcoran.
		27.	136	76	118.57	S. P. Buckmaster.
	May	1.	...	77	82.20	Benj. Jenkins.
		15.	138	37893	1,081.	M. C. Frank.
	June	1.	...	98	100.	W. F. Morison.
	May	20.	...	99	1,200.	M. C. Frank.
1783						
	June	6.	139	37917	32.95	O. Noyes.
		12.	...	29	38.50	H. T. Ingenfritz.
		15.	...	38	221.25	Wm. Blincoe.
		18.	...	46	89.90	H. H. Young.
		26.	140	39766	20.20	Robt. Floser.
	May	M4.	...	76	14.25	E. Evans.
		1.	...	77	2,491.10	Wm. M. Daniels.
	Jul-	18.	...	97	293.95	Chas. Vanberg.
	Sep.	22.	150	38459	36.	V. C. Huleon.
.....			...	60	91.25	John H. McClatchy.
.....			...	61	53.75	John B. Clabby.
.....			...	62	46.25	P. N. Flynn.
.....			...	63	52.	J. H. Huston.
.....			...	64	140.	Sanclers.
.....			...	65	26.50	V. Heimers.
	Sept.	1.	...	67	100.	J. J. Brizendine.
	Dec.	16.	...	38477	40.	William.
	Mch.	6.	...	99	66.45	H. C. Graves.
	Feb.	22.	151	38503	222.10	Peter Kelley.
	Mch.	11.	...	13	2,566.30	Marie C. Meagher.
	Apr.	16.	...	17	36.	Joseph Ellis.
	May	1.	...	19	218.	N. Elliott.
.....			...	23	88.	G. & B. Bowersock.
		12.	...	38524	190.	S. L. & C. H. Young.
'88,	May	23.	151	28543	84.	J. H. Madson.
.....			...	44	23.84	do.
	June	1.	152	63	47.80	Thos. Rea.
		2.	...	64	125.	A. A. Lessek.
		9.	...	90	100.	A. E. Groves.
		13.	153	38611	50.	S. D. Jaynes.
		16.	...	27	211.30	Wm. Jones.
		21.	...	49	74.50	W. Meradith.
		5.	154	38650	83.20	D. Price.
		22.	...	57	103.70	Andrew Strube.
		26.	...	78	28.	Robt. Floser.
	Jul-	23.	156	38771	28.70	A. Gilver.
		31.	...	80	245.62	M. C. Frank.
		2.	...	86	25.	Will Smith.
	Aug.	6.	...	94	20.75	John P. Cook.
	Jun-	27.	...	98	1,800.	France & Harlan.
	Jan.	31.	165	39231	225.	J. J. Sidwell.
		24.	...	32	75.	T. B. Bennett.

	Feb. 25.	...	34	80.	Thos. S. Gleason.
	Jan. 27.	...	35	50.	M. D. Chambers.
.....		...	33	36.75	L. H. Hamilton.
.....		...	37	22.50	Jos. Samsall.
	Mch. 8.	...	39	15.	E. Schmidt.
	Apr. 2.	...	39245	53.95	Vaviel Friesen.
	1.	...	47	14.75	J. A. W. Johnson.
	4.	...	48	14.75	M. J. Covers.
	24.	...	49	35.	M. C. Horn.
	Feb. 22.	166	39252	80.	M. Elliott.
	May 10.	...	58	357.50	S. F. Frazier.
	1.	...	60	129.90	J. W. Askew.
	16.	...	67	215.	Oliver Baggs.
	23.	...	68	58.70	Mary G. & Otto Fair.
	Jun- 12.	166	39281	87.50	Geo. H. McKinyon.
	13.	...	2	114.70	Wm. Wesstsbaugh.
	27.	...	91	50.	G. Gross.
	29.	...	2	50.	H. Nabor.
	28.	...	3	74.20	A. Miller.
	30.	167	39324	1,925.39	M. A. & I. Meagher.
	Jul- 26.	168	68	1,013.10	J. W. Underhill.
	Apr. 21.	169	434	100.	S. W. Sidwell.
.....		...	5	257.50	
	July 2.	...	38	3,500	M. C. Frank.
1784					
	Jul- 2.	170	451	15.00	Will Smith.
	Jun- 28.	...	2	23.	M. Wertsbaugh.
	Aug. 8.	...	3	21.95	F. O. Clapp.
	29.	171	39504	79.70	J. E. Hunt.
	24.	...	35	300.	P. E. Haynes et al.
	21.	...	36	26.75	S. F. Wood.
	Sep. 20.	...	561	103.50	Andrew Strub.
	Feb. 16.	180	39977	121.	Jasper Mosgrove.
	"	...	8	126.	Armon Friel.
	"	...	9	167.60	O. S. Heath.
	"	...	80	118.20	Frank Laird.
	Apr. 2.	...	39998	32.50	David Fessiann.
	May 9.	181	40010	387.30	Geo. W. Mayo.
	10.	...	17	120.20	I. A. Rummell.
	25.	...	26	50.20	Geo. D. Elliott.
	Jun- 13.	...	34	342.90	W. E. Churchill.
	Feb. 2.	...	36	205.	I. W. Cullingham et al.
	May 15.	...	48	1,192.	J. W. Underhill.
	Jul- 31.	182	40078	2,700.	M. C. Frank.
	Apr. 30.	...	99	905.	M.A.&JohnHeagher.
	9.	183	105	28.	Alex Maxwell.
	Aug. 9.	...	6	167.70	H. M. Heaton.
	Aug. 21.	185	40209	1,231.	M. C. Frank.
	15.	...	16	1,104.45	"

		24.	...	27	125.	P. E. Haines.
		25.	...	28	120.50	T. H. Carrol.
		1.	...	40232	58.50	H. G. Ilgenfritz.
	Sep.	21.	186	81	37.70	W. Dart.
		22.	...	85	192.45	I. H. Walker.
		29.	...	40292	677.37	M. C. Frank.
'86,	Dec.	27.	195	701	500.	M. Luckey.
'87,	Oct.	27.	...	17	50.	Ezra A. Edwards.
'88,	Mar.	9.	...	25	150.	Stephen Evans.
	June	2.	196	40759	208.	S. A. Leselk.
	May	1.	...	61	750.	Christian Losen.
	Jun-	13.	...	66	2,031.20	Adam Trickey.
		12.	...	67	87.50	Geo. H. Kinyon.
		19.	...	40770	435.	H. M. Woolman.
	Jul-	2.	...	95	124.20	A. F. Brown.
	Aug.	29.	197	40816	47.80	Thos. Rea.
	Sept.	3.	198	40851	98.	Stark & Mosher.
		1.	...	57	211.30	Wm. Jones.
		1.	...	61	222.25	Peter Kelley.
		11.	...	73	50.	S. D. James.
		1.	...	96	166.45	H. C. Graves.
		24.	199	40944	196.55	John Chadd.
		15.	...	49	44.	Thos. Jones.
	Oct.	1.	200	40972	87.25	Thos. S. Gleesen.
	Sep.	24.	...	3	53.10	O. N. & I. F. Kelley.
		29.	...	4	14.	Chas. Hattch.
		25.	201	41018	1,800.	Geo. B. France et al.
	Oct.	31.	...	44	300.	S. F. Frazier.
	Nov.	27.	203	41114	200.	Lewis E. Fees.
	Feb.	1.	210	41469	120.20	Chas. Petterson.
		25.	...	76	80.	Thos. S. Gleesen.
'87,	Oct.	27.	211	41522	100.	E. A. Edwards.
'88,	Apr.	1.	...	3	14.75	A. Westergren.
	Mar.	17.	...	4	80.	C. W. Churchill.
	Apr.	20.	...	48	10.	R. L. Martin.
	May	9.	213	41601	330.30	Geo. W. Mayo.
		12.	...	6	205.	S. L. & C. H. Young.
		1.	...	32	653.52	Edward Gleim.
	Jun-	28.	...	43	346.50	Oscar M. Miller.
		"	...	44	346.50	"
		9.	214	41683	41.20	Edward Gleim.
1785						
	Aug.	31.	215	706	60.	Chas. Green.
		24.	...	12	125.	A. E. Haynes.
	Oct.	1.	...	42	27.75	John B. Clabby.
		1.	217	41808	79.70	O. E. Hunt.
		18.	...	21	112.88	F. A. Donelson.
		20.	...	2	100.	France & Harlan.
		3.	218	41864	3,572.35	M. C. Frank.
		1.	...	96	35.70	Mary L. & Geo. Thair.
	Nov.	27.	220	41952	50.50	Lewis E. Fees.

	Dec.	7.	...	88	225.	T. P. Owen.
	Oct.	17.	...	89	1,013.10	J. W. Underhill.
	Dec.	1.	...	90	34.10	G. H. Speer.
		22.	221	42017	166.25	H. C. Graves.
		20.	...	18	31.	G. H. Spears.
		1.	...	24	124.20	Peter Kelley.
'89,	Jan.	2.	...	34	79.30	W. Meredith.
	Jan.	4.	...	36	60.	E. D. Parsons.
		12.	...	44	30.	Robt. Flesser.
'88,	Feb.	23.	230	42451	400.	E. M. Freeman.
		22.	...	2	80.	Martin Elliott.
	Mar.	28.	...	55	133.75	Geo. Newton.
		28.	...	56	133.75	E. W. "
	Nov.	1.	...	95	537.50	Wm. McDaniel.
	Aug.	1.	...	6	2,554.67	Wm. M. McDaniel.
		14.	...	7	577.50	Mary&JohnMeagher.
		14.	...	8	683.	do.
	Nov.	1.	232	42535	2,755.80	M. C. Frank.
		20.	...	66	1,262.80	do.
		16.	...	70	1,113.04	do.
		1.	...	96	205.45	J. H. Walker.
	Dec.	3.	233	42625	93.75	Thos. S. Gleesen.
		1.	...	44	222.25	P. Kelley.
		26.	234	42666	130.	S. W. Sidwell.
		26.	...	67	381.95	do.
		22.	...	74	130.	S. P. Buckmaster.
		29.	...	75	131.85	C. E. Fosterburg.
'89,	Jan.	1.	...	82	2,110.20	Adam Frickey.
'88,	Dec.	31.	...	84	211.30	Wm. Jones.
	Jan.	1.	...	91	80.	James Geagley.
'89,	Jan.	9.	...	99	79.25	C. H. Young.
'88,	Feb.	4.	245	43208	105.90	D. J. Bennett.
	Sept.	3.	...	23	219.62	P. Owens.
	Sep.	11.	...	44	2,694.60	M. & J. Meagher.
	Nov.	27.	246	43254	100.	Lewis E. Fees.
	Dec.	10.	247	314	114.75	P. & N. Heaton.
		17.	...	37	153.20	M. & J. Meagher.
		24.	248	43336	1,800.	Geo. B. France et al.
		17.	...	57	23.	Milton Wertsbaugh.
		14.	...	58	25.95	F. O. Clapp.
		10.	248	43365	50.	S. D. Jones.
		29.	...	74	265.44	W. Blincen.
		29.	...	5	117.75	Wm. Nolan.
		29.	...	6	128.25	H. & F. Bledodt.
		"	...	7	19.	R. B. Price.
		26.	...	8	53.75	David & B. Price.
		27.	249	42400	60.	Wm. Aldrich.
9.	Jan.	1.	...	8	410.40	S. L. & C. H. Young.
		8.	...	9	42.50	L.M.& John Gunnell.
		"	...	10	299.45	John Gunnell.
		1.	...	17	51.	Louis Fees.

		25.	250	42462	23.50	James Campbell.
	Feb.	1.	...	480	25.	M. Mitchell.
		1.	...	96	103.70	Dorn & Raymon.
		19.	251	43532	100.	E. Wendelt.
'88,	Oct.	1.	260	972	1,975.19	M. & J. Meagher.
1786						
	Dec.	26.	...	89	1,225.15	H. B. Gue.
		28.	...	95	120.52	Geo. Heaton.
		31.	261	44013	361.40	G. W. Mays.
'89,	Jan.	3.	...	35	126.10	D. P. Hunter.
		11.	262	50	526.10	Wm. M. Daniel.
		12.	...	64	105.	N. A. Dean.
'88,	Dec.	31.	...	69	58.50	H. G. Ilginfritz.
'89,	Jan.	12.	...	70	63.50	W. H. Reader.
		"	...	71	65.40	Wm. Workbaugh.
		15.	263	44148	166.45	H. C. Graves.
'88,	May	16.	275	703	210.	Oliver Baggs.
	Nov.	14.	...	17	951.	M. & J. Meagher.
		15.	...	28	1,252.23	J. W. Underhill.
'89,	Feb.	1.	278	44853	219.	Wm. Jones.
		18.	280	962	196.15	Mathilda C. Hice.
'88,	May	9.	...	81	50.	J. A. Adams et al.
'89,	Mar.	19.	281	45021	53.75	David & Benj. Price.
	Feb.	2.	...	2	551.39	Wm. McDaniels.
	Apr.	15.	...	3	31.	Geo. W. Harvey.
		17.	...	4	19.95	A. C. Moore.
		23.	...	25	26.	Robt. Fleeser.
		25.	...	31	31.	G. H. Spears.
'88,	Dec.	11.	290	45457	182.45	Geo. W. Kenyon.
		27.	...	62	173.	Geo. W. Bowen.
		26.	...	63	102.10	H. B. Gue.
'89,	Dec.	25.	...	68	112.50	David Meley.
	Jun-	14.	...	69	500.	do.
	Feb.	15.	291	45500	67.15	Wm. H. & J. Willes.
		27.	...	18	62.12	J. B. Frickey.
	Mar.	9.	292	61	50.	S. T. James.
	Apr.	17.	294	45670	25.95	F. O. Clapp.
		9.	...	1	38.	E. H. Underhill.
		15.	...	2	628.20	Gilmore Bros.
	May	8.	295	45701	69.25	F. Baldwin.
'88,	Feb.	23.	305	46229	400.	E. M. Freeman.
		23.	...	30	370.	do.
	Jun-	29.	...	36	450.	John F. McConaughy.
	Feb.	13.	...	39	35.	Mary Chadd & J. Chadd.
	Apr.	23.	...	40	80.	Nathaniel Dean.
	Sept.	3.	...	45	300.	Mary & Leroy Neville.
		19.	...	46	350.	Peter Bohm.
	July	1.	306	46252	1,100.	S. H. Sedwicke.

	Aug.	24.	...	64	300.	P. E. Haines.
	Sept.	28.	...	72	52.50	I. A. Stubbs.
	Nov.	27.	...	79	200.	Louis E. Lees.
	Dec.	5.	...	80	237.70	Henry Metz.
		17.	...	83	129.	John I. Davis.
		17.	...	84	104.	John & Aug. Dick.
'88,	Dec.	13.	303	46293	575.20	C. Lorenz.
		26.	...	94	200.	Louis Fees.
'89,	Jun-	1.	...	97	80.	James I. Geagle.
		12.	307	46301	166.20	Robt. Sloser.
	Total				159,465.12	

1787 EXHIBIT "13A."

Stark & Mosher Notes, as Shown by Discount Register No. 3.

Date.			Page.	No.	Amt.	Name of maker.
1889,	Jan.	12.	30	57015	24.25	W. A. Dean.
		14.	...	16	754.	David Meley.
	Feb.	12.	...	32	264.	H. Ford & M. Meeker
	Apr.	22.	32	142	105.	W. A. Dean.
	"		33	57161	539.25	Wm. McDaniel.
	Jun-	14.	...	2	716.10	do.
		18.	...	3	1,038.45	J. W. Underhill.
	Apr.	15.	34	210	176.45	H. C. Graves.
	Feb.	8.	40	58013	324.25	J. H. Campbell.
		18.	...	17	362.	Matilda C. Hice.
		5.	...	28	2,684.53	Wm. McDaniel.
		17.	...	29	717.70	Mary A.& J.Meagher.
		17.	...	30	606.81	do.
	Jun-	29.	44	58226	230.50	David Meley.
	Jul-	13.	45	71	14.	F. J. Ferguson.
	Jun-	17.	50	59021	185.	Elizabeth Clabby.
	Feb.	19.	...	29	115.	N. Wendell.
'88,	Sep.	17.	...	37	280.	O. R. Jones et al.
	Aug.	30.	...	38	200.	J. W. Fasstes et al.
'89,	Mar.	14.	...	43	2,831.57	Mary & JohnMeagher
	June	7.	52	59140	50.	S. W. James.
	Jul-	18.	55	259	35.20	Wm. Miller.
	Sept.	7.	56	321	51.20	Eben Perry.
	Mar.	12.	60	60034	112.65	Louis E. Feace.
'87,	Oct.	6.	...	36	100.	C. H. Morse et al.
'9,	Jul-	15.	63	180	12.	H. B. Gue.
'88,	Nov.	5.	...	91	300.	Mary J. Lloyd et al.
'89,	Aug.	1.	64	231	106.	Thos. Jones.
	Apr.	26.	...	2	150.	J. G. Cording & T. Scott.
	July	8.	65	53	117.20	W. H. Greer.
	Sep.	18.	66	60318	9.75	J. J. O'Brien.

'88,	Nov.	10.	70	61033	110.	S. P. Huffman.
	May	9.	...	37	382.30	Geo. W. Mays.
'89,	Apr.	15.	...	39	13.75	N. J. Keys et al.
	Mar.	27.	...	40	13.75	G. D. Keys.
	May	15.	71	61055	1,251.23	J. W. Underhill.
	Aug.	2.	72	115	38.50	H. G. Ingelfritz.
		13.	...	23	15.	T. W. Mayo.
		23.	74	61204	37.	S. G. Wood.
	Sep.	2.	...	18	22.20	L. C. Nolan.
		26.	75	50	40.	D. V. Twichell.
	Mar.	11.	80	62019	242.75	E. W. Newton.
		12.	...	20	134.95	E. I. Bennett.
	Dec.	29.	...	21	100.	J. W. Franklin.
	Mar.	23.	...	23	23.50	O. W. Williams.
	Aug.	17.	81	62063	28.50	Chas. Dolovan.
	Sep.	5.	82	124	50.	S. D. James.
	Oct.	8.	84	62247	117.20	W. H. Greer.
		23.	...	48	52.	W. F. Freeman.
	Nov.	9.	86	300	110.	J. J. Smetzer et al.
		11.	...	1	40.	Chas. Green et al.
		9.	...	2	104.	Thos. Jonas.
	Feb.	2.	90	71034	500.	Albert Harlan.
	Mar.	1.	..	39	87.50	Emil Meagher.
		21.	...	40	271.	W. Elliott.
	Jul-	19.	91	71	35.70	Henry Metz.
	Aug.	19.	...	72	101.55	Wm. Wetzburgh.
1788						
	Aug.	23.	...	73	35.	Dick Howard et al.
		29.	...	76	213.62	Oscar M. Miller.
	Sep.	7.	...	77	131.20	S. M. Kline.
		10.	...	78	116.20	Chas. & G. Bowersock
		9.	...	79	198.	G. W. Bowers.
'89,	Sept.	1.	91	71083	373.20	J. H. Campbell.
	Jul-	8.	92	130	58.20	P. A. Hoover.
	Apr.	19.	...	2	70.	Geo. Gleim.
	Oct.	27.	94	71207	280.50	A. S. & W. Harland et al.
		12.	...	8	12.	Anton Bechtel.
		16.	...	9	70.	John Faul.
	Sep.	25.	...	10	11.	H. H. & E. B. Hunt.
	Oct.	16.	...	1	11.70	J. A. Johnson.
		12.	...	2	60.	J. E. Lonsdale.
		18.	...	3	23.30	Gilmore Bros.
		18.	...	4	20.	J. B. Clubby.
	Sep.	20.	...	15	12.80	J. A. Anderson et al.
	Nov.	9.	96	71304	15.	M. R. Simpson.
	Oct.	19.	...	12	25.	W. A. Muchmore.
	Dec.	16.	97	63	21.	W. Patten.
		27.	98	71425	40.	W. A. Dean.
	Jun-	1.	100	72001	80.	J. K. Geagley.
	July	29.	...	2	115.20	J. J. Smeltzer.

	Sep.	24.	...	13	131.87	J. B. Clabby.
	Oct.	3.	20	.....	8.45	S. H. Hull.
	Aug.	19.	102	72113	50.	E. & P. W. Dale.
	Dec.	24.	103	197	130.	H. C. Graves.
	Nov.	21.	...	98	40.	J. W. Barnes.
'90,	Jun-	6.	104	72228	4.75	F. A. Baker.
		13.	105	53	21.75	T. G. Simpson.
		12.	...	63	61.50	James E. Lonsdale.
'89,	Sept.	4.	110	73012	20.	N. A. Dean.
		12.	...	16	526.	W. N. Smith.
		19.	...	27	115.	E. Wendelt.
	Nov.	9.	...	39	100.	Thos. Jones.
	Dec.	14.	112	73103	43.20	J. W. Donivan.
		4.	113	153	50.	S. D. Jones.
		20.	...	4	50.	W. R. Turman.
		30.	114	73221	43.20	R. B. Simpson.
	"		...	2	50.	S. F. Wood.
		31.	...	3	329.	M. C. Hice et al.
'90,	Jun-	3.	...	4	60.30	W. F. Tilden.
		20.	...	5	40.	H. & F. Bledodt.
'89,	Oct.	29.	115	73262	157.50	J. G. Cording.
'90,	Jan.	30.	...	3	113.20	Eben Perry.
		25.	...	4	21.	W. Pattoo.
	Feb.	15.	116	73306	283.50	J. A. Campbell.
	Apr.	13.	120	74004	100.	Fred & F. Bittinger et al.
		22.	...	5	22.	J. A. Woodruff et al.
'89,	Oct.	21.	...	74047	1,821.15	Wm. McDaniel.
		21.	...	8	706.78	do.
	"		...	9	2,178.85	do.
		28.	121	55	400.	Mary&JohnMeagher
	Nov.	19.	...	74060	100.	W. H. Reader.
'89,	Dec.	30.	123	182	700.	Richard I. Thesing.
'90,	Jun-	4.	...	3	24.70	M. L. Grant et al.
		15.	...	4	25.95	F. O. Clapp.
		13.	...	5	11.75	T. H. O'Brien.
		7.	...	6	140.20	Robt. Fleeser.
	"		...	7	133.95	R. D. Owen.
		22.	...	74189	142.12	Geo. Heaton.
		25.	125	259	75.20	C. M. Read.
		27.	...	60	117.20	W. H. Geer.
		29.	...	1	1,000.	E. Nixon.
	Feb.	1.	...	2	34.95	E. H. Underhill.
	"		...	3	40.	Chas. Bear.
1789						
	Mar.	3.	126	74341	153.20	J. H. Frew.
	Feb.	22.	..	2	11.	H. H. & E. Hunt.
		26	...	3	63.	A. J. Neuman.
	Mar.	15.	127	74366	288.50	J. A. Campbell.
'89,	Jan.	2.	130	75002	233 46	Haneick & Conover.
		2.	...	3	346.06	do.

'90,	Jun-	20.	...	44	54.90	E. W. Spears.
		23	131	94	290.15	L. E. Fees.
		25.	...	95	82.40	Wm. Wertsbaugh.
		"	96	93	28.	Godfrey Carlen et al.
		29.	...	97	27.80	David Price.
	Feb.	4.	...	98	110.55	Wm. Wertsbaugh.
'89,	Dec.	5.	134	75216	50.	Rice Bryce et al.
'90,	Mar.	1.	...	17	19.	Thos. Ball.
	Jun-	29.	...	18	171.85	C. E. Farsteburge.
	Feb.	28.	...	19	231.	J. A. Neuman.
	Mar.	8.	...	20	100.	R. Fisher & E. Westerfelt.
		18.	...	21	400.	J. M. Barns.
'89,	June	1.	140	76003	518.75	David Maley.
	Oct.	28.	...	6	4,811.77	Mary&JohnMeagher.
	Dec.	14.	...	16	47.50	Will Smith.
	Oct.	21.	...	36	200.	Wm. McDaniel.
	Dec.	10.	...	37	120.	Chas. M. Donivan.
		28.	...	41	36.63	Thos. Jones.
'90,	Mar.	3.	142	76141	50.	S. D. Jones.
	Mar.	20.	144	203	50.	W. B. Turman.
		25.	...	4	40.	Thos. Jones.
	Apr.	9.	...	25	33.38	Wm. McLaughan.
		12.	...	26	10.	Wilson Richter.
		21.	145	77251	53.	S. F. Wood.
	Mar.	20.	...	93	124.	Richard Thesing.
'89,	Jul-	29.	150	77001	100.	W. M. Cowall.
		14.	...	2	791.70	David Meley.
	Nov.	9.	...	3	139.	Thos. Jones.
		28.	...	4	27	Fred Schfenberg.
		"	...	5	128.50	Jacob Mack.
		"	...	6	16.50	Oliver Pierson.
		20.	150	77007	26.80	G. Walt.
		"	...	8	34.80	G. & W. J. Miller.
'90,	Feb.	1.	...	26	105.40	C. Peterson.
	Jun-	18.	...	30	1,142.30	J. W. Underhill.
		1.	...	32	75.	G. W. Bowers.
	Mar.	1.	...	41	19.	Thos. Bell.
	Apr.	4.	152	77132	83.	J. W. Stuart.
		7.	...	3	133.95	R. D. Owen.
		19.	153	93	55.	Robt. Shulz.
'89,	Aug.	17.	160	78007	765.68	Mary&JohnMeagher.
'90,	Mar.	1.	...	22	21.	Thos. Bell.
	Feb.	21.	...	23	75.	S. F. Frazier et al.
		26.	...	24	62.	E. J. Newman.
	Apr.	1.	...	32	160.	C. C. Epp.
	May	31.	163	78174	50.	S. D. Jones.
	June	2.	...	79	124.94	M. C. Delamaeter.
	May	16.	164	78244	34.70	I. E. Bennett.
		17.	...	45	259.50	J. H. Campbell.
	Jul-	18.	...	46	10.75	Thos. Gue.

'89, Aug.	26.	170	79060	303.	Robt. E. Meagher.
Sep.	14.	...	1	162.52	R. S. & M. Kelley.
	18.	...	2	34.	Elisha & Emma Vandeventer.
	"	...	3	180.	C. H. Fisher.
	"	...	4	46.50	W. Hathaway.
.....		...	5	31.20	J. H. McClatchey.
.....		...	6	61.20	H. A. Lording.
	24.	...	7	90.39	John B. Clabby.
'90, Jan.	27.	...	29	82.70	S. F. Wood.

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Feb.	28.	...	34	62.20	J. W. Donivan.
Mar.	1.	...	35	21.	Thos. Bell.
	8.	...	36	50.	Chas. Putman.
'90, Mar.	19.	171	79050	10.40	Bacon M. Dyer.
	1.	...	51	88.	J. G. Cording.
Apr.	15.	...	53	32.50	Ned Patten.
	12.	...	54	21.	Wm. Richter.
May	1.	...	58	65.	L. J. Smith.
	"	...	59	5,322.74	M. C. Frank.
Mar.	10.	175	77262	27.75	R. Fleming.
Apr.	23.	...	3	9.	C. B. Wilson.
May	17.	...	4	20.	H. H. Hunt.
	29.	...	65	28.20	Chas. M. Donivan.
June	25.	...	6	16.75	E. H. Underhill.
	13.	...	7	12.50	D. E. Kibby.
	18.	...	8	50.	W. R. Turman.
	21.	...	9	109.	Thos. Jones.
	10.	...	77282	400.	J. W. Barns.
'89, Oct.	16.	180	80005	50.	Johann Faul.
	19.	...	6	60.	Wm. M. Mochmoore.
Nov.	14.	...	25	22.50	Joe Williams.
'90, Jan.	6.	...	27	12.50	C. O. Brown et al.
	"	...	28	22.50	Oscar Faulman.
	"	...	29	22.50	H. C. Noll.
	"	...	30	16.25	R. Schonesk.
	"	...	31	5.25	T. J. Ferguson.
	"	...	32	17.	D. Scudder.
		...	33	10.	James Bauer.
.....		...	34	69.	Phillip Bohl.
.....		...	41	20.	G. W. Ong et al.
	27.	...	42	100.	James K. Geagley.
Feb.	1.	...	43	200.	Jno. Cockle.
'89, Dec.	11.	...	80056	25.	Wm. Taylor.
'90, Mar.	4.	181	57	170.	M. T. Pensington.
	1.	...	80068	35.25	Chas. Green.
'90, Apr.	2.	181	73	29.60	Eli Nixon.
	7.	...	79	118.20	Z. Walker.
	19.	...	82	18.	Oscar H. Parker.
	23.	...	83	24.75	N. F. Tilden.
	29.	...			

		23.	...	84	12.	Chas. W. Putman.
		15.	...	80083	55.	Frank L. Buell.
		26.	...	86	41.62	Wm. McDaniel.
		24.	...	87	2,237.46	do.
		24.	...	88	1,895.20	do.
		9.	...	89	75.27	O. M. Miller.
	May	23.	...	93	175.15	John&MaryMeagher.
	Feb.	1.	184	80216	13.	James K. Geagly.
	May	14.	...	17	110.70	J. J. Smeltzer.
		26.	...	18	168.70	Jno. B. Clabby.
		24.	...	19	23.36	Elmira E. Dale.
	Jul-	13.	...	20	22.50	Thos. Jones.
'89,	Oct.	15.	190	81002	50.	M. C. Horn.
'90,	Mar.	17.	...	45	50.	R. Thesing.
		11.	...	46	12.	C. D. Keyes.
		15.	...	47	65.15	D. E. Kirby.
	Apr.	7.	191	81050	37.50	C. Custer.
		22.	...	1	600.	Chas. Green.
		22.	...	2	600.	do.
		23.	...	3	294.80	G. R. Meredith.
	May	13.	...	90	125.	J. J. Smeltzer.
	Aug.	16.	194	81247	105.	H. Blodgett.
	Sept.	16.	...	8	32.70	O. J. Simmons.
	Jun-	20.	200	82033	80.	James K. Geagley.
'89,	Dec.	13.	...	34	525.20	C. Lorenz.
'90,	Mar.	8.	...	47	90.	Chas. W. Putman.
'89,	Dec.	21.	...	48	100.	Nettie Curwood et al.

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	Dec.	26.	...	49	225.	Irvin Culver et al.
'90,	Apr.	14.	201	82055	11.25	M. J. Keyes.
		12.	...	56	23.	Wm. Richter.
	Jun-	7.	...	67	974.50	David Meley.
	Sep.	17.	203	82192	102.50	G. W. Bowers.
		4.	205	254	100.	A. N. Ray.
		16.	...	55	50.	W. B. Furman.
	Oct.	11.	206	82328	150.	John E. Simpson.
		29.	...	29	50.	Thos. Jones.
		16.	211	91061	70.	Joban Faul.
'89,	Dec.	11.	...	64	200.	John Cockel.
'90,	Apr.	15.	...	86	32.50	Ned Patton.
	May	9.	...	96	313.18	C. N. Miller.
	Sep.	27.	213	91178	50.	Thos. Jones.
		25.	...	9	26.70	S. K. Bouslough.
	Aug.	2.	...	80	35.20	Theo. Bell.
	Oct.	4.	216	91348	10.	Owen Dyer.
	Feb.	1.	217	94	65.34	John P. Kline.
'89,	Oct.	15.	220	92011	110.20	W. C. Horn.
'90,	Jan.	20.	...	13	80.	James K. Geagley.
		4.	...	14	100.	W. D. Stiles.
	Feb.	1.	...	15	100.	Ed Morris.
		1.	...	16	100.20	James K. Geagley.

	Mar.	29.	223	92185	182.50	D. & T. Price.
	Nov.	15.	224	92225	185.	W. H. Martin.
		13.	...	6	105.	H. & L. Blodgett.
	Dec.	16.	...	7	100.	E. Eckles.
	Mar.	25.	230	93012	160.	J. S. Pruett et al.
	Apr.	12.	...	3	21.	Wm. Richter.
	Oct.	25.	...	49	77.	L. J. Smith.
	Nov.	28.	234	93209	33.50	Will Smith.
		29.	...	10	254.70	John Clabby.
	Dec.	11.	...	11	50.	W. R. Furman.
'90,	Dec.	31.	234	93215	65.40	N. A. Dean.
			...	16	135.65	John Faul.
.....			...			
'91,	Jun-	17.	...	23	2,163.28	N. W. Frank.
		17.	...	28	37.	S. F. Wood.
		17.	...	48	25.	M. C. Frank.
	Feb.	14.	235	93266	380.	Alice Rogers.
	Sep.	27.	240	94001	100.	Thos. Jones.
	Aug.	18.	...	2	112.	David George.
	Oct.	25.	...	24	29.25	Wm. Taylor.
'90.	Dec.	13.	242	94117	150.	J. D. Simpson.
'91.	Jun-	17.	...	35	159.40	R. D. Owen.
		17.	...	36	144.95	J. Ctorall et al.
'90.	Nov.	22.	251	95053	95.	S. F. Wood.
		1.	...	54	16.95	D. E. Kibby.
		15.	...	55	500.	Anna & Chas. Bennard.
'91.	Jun-	20.	...	56	53.50	J. N. Doak.
		1.	...	57	14.50	W. H. Short.
	Feb.	18.	253	95162	54.20	N. Dorset.
	Mar.	19.	255	283	25.75	Peter Bohn.
	Sep.	4.	260	96001	120.20	A. M. Ray.
'89.	Dec.	10.	...	14	120.	Chas. M. Donivan.
'90.	Nov.	26.	...	15	126.30	Robt. Fluer.
	Dec.	18.	...	33	135.	Thos. Jonas.
		1.	...	96034	1,400.	J. W. Underhill.
		12.	...	35	17.25	James E. Lonsdale.
	Nov.	28.	...	36	500.	Will Smith.
	Dec.	1.	...	37	600.	J. W. Underhill.
	Oct.	29.	...	38	78.	Carl Irnig.
'91.	Mar.	15.	264	96224	50.	W. R. Furman.
	Apr.	6.	...	30	80.	Julia E. & Jno. Dunn
		22.	...	31	37.45	Chas. Green.

1792

'90.	Sep.	27.	270	97000	150.	Thos. Jones.
	Jul-	22.	...	11	34.80	W. J. Miller.
'91.	Jun-	16.	...	13	33.40	W. Meredith.
	Feb.	21.	...	19	104.	G. W. Bowers.
'89.	July	22.	280	98001	200.	Cora Polase.
'90.	Dec.	31.	...	5	35.50	N. Patton.
'91.	Jun-	14.	...	6	51.67	Alex. Anderson.

	Feb.	13.	...	15	17.	W. S. Bartch.
	Mar.	14.	...	22	135.20	Levi H. Hamilton.
	Feb.	21.	...	23	6.12	F. J. Fergeson.
		19.	...	98035	41.25	Wm. McDaniel.
	May	18.	282	139	54.20	D. Dorset.
	Sept.	5.	290	99004	651.20	Martha Ross et al.
	Nov.	12.	...	7	180.	C. H. Fisher.
		26.	...	9	75.	Robt. Flour.
	Mar.	26.	...	36	50.	C. & W. McDaniel.
	Apr.	21.	300	100018	600.	J. W. Underhill.
	Sep.	27.	...	19	56.	Theo. Jones.
'90,	Oct.	9.	...	24	3,000.	John A. Burk.
	Dec.	13.	...	30	110.	M. K. Bennington.
		18.	...	32	128.	L. S. Leash.
		20.	...	33	150.	Martha & Albert Ross
		29.	...	42	31.10	J. M. W. Comforth.
	Feb.	4.	301	.....	27.57	Joe Williams et al.
		7.	...	.....	58.70	J. D. Trickey.
	Oct.	1.	302	100104	181.40	Mary A. & John Meagher.
'91,	Apr.	20.	...	105	67.	Jacob Welch & Chas. H. Wray.
'86,	Oct.	15.	315	46416	110.20	M. C. Horn.
'90,	Jun-	20.	316	465	80.	James K. Geagley.
		4.	...	66	100.	Wm. D. Styles.
	Feb.	1.	...	72	100.	Edward Morris et al.
	"		...	73	100.20	James K. Gagley.
	Jan.	1.	...	74	1,300.	Van Wyl et al.
'90,	Mar.	1.	316	46481	400.	M. T. Pennington.
	"		...	2	250.	do.
	"		...	3	350.	do.
	"		...	4	500.	do.
		25.	...	46490	160.	J. S. Prewitt.
		22.	...	1	350.	Edward Gleim.
	"		...	2	350.	do.
	Apr.	7.	...	46494	200.	Eli Nixon.
	"		...	5	200.	do.
	"		...	6	110.	do.
	"		...	7	140.	do.
	"		...	8	250.	do.
	"		...	9	310.	do.
		12.	317	46500	21.	Wm. Richter.
		7.	...	1	37.50	C. Custer.
		21.	...	2	600.	J. W. Underhill.
		21.	...	3	600.	do.
	July	2.	...	27	200.	Cora Robase.
		10.	...	28	610.07	W. Elliott.
	"		...	29	610.07	do.
	"		...	30	610.07	do.
	"		...	31	610.07	do.
	"		...	32	1.220.72	do.

	Sept.	5.	...	46542	651.20	Mathew Ross et al.
		27.	...	45	56.	Thos. Jones.
		27.	...	46	1,400.	do.
	Oct.	29.	318	46559	115.90	C. F. & Minnie Leslie
	Oct.	30.	...	60	500.	Thos. Jones.
	Nov.	1.	...	61	294.80	G. A. Meredith.
		15.	...	84	500.	A. & Chas. F. Bennard.
		"	...	85	500.	do.
		"	...	86	500.	do.
		"	...	87	671.55	do.
1793						
'90,	Nov.	26.	318	46588	105.20	Robt. Flouer.
	Dec.	13.	...	9	525.20	Christina Lorenz.
	Nov.	15.	...	90	101.80	Chas. Donovan.
'91,	Jan.	1.	...	91	75.	Chas. W. Pittman.
		2.	...	92	36.30	S. L. Bushline.
'90,	Dec.	24.	...	93	933.	W. H. Barstow.
		31.	...	94	54.45	John Cockle.
'91,	June	3.	...	46595	14.60	do.
	Sept.	10.	...	96	600.	J. J. Richards.
		"	...	97	600.	do.
	Jan.	14.	...	98	106.66	Alex. Anderson.
'90,	Dec.	26.	...	99	150.	J. & J. Culver.
'91,	Jan.	20.	319	46601	22.	G. D. Buckmartin.
'90,	Dec.	24.	...	3	934.	W. H. Barstow.
		"	...	4	933.	do.
		17.	...	5	300.	LizzieK.&M.C.Frank.
		15.	...	6	39.75	S. H. Summers.
	Oct.	6.	...	7	8.	Gagnar.
	Aug.	24.	...	8	40.	Ephraim Bowles.
	Dec.	15.	...	9	39.32	S. H. Sommers.
		19.	...	46610	41.32	S. S. Ball.
'91,	Mar.	14.	...	37	166.50	D. I. Hunter.
		1.	...	42	100.	John W. Rider & Leash.
		"	...	43	100.	do.
		"	...	44	100.	do.
	Total.....				98,743.22	

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Exhibit "14-A."

Stark & Mosher Notes, as Shown by Discount Register No. 4.

Date.		Page.	No.	Amt.	Name of maker.
'91, Jun-	29.	29	100,308	32.25	L. P. Weeks et al.
'90, Oct.	29.	30	101,044	115.90	C. F. & Minnie Leslie
Nov.	1.	...	45	294.80	G. R. Meredith.
	26.	40	102,031	105.20	Robt. Flouer.

	Dec.	13.	...	2	525.20	Christian.
		26.	...	3	150.	Jennie&JasperCulver
'91,	Sep.	12.	4	102,140	43.80	C. L. Fuller.
	Mar.	21.	50	111,000	50.	David Maloy.
	Apr.	4.	...	16	215.57	J.R.C.& W.Meredith.
'90,	Mar.	20.	...	33	350.	Edward Gleim.
'91,	Jan.	1.	...	47	75.	Chas. W. Putman.
		2.	...	48	36.30	S. L. Bushline.
	Dec.	24.	...	49	933.	W. H. Barstow.
	Oct.	6.	52	111,111	285.80	Joe Faul.
	Sep.	30.	...	2	50.	W. F. Furman.
	Aug.	12.	306	1025	26.25	E. H. Merrill.
	Sep.	4.	...	26	77.	J. W. Rider.
	Aug.	13.	...	27	185.	W. H. Martin.
	Jul-	16.	...	28	34.90	W. Meredith.
	Aug.	5.	...	29	76.20	J. F. Dunn.
	Sep.	13.	...	30	107.	HenryC.Fiedler et al.
	Aug.	22.	...	31	135.58	F. D. Frank.
	Sep.	14.	...	32	50.70	Jno. W. Rider.
	Aug.	14.	...	33	146.47	James Powers.
	Oct.	14.	...	34	250.	Wm. & Theo. McDaniel.
		"	...	35	150.	do.
		19.	...	1040	208.	Z. Kelley.
	Mar.	4.	...	1	250.	W. H. Brook.
'90,	Jul-	10.	...	2	610.07	N. Elliott.
		20.	...	3	34.80	W. J. Miller.
'91,	Jun-	1.	...	4	3,856.53	M. C. Frank.
		27.	...	5	60.	Chas. Green & Biggs.
	Mar.	1.	...	6	34.35	Will Smith.
'91,	Apr.	22.	306	1047	73.32	H. Harding.
'89,	Jul-	22.	...	8	200.	Cora Robure.
'91,	Jan.	14.	...	9	51.67	Alex Anderson.
	Feb.	13.	307	1050	17.	W. S. Burch.
		19.	...	1	2,125.40	Wm. McDaniel.
	Mar.	5.	...	2	83.10	Peter Bohm.
		14.	...	3	135.20	Levi H. Hamilton.
	Feb.	21.	...	4	6.12	F. J. Furgeson.
		19.	...	55	2,000.	Wm. McDaniel.
		"	...	6	41.25	do.
	Apr.	10.	...	7	28.	Herbert J. Fountain.
	May	9.	...	8	105.	A. & F. Blodgett.
	Mar.	20.	...	9	90.	C. A. & J. B. Clabby.
'90,	Oct.	30.	...	60	500.	Thos. Jones.
'91,	Apr.	9.	...	1	1,000.	W. H. Barstow.
	Oct.	20.	...	2	2,000.	M. C. Frank.
	Apr.	1.	...	3	231.27	do.
	Oct.	1.	...	4	5,948.44	do.
	Nov.	10.	...	65	571.50	N. A. Dean et al.
		11.	...	6	105.20	David Wildman.
'86,	Sep.	22.	...	7	500.	Levi Dean.

'90,		5.	...	8	651.20	Martha Ross.
	Nov.	12.	...	9	180.	C. H. Fisher.
		26.	...	70	75.	Robt. Flowers.
1795						
	Jun-	13.	...	1	100.	S. F. Wagner.
'91,	Mar.	26.	...	2	50.	C. & W. McDaniel.
		25.	...	3	60.	L. Vund Gumly.
	Apr.	23.	...	4	481.41	R. E. Meagher.
		25.	...	75	52.	N. Wendall.
	Mar.	17.	...	6	12.	Green Statts.
	Apr.	4.	...	7	42.10	J. I. Siegrest.
'91,	Apr.	4.	307	1078	208.30	John Meredith.
	Jun-	6.	...	9	53.40	Peter Ehler.
		2.	...	80	38.25	E. H. Underhill.
	July	3.	...	1	35.	John Neville.
		6.	...	2	85.	S. J. Smith.
'90,	Nov.	15.	...	3	500.	Anna & C. Bernaul.
'91,	Dec.	22.	...	4	152.20	Iza Graham.
	Jul-	22.	...	85	57.50	J. C. Robertson.
		"	...	6	47.	Jerry Pondoen.
		23.	...	7	57.50	R. A. & Eva Williams.
	Oct.	22.	...	8	27.61	W. E. Brabst et al.
	Dec.	11.	...	9	427.20	F. G. Wood.
	Nov.	13.	...	90	94.	Anna R. Fisher et al.
	Dec.	12.	...	1	107.20	G. R. Parker.
		8.	...	2	100.	Henry Frey.
	Oct.	19.	...	3	130.	J. R. Briscoe.
	Dec.	21.	...	4	55.20	C. M. Dorsett.
		24.	...	95	86.20	Ed. C. Skinner.
		26.	...	6	61.50	J. Salenberger.
		22.	...	7	348.13	C. W. Ray.
'92,	Jan.	2.	...	8	27.20	W. H. Brooks.
		7.	...	9	58.	E. E. Sutton.
		2.	308	1100	33.50	J. F. Otto.
		9.	...	1	92.	Wm. H. Imel.
'91,	Dec.	23.	...	2	90.90	do.
		24.	...	3	85.	S. L. & D. Bushline.
'92,	Jun-	9.	...	4	58.20	H. Graham.
	Dec.	23.	...	5	204.	Wm. H. Imeh.
'90,	Apr.	..	...	6	600.	J. W. Underhill.
	Oct.	n9.	...	7	3,000.	John A. Burk.
	Dec.	18.	...	8	128.	L. S. Lesh.
		20.	...	9	150.	Martha & R. Ross.
		29.	...	10	31.10	J. W. Comforth.
'91,	Feb.	4.	308	1111	27.57	Joe Williams et al.
		7.	...	2	58.70	J. B. Trickey.
	Apr.	20.	...	3	5,173.93	Mary A.& J.Meagher.
		"	...	4	460.	do.
		"	...	15	5,432.94	do.
'90,	Oct.	1.	...	6	181.40	do.

'91,	Mar.	20.	...	7	20.	W. H. & F. H. Weiswell.
	Apr.	25.	...	8	107.40	Wm. Wertbaugh.
		11.	...	9	50.	John & MaryMeagher
		25.	...	20	59.15	J. W. Donovan.
		20.	...	1	889.40	Mary A.& J.Meagher
	July	6.	...	2	67.90	E. F. Cavenaugh.
	Apr.	1.	...	3	500.	E. E. Van Duesen.
	Mar.	1.	...	4	800.	D. B. Peters.
	Jan.	9.	...	25	497.85	Thos. Jones.
		16.	...	6	80.20	H. Wellington.
	Oct.	1.	...	7	11,513.25	M. & J. Meagher.
		"	...	8	4,000.	do.
	Jun-	27.	...	9	2,506.70	John A. Burk.
	Nov.	1.	...	30	110.10	C. F. Lectie.
	Dec.	13.	...	1	535.70	Anna A. Branz.
	Jun-	25.	...	2	112.38	Eli Nixon.
'90,	Oct.	3.	...	3	80.	W. H. Barstow.
'91,	Mar.	10.	...	4	125.	Henry W. & F. E. Polck.
	Jun-	1.	35	35	17.70	O. H. Parker.
1796						
	Apr.	2.	...	6	500.	W. H. Barstow.
'89,	Nov.	6.	...	7	101.50	Lewis S. Leach.
'90,		1.	...	8	294.80	G. R. Meredith.
		15.	...	9	500.	Anna & C. F. Benard
		18.	...	40	101.80	Chas. Donovan.
'91,	Oct.	17.	...	1	51.75	Gus R. Nisser.
		1.	...	2	1,874.55	M. C. Frank.
'91,	Oct.	23.	308	1143	500.	M. C. Frank.
	Apr.	20.	...	4	100.	J. R. Gatrall.
'90,	Nov.	26.	45	.....	105.20	Pol't. Flour.
	Dec.	26.	...	6	150.	J. & J. Culver.
'91,	Feb.	28.	...	7	68.	Jasper Connett.
'92,	Jan.	1.	...	8	1,300.	Henry W. Neuman.
'91,	Apr.	25.	...	9	138.80	N. Wendall.
		14.	309	50	40.	Wm. Aldrich.
		4.	...	1	215.57	John B. C. & W. Meredith.
	Jan.	1.	...	2	75.	Chas. W. Putnam.
	Dec.	27.	...	3	933.	W. H. Barstow.
		31.	...	4	54.45	John Cochel.
	Jan.	3.	...	55	14.60	do.
		20.	...	6	22.	G. D. Buckmaster.
	Mar.	14.	...	7	166.50	D. I. Hunter.
	Oct.	6.	...	8	285.80	John Faul.
	Sep.	30.	...	9	50.	W. F. Ferman.
	Oct.	6.	60	.....	125.	Nelson Blue.
	Aug.	7.	...	1	525.	do.
	Jan.	15.	...	2	122.50	C. A. McDaniel.
		16.	...	3	36.80	do.

	Mar.	20.	...	4	64.25	C. A. & J. B. Clabby.
	Apr.	2.	...	65	1,300.	W. H. Barstow.
	Mar.	20.	...	6	62.50	C. A. & J. B. Clabby.
	Apr.	25.	...	7	142.80	Geo. Barstow.
		2.	...	8	500.	W. H. Barstow.
		2.	...	9	500.	do.
'89,	Nov.	6.	...	70	101.50	Lewis Leash.
	Dec.	12.	...	1	1,020.	W. A. Meagher.
		12.	...	2	1,403.42	do.
	Oct.	21.	...	3	200.	Wm. McDaniel.
	"		...	4	200.	do.
'89,	Oct.	21.	309	1175	200.	Wm. McDaniel.
	"		...	6	300.	do.
	Dec.	10.	...	7	500.	C. M. Donovan.
.....			...	8	500.	do.
	"		...	9	600.	do.
	"		...	80	500.	do.
	"		...	1	400.	do.
'90,	Apr.	7.	...	2	200.	Eli Nixon.
	"		...	3	110.	do.
	"		...	4	140.	do.
	"		...	85	250.	do.
	"		...	6	310.	do.
	Jul-	10.	...	7	610.07	N. Elliott.
	"		...	8	610.07	do.
	"		...	9	610.07	do.
	"		...	90	1,220.72	do.
	Sep.	27.	...	1	1,400.	Thos. Jones.
	Nov.	15.	...	2	500.	A. & C. Barnard.
	"		...	3	671.55	do.
	Sep.	10.	...	4	600.	J. G. Richards.
	"	"	...	95	600.	do.
	Feb.	7.	...	6	578.41	D. Meloy.
	"		...	7	578.41	do.
	Dec.	24.	...	8	934.	W. H. Barstow.
	"		...	9	933.	do.
'91,	Mar.	1.	310	1200	46.80	J. W. Reider.
1797						
'91,	Mar.	7.	310	1201	49.	David Maloy.
		4.	...	2	250.	W. H. Brook.
		1.	...	3	34.50	J. W. Rider.
	"		...	4	31.50	do.
	"		...	5	100.	do.
	"		...	6	100.	do.
'91,	Mar.	1.	310	1207	100.	J. W. Rider.
	"		...	8	950.	do.
	Jan.	16.	...	9	1,000.	Wm. McDaniel.
	July	6.	...	10	373.50	N. Elliott.
'92,		15.	...	1	150.	Thos. Price.
		9.	...	2	430.	J. M. Meredith et al.

	Jun-	18.	...	3	200.30	N. Wendall.
	Mar.	25.	...	4	877.54	Wm. Ellis.
	Jun-	18.	...	15	50.	Henry Fry.
	Sep.	14.	...	6	115.	M. Wertsbaugh.
		5.	...	7	100.	A.C.& Lizzie Russell.
		5.	...	8	100.	do.
		5.	...	9	100.	do.
		1.	...	1220	4,301.40	M.A.& John Meagher.
	Aug.	16.	...	40	2,000.	M. C. Frank.
	Apr.	1.	...	1	400.	Lizzie K. Frank.
	"		...	2	400.	do.
	"		...	3	400.	do.
	Sept.	7.	...	45	150.	Wm. & Theo. McDaniel.
		22.	...	6	200.	Park W. Cook.
		7.	...	7	250.	Wm. & Theo. McDaniel.
	Oct.	18.	...	8	200.	J. S. Collings.
		18.	...	9	200.	do.
'89,	Nov.	6.	315	46666	101.50	Louis Lesh.
'89,	Dec.	12.	...	70	1,020.	M. A. Meagher.
'90,	Jul-	10.	...	93	610.07	N. Elliott.
	"		...	94	610.07	do.
	"		...	95	610.07	do.
	"		...	96	1,220.72	do.
	Sep.	27.	...	97	1,400.	Thos. Jones.
	Oct.	30.	...	99	500.	do.
'90,	Nov.	15.	316	46701	500.	Anna & Chas. Benard.
	"		...	2	500.	do.
	"		...	3	671.55	do.
	Sep.	10.	...	4	600.	J. G. Richards.
	"		...	5	600.	do.
'91,	Feb.	1.	...	6	102.	E. & A. Morris.
		6.	...	7	162.94	Geo. E. Pence.
		7.	...	8	578.41	I. Maloy.
	"		...	9	578.41	do.
'90,	Dec.	24.	...	46710	934.	W. H. Barstow.
	"		...	1	933.	do.
		17.	...	2	300.	M. C. Frank.
'91,	Mar.	1.	...	3	46.80	J. W. Reider.
	Feb.	7.	...	4	51.02	David Maloy.
	"		...	5	49.	do.
	Mar.	4.	...	6	250.	W. H. Brook.
	"		...	7	250.	do.
		1.	...	8	34.50	J. W. Reider.
			...	9	31.50	do.
.....			...			
	Feb.	7.	...	46720	49.	David Maloy.
	Mar.	1.	...	1	100.	J. W. Reider.
		1.	...	2	100.	do.
	"		...	3	100.	do.
	"		...	4	950.	do.

	Jan.	16.	...	25	1,000.	Wm. McDaniel et al.
	Mar.	26.	...	6	162.75	C. F. Schawl.
	Apr.	9.	...	7	1,000.	W. H. Barstow.
'92,	Nov.	10.	276	1250	100.	L. S. Lesh.
	"		...	1	159.83	do.
1798						
'92,	Nov.	8.	...	1252	120.	J. B. Bellairs et al.
	Mar.	28.	...	3	210.28	Wm. Ellis.
	Feb.	24.	...	4	150.	C. L. Wallace.
'92,	Mar.	28.	276	1255	95.	C. Layher.
	"		...	6	210.29	Wm. Ellis.
'91,	Apr.	17.	...	7	250.	F. C. Mustain.
'92,	Dec.	23.	...	8	50.	John W. Reider.
	"		...	9	80.	do.
	Mar.	23.	...	60	50.	James S. Caywoods.
	Sep.	5.	...	1	100.	A. C. Russell et al.
	Total				123,865.86	

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EXHIBIT "15-A."

Stark & Mosher Notes as Shown by Discount Register "A."

Date.	Page.	No.	Amt.	Name of maker.
'84, Dec. 29.	...	15000	90.	B. F. Flock.
'85, Mar. 17.	...	15001	48.50	Chas. H. Heaton.
'86, Jan. 21.	5	15220	1,000.	S. T. Mead.
Feb. 8.	...	15229	483.95	O. N. Kelley.
'84, Dec. 12.	...	15230	48.35	J. D. Emoyer.
Coupon 84.	...	15231	32.	Jno. Guthrie.
'86, Feb. 12.	...	15245	107.50	Jno. Widdle.
Feb. 23.	...	15249	500.	J. C. Kilner.
25.	6	15253	16.35	J. M. W. Comfortn.
25.	...	15254	21.50	J. E. D. Tong.
27.	...	15258	81.	F. A. Johnson.
20.	...	15260	900.	J. F. McConaughy.
Mar. 1.	...	15261	200.	C. O. Wilcox.
Feb. 28.	...	15262	150.	F. P. Baker.
23.	...	15263	67.	D. E. Dickson.
.....	...	15264	68.	do.
Mar. 10.	...	15265	59.40	J. C. Brown.
11.	...	15267	325.84	Jno. Offerst.
.....	...	15268	51.75	S. F. Wood.
10.	...	15269	357.90	N. A. Dean.
13.	...	15271	28.	J. H. Crawford.
.....	...	15273	79.	G. W. Sprague.
22.	...	15279	168.30	W. J. Miller.
.....	...	15280	33.20	Jos. Clabby.
25.	...	15288	545.	R. G. Middleton.
.....	...	15289	11.90	M. K. Whitmore.

	29.	...	15290	15.75	A. Trickery.
.....		...	15291	183.20	W. Meredith.
	Apr. 2.	...	15293	575.40	P. R. Nally.
	3.	...	15294	19.90	H. S. Amstead.
	9.	...	15297	50.	A. Jeffery.
'86,	Mar. 27.	...	15301	32.20	A. Whitmore.
	25.	...	15302	11.35	A. Harner.
	Apr. 17.	...	15303	37.20	J. C. Everetts.
.....		...	15304	7.	J. Chaff.
.....		...	15305	65.20	A. Zillman.
	Mar. 7.	...	15313	53.	J. H. York.
'84,	Dec. 12.	...	15314	2,085.	Bidwell & Chapan.
	10.	...	15315	142.	Jno. Denoyer.
'85,	Mar. 18.	...	15315	142.	do.
	May 10.	...	15315	89.20	O. F. Linstrom.
	19.	...	15316	35.80	C. E. Spellman.
	Jun- 7.	...	15317	156.40	Jno. Miller.
	12.	...	15320	17.40	C. N. Halstead.
.....		...	15321	25.72	do.
.....		...	15322	119.50	C. M. Rogers.
	30.	...	15323	77.	C. Pickrell.
	July 7.	...	15324	38.	Jos. Baurer.
	9.	...	15325	274.25	W. S. Rush.
	18.	...	15326	100.	M. E. Tieger.
.....		...	15327	111.20	do.
	27.	...	15328	38.90	Jno. Denoyer.
	29.	...	15329	210.20	A. D. Camp.
	Aug. 1.	...	15330	290.	L. Cook.
.....		...	15331	82.20	L. H. Donaldson.
.....		...	15332	275.	A. S. Prewett.
.....		...	15333	70.	Jacob Friesen.
	Oct. 29.	...	15334	158.90	J. Baurer.
1800					
	Oct. 23.	...	15335	88.75	J. S. Bennett.
	Nov. 5.	...	15336	198.20	W. W. Shufelt.
	14.	...	15337	917.70	H. C. Graves.
	20.	...	15338	207.40	C. M. Rogers.
'85,	Nov. 1.	7	15339	550.	S. J. Wagner.
	2.	...	15340	175.60	D. T. Hunter.
	8.	...	15341	41.50	J. B. Weeks.
.....		...	15342	31.45	H. Tissman.
.....		...	15343	32.95	G. Bond.
.....		...	15344	108.05	O. M. Hurst.
	10.	...	15345	43.	J. H. Dobbins.
	29.	...	15346	140.	W. Miller.
.....		...	7	223.79	Chas. Green.
.....		...	8	71.64	Lighe Bros.
.....		...	9	50.	S. A. Myers.
	Dec. 3.	8	15350	225.	Armor.
.....		...	1	166.58	Ed Bates.

	15.	...	2	722.55	L. P. Lundeen.
	23.	...	3	163.50	E. Bates.
.....		...	4	44.	J. Duck.
.....		...	5	91.23	A. Puckett.
.....		...	6	22.60	E. Ferris.
'86,	Jan. 26.	...	7	25.75	C. P. Bertram.
.....		...	8	45.	O. V. Marble.
.....		...	9	50.	F. Wisley.
.....		...	60	1,000.	E. W. Mosher.
.....		...	1	107.50	S. Brown.
.....		...	2	530.	E. P. Foley.
.....		...	3	16.50	Hy Muir.
	Jan. 7.	...	4	607.70	W. S. Siewell.
	8.	...	65	221.10	S. A. Youngus.
	6.	...	7	311.30	A. Puckett.
	12.	...	8	193.50	G. D. Moore.
	12.	...	9	100.	W. F. Merriam.
	12.	8	15370	363.	H. Pickrell.
.....		...	1	98.	G. Flock.
.....		...	2	400.	G. W. Dorsey.
.....		...	3	100.	F. M. Bremer.
	13.	...	4	22.50	H. Muir.
.....		...	75	269.80	E. Keller.
	12.	...	6	145.	W. F. Keistler.
	11.	...	7	76.50	G. R. Mereditch.
	10.	...	8	46.	Wm. Herzen.
	11.	...	9	397.50	T. H. Hamilton.
	10.	...	80	30.	L. Dean.
	8.	...	1	58.10	Jas. A. Johnson.
	29.	...	2	204.	A. Day.
.....		...	3	103.20	do.
	27.	...	4	500.	A. M. Adair.
	23.	...	85	103.50	C. F. Johnson.
.....		...	6	26.	J. B. Clabby.
	20.	...	7	103.20	L. Dean.
	10.	...	8	32.	J. M. Ellis.
	1.	...	9	105.90	W. Each.
.....		...	90	300.	C. E. Foursbach.
.....		...	1	500.	E. W. Mosher.
	10.	...	2	10.40	F. H. O'Bryan.
	1.	...	3	112.20	S. Meloy.
	2.	...	4	154.20	H. Wagner.
.....		...	95	127.25	A. F. Johnson.
	1.	...	6	195.50	S. Dean.
.....		...	7	175.95	J. W. Underhill.
.....		...	8	58.45	J. Hoffman.
.....		...	9	108.70	F. Keller.
'86,	Feb. 2.	9	15400	190.80	J. B. Reed.
.....		...	1	34.50	G. R. Ingalls.

1801

86,	Feb.	10.	9	15402	108.70	Aug. Engblom.
	Mar.	1.	...	3	52.	H. Pickrell.
.....			...	4	416.	L. J. Gandey.
		2.	...	405	50.	Geo. Mitchell.
		7.	...	6	105.	L. H. Mosord.
.....			...	7	26.25	G. M. Meredith.
.....			...	8	40.	G. M. Foster.
.....			...	9	129.35	L. S. Litchburger.
		1.	...	410	1,180.50	H. M. Woolman.
		3.	...	1	59.	J. B. Clabby.
		7.	...	2	16.75	H. W. Funk.
.....			...	3	97.40	R. N. Dickson.
		11.	...	4	39.50	W. Gabral.
.....			...	15	112.63	L. Imbroud.
		10.	...	6	550.	W. B. Atkins.
		11.	...	7	32.	A. M. Adams.
		1.	...	8	108.70	J. A. Anderson.
.....			...	9	109.20	J. Lindquist.
.....			...	420	126.65	C. Samille.
.....			...	1	48.20	J. Bannur.
.....			...	2	192.50	H. Kelby.
		2.	3	.....	54.50	O. Jackson.
		3.	4	.....	283.10	Jno. Meredith.
		6.	25	.....	150.	N. V. Harlan.
		8.	...	6	140.	John Miller.
		3.	...	7	200.	J. D. Dutton.
		9.	...	8	18.	L. Dean.
		6.	...	9	400.	do.
		7.	...	430	40.	S. A. Shelby.
'86,	Mar.	9.	9	15431	44.	J. A. Sutton.
		10.	...	2	22.50	Jno. Heller.
		1.	...	3	108.	F. Heller.
		3.	...	4	10.	G. D. Pence.
		4.	...	35	331.95	L. Dean.
		6.	...	6	1,635.	M. C. Frank.
.....			...	7	45.	C. Wallbacht.
		7.	...	8	42.05	J. J. Richards.
.....			...	9	112.20	J. Backin.
		10.	...	440	28.	A. E. Wobgram.
.....			...	1	200.	G. B. Francer.
'85,	Nov.	14.	...	2	109.	J. Peters.
'86,	Mar.	20.	...	3	607.	do.
	Dec.	3.	10	15484	231.20	First N. B. York.
'81,	Nov.	3.	11	15503	400.	W. F. Willine.
'84,	Aug.	14.	15	15726	237.50	Wm. Dyer.
'86,	May	5.	16	15753	67.50	Wm. Holmes.
	Mar.	10.	...	15756	95.	I. McConaughy.
'85,	Dec.	9.	...	15763	60.	H. H. Tolls.
	Aug.	9.	...	15783	145.	W. N. Baker.
'86,	Mar.	30.	...	4	125.	W. Naw.

.....		...	5	85.20	L. C. Nolan.
	Apr.	9.	...	6	75.20	E. Fees.
	Oct.	2.	17	15823	333.90	Chas. F. Johnson.
	Apr.	28.	19	15902	22.20	F. A. Bacon.
	Feb.	6.	...	15940	18.	F. P. Baker.
		8.	...	41	103.	C. Stark.
	May	17.	...	44	10.50	H. A. Farding.
		22.	...	45	200.	R. B. Green.
		5.	20	15970	122.	Wm. Willis.
		21.	21	16018	100.	H. Durtrich.
	June	9.	...	16033	30.75	John Sims.
		10.	...	16035	280.	Harry White.
	Feb.	17.	22	16038	108.	E. C. Stally.
		20.	...	16071	55.	S. C. Davis.
	Mar.	8.	...	16087	55.25	G. E. Marden.
1802						
.....			...	16088	184.40	Joe Neville.
		9.	...	16089	27.70	Geo. Brown.
.....			...	16090	229.70	M. Brice.
		11.	...	93	449.	A. C. Montgomery.
		12.	...	8	498.50	J. Hackenthall.
.....			...	9	163.50	H. Miller.
	Feb.	10.	23	16106	25.	J. L. Drury.
	Mar.	16.	...	16111	307.50	S. A. Sedgwick.
		22.	...	16142	846.40	A. Fickey.
		12.	...	16143	54.	W. H. Miller.
		17.	...	16144	200.	J. W. Jackson.
		30.	24	16163	241.20	W. H. Cook.
		29.	...	66	103.20	J. R. Frickey.
.....			...	67	65.70	Ed George.
		27.	...	72	250.	Jos. Horkenthal.
		3.	...	77	75.	E. Andrews.
	Apr.	1.	...	78	130.20	M. E. Bendant.
.....			...	79	233.20	E. Andrews.
.....			...	16180	65.	S. S. Stuart.
		3.	...	1	442.62	W. Hokenbaum.
		5.	...	2	1,000.	J. N. Davidson.
		7.	...	9	12.50	S. Fint.
		10.	...	16195	105.	A. Trickey.
	Mar.	23.	25	16202	18.	G. Cald.
'86,	Apr.	14.	25	16204	44.50	L. R. Millner.
		15.	...	5	20.	Jos. Ellis.
		14.	...	6	275.	R. Sanders.
		16.	...	8	27.	R. J. Ramsey.
		10.	...	9	165.45	E. M. Chenney.
		17.	...	13	36.	F. Helmer.
	Mar.	12.	...	16249	45.	H. B. Gue.
	Mar.	12.	26	16251	162.50	H. W. Hopmaster.
'85,	Jul-	11.	...	2	45.	J. Clabby.
	Dec.	22.	...	3	27.50	A. N. Stuart.
		30.	...	4	48.	J. R. Brumsey.

	Jun-	19.	...	55	57.25	W. C. Fitzpatrick.
'86,	Apr.	3.	...	6	109.	P. Wall.
'85,	Oct.	10.	...	7	69.	J. Org.
'86,	Jan.	1.	...	8	100.	C. Green.
.....			...	9	35.	G. A. Wonton.
	Mar.	1.	60	.....	65.20	P. Wall.
'85,	Dec.	1.	...	1	50.	I. Hasbuck.
'86,	Feb.	1.	...	2	175.10	A. Cook.
	Mar.	1.	...	3	56.50	Michael Search.
		3.	...	4	11.46	do.
		4.	...	65	62.	do.
	"		...	6	420.20	do.
		1.	...	7	60.	A. S. Colby.
	"		...	8	52.20	W. Search.
.....			...	9	65.	R. F. Pate.
.....			...	70	100.	C. Green.
		6.	...	1	95.10	G. Greene.
	"		...	2	99.	L. F. Pier.
		6.	...	3	291.40	C. Greene.
		6.	26	16274	120.	C. H. Gue.
.....			...	5	563.	C. Tighe.
.....			...	6	40.20	F. Gunning.
.....			...	7	70.	J. E. & W. Vandeventer.
.....			...	8	59.	W. J. Kington.
.....			...	9	37.23	S. Ditch.
.....			...	80	65.	Stubbs & White.
.....			...	1	84.	C. Rice.
.....			...	2	51.65	W. A. Cross.
.....			...	3	35.85	G. Weyman.
.....			...	4	35.	do.
.....			...	85	60.	H. A. Hosteetler.
.....			...	6	83.05	H. H. Chapin.

1803

'86,	Mar.	6.	26	16287	44.20	F. K. Sanberger.
.....			...	8	10.60	C. Bennett.
.....			...	9	133.33	W. H. Young.
.....			...	90	60.	E. Vandeventer.
.....			...	1	18.75	S. Ditch.
.....			...	2	18.75	P. & A. Friezen.
.....			...	3	149.	E. L. Brewer.
.....			...	4	30.	Wm. Stafford.
.....			...	95	72.50	F. H. Brock.
.....			...	6	48.	James Prewitt.
.....			...	7	112.	H. A. Firding.
.....			...	8	30.	W. B. Willson et al.
.....			...	9	38.	E. F. W. Whitcomb.
.....			27	16300	37.50	M. A. Dean.
.....			...	1	55.	T. W. Watt.
.....			...	2	700.	J. Tighe & Co.

.....	...		3	80.	T. Foley.
.....	...		4	59.	E. Austin.
.....	...		5	107.25	L. C. Olcott.
.....	...		6	95.	J. B. Couger.
.....	...		7	111.	H. F. Stubbs.
.....	...		8	30.	G. F. Latham.
.....	...		9	75.10	G. Wall.
.....	...		10	85.	J. W. Underhill.
.....	...		1	35.	J. H. B. Sands.
.....	...		2	118.25	J. M. Kelton.
.....	...		3	103.	T. P. Miller.
.....	...		4	78.	G. A. Gelvin.
Jun-	16.	...	16319	900.	J. F. McConaughy.
	12.	...	20	400.	France & Harlan.
	19.	...	3	416.	John C. Kilner.
Apr.	26.	36	16701	189.60	Geo. P. Furch.
	.....	...	2	132.95	do.
	28.	...	3	86.	Wm. Anderson.
	29.	...	4	39.20	John Carlstrom.
May	7.	...	16731	22.60	Wm. Golden.
	10.	...	3	108.	G. W. Ellis.
	10.	...	4	38.	Jos. Neville.
	11.	...	6	36.08	W. A. Cate.
	2.	...	7	421.	Henry White.
	13.	...	16747	100.	John C. Kinner.
	19.	...	66	53.	A. C. Montgomery.
	31.	36	90	200.	Wertesold Bros.
June	5.	...	2	26.50	P. Rayond.
	12.	37	16813	10.60	John Vich.
.....	...	...	4	1,060.	M. C. Yank.
	14.	...	18	25.90	J. W. Wendell.
Feb.	10.	38	16851	25.	J. L. Druer.
Mar.	15.	...	3	35.	I. F. Kennedy.
	22.	...	8	34.20	L. Meehan.
	31.	...	16867	252.20	W. R. Meyers.
'86. Apr.	9.	39	16934	30.90	J. Jones.
	22.	40	59	235.50	T. L. Simmons.
	21.	...	16953	129.20	W. B. Kibble.
Jun-	16.	...	16998	900.	I. J. McConaughy.
	12.	...	9	4,000.	France & Harlan.
	19.	41	17005	102.	A. G. Middleton.
.....	...	...	6	10.75	D. M. Foster.
.....	...	...	7	1,000.	T. F. Mead.
	21.	...	17014	300.	S. H. Sedgwick.
	29.	...	17044	36.	Henry Pickrell.
.....	...	...	5	415.	do.
Apr.	20.	50	17450	559.90	John Price.
1804					
May	3.	...	17473	109.20	H. O. Wright.
	4.	...	9	81.	S. P. Worthington.
	17.	51	17541	108.70	C. D. Sharp.

.....	...		2	86.25	W. A. Cate.
	22.	52	54	150.25	A. W. Towns.
	26.	...	75	312.80	Chas. Boggs.
	24.	...	6	54.65	G. A. Waggoner.
June	1.	...	7	167.45	J. E. Phillips.
May	29.	...	8	10.	F. Feuth.
June	4.	...	17596	105.	W. Search.
	3.	...	7	83.20	W. J. Thorpe.
	9.	53	17613	112.	John Sims.
	15.	...	38	7.	S. A. Lesseek.
Mar.	8.	...	9	60.	Jerry Torndrian.
Jun-	30.	...	17640	177.35	John Hieland.
Feb.	10.	...	1	25.	J. L. Druer.
Mar.	26.	...	5	349.20	C. Vanberg.
.....		...	6	97.20	J. P. W. Kenkins.
.....		...	7	6.75	C. Vanberg.
	1.	54	17650	100.	John Heiland.
Apr.	22.	...	8	12.	C. Manburg.
	20.	...	9	107.50	Jos. Greene.
'85, Nov.	31.	...	62	1,702.50	M. C. Frank.
'86, Jun-	19.	...	70	336.50	M. A. Dean.
.....		...	1	26.50	J. Martin.
.....		...	2	475.	M. B. Atkin.
May	21.	...	3	1,617.60	M. C. Frank.
Jun-	21.	...	17681	200.	Geo. B. France.
.....		...	2	25.	Geo. F. Ingals.
	22.	...	8	26.50	W. R. Lloyd.
	24.	...	90	107.20	P. Price.
July	6.	55	17739	10.50	J. M. Walker.
	7.	...	40	35.10	Jos. Clabby.
	8.	...	8	87.15	W. Willis.
	9.	...	9	23.60	W. Golden.
	10.	56	50	25.90	John H. Wendell.
	12.	...	1	15.	John Rech.
Jun-	28.	...	2	241.20	H. H. Cook.
Jul-	12.	...	17764	665.45	Ira Dean.
	1.	...	5	229.70	N. Pierce.
	10.	...	6	36.80	W. A. Cate.
	13.	...	17791	70.10	A. Weberten.
	1.	...	2	236.50	G. D. Morris.
	16.	...	3	19.90	W. S. Burtch.
	18.	...	17806	127.50	Samuel Brown.
	20.	...	12	10.75	E. Foster.
	17.	...	3	109.20	John Lindwuist.
	18.	...	4	315.70	E. Hiller.
	16.	...	17826	700.	J. J. McConaughy.
	27.	...	33	5.50	D. M. Foster.
Jul-	28.	56	17834	416.	J. C. Killiner.
	27.	...	9	1,180.50	H. M. Woolman.
	28.	...	17843	88.50	Wm. Somersoon.
Mar.	10.	65	18200	24.60	J. B. Lund.

.....		...	1	80.	do.
	May	8.	...	18210	166.20	G. Everets.
	Mar.	26.	...	1	27.50	Wm. Jones.
		10.	...	4	331.20	Jessie R. Stark.
	June	1.	66	18254	157.	Jasper Sanders.
				5	68.60	J. H. Rush.
.....			...	6	150.	John Gunnell.
	May	28.	...	7	78.	Andrew Lund.
		29.	...	18273	109.	A. Halstead.
	Jul-	5.	...	85	93.20	J. W. Underhill.
		8.	...	6	108.70	John Stollan.
.....			...			
1805						
	Jul-	9.	...	92	11.50	Chas. Vangburg.
		12.	67	18305	47.20	T. F. Holmbaum.
		14.	...	13	486.20	W. M. Darner.
		14.	...	14	17.95	C. E. Wheeler.
		1.	...	15	200.	I. W. Jackson.
	Mar.	5.	...	18325	256.70	Wm. Stafford.
		1.	...	6	24.	Chas. Steelman.
	June	14.	...	32	37.55	A. H. Campbell.
	Mar.	8.	...	3	73.20	John Cladd.
				4	92.20	G. Cladd.
.....			...			
	Feb.	10.	...	18337	225.	J. L. Drewer.
	Mar.	22.	...	47	32.50	W. Boenstadt.
		17.	...	8	376.20	do.
		23.	...	9	268.35	J. S. Snowberger.
'86,	Mar.	27.	68	18355	32.20	V. Vanburg.
		26.	...	6	56.25	Nelson Heaton.
		17.	...	7	200.	O. C. Jackson.
		30.	...	8	103.20	G. D. Elliott.
		29.	...	18360	86.25	T. H. Cowall.
		24.	...	1	20.	J. A. Buckmaster.
		27.	...	4	520.75	Jas. Jackemstadt.
		31.	...	5	166.20	J. M. Rapp.
.....			...	6	160.	John Price.
		22.	...	7	160.	do.
		31.	...	8	150.15	John Walkup.
		6.	...	78	35.	K. A. Custer.
	Apr.	5.	...	9	28.	D. Feritt.
	Mar.	31.	...	18380	20.	C. L. Morrison.
	Jun-	10.	...	96	55.70	W. M. Smith.
		11.	...	7	34.20	F. C. Furgeson.
		17.	...	8	14.	John Tows.
			...	9	2,489.30	E. W. Mosher.
.....		22.	69	14833	55.70	W. A. Cate.
		24.	...	9	27.50	J. M. Carder.
		28.	70	82	32.20	Wm. Rishtoss.
.....			...	3	38.10	James Powers.
	Mar.	9.	...	4	52.50	W. S. Rush.
	Jun-	30.	71	18507	275.	R. Saunders.

.....		...	13	130.20	M. E. Bedient.
	Feb.	27.	...	21	81.	F. O. Johnson.
	June	1.	...	24	421.	Harry White.
		10.	...	5	184.40	John Neville.
	Jul-	12.	...	18538	29.20	W. A. Thomas.
		1.	...	9	1,060.	M. C. Frank.
		10.	...	40	252.	W. D. Camp.
		12.	...	1	54.	W. H. Miller.
		13.	72	18571	108.30	R. G. Middleton.
.....			...	4	203.20	J. W. Underhill.
		3.	...	5	150.	N. V. Harlan.
		15.	...	6	14.20	L. C. Noland.
	Apr.	20.	...	18580	102.20	O. F. Linstrom.
	Jul-	21.	...	91	33.	John Sims.
.....			...	2	112.	J. Kelley.
		5.	...	3	28.	T. Raymond.
		22.	73	18604	5.50	J. C. Curtis.
		29.	...	21	8.	John Walkup.
	Aug.	3.	...	30	10.75	E. W. Mosher.
.....			...	1	152.50	H. W. Hofmaster.
		4.	...	43	100.	W. Dertrick.
.....			...	4	36.90	A. L. Johnson.
		19.	74	18674	439.83	C. E. Forstburg.
		18.	...	5	81.	T. P. Worthington.
		21.	...	80	29.20	J. A. Brumsay.
		23.	...	2	363.50	N. A. Dean.
		24.	...	85	168.30	W. J. Miller.
1806						
		21.	...	18691	107.50	G. Gross.
		28.	...	2	31.	Chas. Bell.
		1.	...	3	1,178.68	H. M. Woodman.
		28.	...	7	201.10	M. C. Frank.
		30.	...	8	50.	Henry Jeffery.
	Apr.	28.	80	18950	65.	Thos. Jones.
		17.	...	1	56.	John Lett.
	May	8.	...	65	350.20	H. Thurman.
		11.	...	8	58.	E. W. Mosher et al.
		25.	...	18971	382.10	A. Miller.
		22.	...	2	165.60	O. N. Miller.
		29.	...	8	129.20	A. G. Granger.
'85,	Dec.	10.	...	18981	500.	R. Price.
'86,	June	5.	80	18982	85.95	Jos. Allerson.
.....			...	3	154.95	H. Hull-stead.
		4.	...	4	116.20	Jos. Ellis.
	May.	19.	...	5	60.	G. W. Frank.
	Feb.	10.	82	19082	25.	J. L. Druyer.
	Mar.	10.	...	3	79.20	J. N. Brinsbaugh.
		27.	...	19095	74.25	B. L. Sharp.
	Apr.	3.	...	99	288.70	M. Haverick.
		5.	83	19105	190.20	J. C. Swartz.
.....			...	7	225.	M. Toolery.
		6.	...	8	119.20	O. L. Sparke.

.....		...		9	32.70	G. Nowlan.
.....		...		19110	259.95	J. H. Wilson.
		7.	...	3	57.50	M. McCarty.
		10.	...	19115	175.70	C. M. Luman.
		7.	...	6	20.	F. C. Freeman.
		17.	...	9	181.20	I. H. High.
		19.	...	20	120.	Theo. Flemis.
	Mar.	24.	...	1	58.	F. Lavid.
	Apr.	20.	...	8	181.20	W. Tulmey.
	Jul-	20.	...	29	60.	E. P. Cooper.
		25.	...	30	62.	W. B. Morrison.
		20.	...	31	60.	W. F. Simmons.
	Jun-	18.	...	19141	84.50	H. N. Logan.
.....		...	...	2	600.	C. W. Howell.
		26.	84	60	135.10	David Melony.
.....		...	...	1	913.50	do.
	July	7.	85	19206	275.85	C. M. Rogers.
	Apr.	27.	...	10	583.95	A. C. Snowburger.
	Jul-	10.	...	19218	34.20	G. Melvin.
		15.	...	9	70.	Robt. McGovern.
	Jun-	11.	...	19231	25.	Morris Mace.
	July	1.	86	19256	4,000.	Geo. B. France.
	Apr.	15.	...	60	70.78	L. H. Dolalson.
	Jul-	14.	...	3	70.	S. S. Sturdevant.
		12.	...	4	216.20	E. W. Quinn.
		9.	...	19283	30.90	I. Jones.
		28.	87	19329	100.	John Keiner.
'84,	Aug.	14.	...	44	200.	Wm. Dirs.
'86,	Jul-	31.	...	49	105.	H. O. Wright.
	Aug.	2.	88	19350	100.	W. F. Morrison.
.....		...	...	3	70.	G. W. Ellis.
	Jul-	19.	89	19405	24.	John Offelt.
	Aug.	20.	...	8	61.50	J. Lindquist.
.....		...	...	12	559.90	John Price.
		23.	...	3	380.	J. C. Killner.
		26.	...	19417	88.	Uriah B. Libble.
		27.	...	34	70.50	W. Sunderson.
		28.	...	35	53.75	D. Price.
		30.	...	43	579.95	W. McDonal.
.....		...	...	4	1,051.20	Adam F. Trickey.
	Sept.	1.	...	7	60.	Levi Gondill.
	Aug.	30.	...	8	24.50	B. J. Rummey.
1807						
	Sept.	2.	90	19462	122.50	H. W. Hoffmaster.
	Aug.	23.	...	3	107.20	Ben Price.
	Sept.	4.	...	73	50.	Henry Jeffers.
.....		...	...	4	100.	M. Cellank.
		3.	...	5	266.50	N. O. Dean.
		13.	91	19514	319.50	Pratt & Foley.
.....		...	...	15	229.70	N. Pierce.

		7.	...	16	10.50	J. M. Walker.
		4.	...	17	10.50	C. P. Cloud.
		21.	...	40	56.	G. H. Spears.
		22.	...	1	92.25	Wm. McDonel.
'86,	Sep.	23.	91	19546	157.20	A. Freeman.
		24.	92	57	320.	John Price.
		25.	...	61	14.50	Johnson Fuss.
		16.	...	62	32.20	F. C. Furgeson.
		24.	...	63	715.90	J. F. McConaughy.
		18.	...	64	439.83	C. E. Faseburg.
		27.	...	19565	166.20	F. A. Raper.
.....		.....	...	67	365.20	Chas. Vanburg.
		25.	...	68	1,178.68	H. M. Woolman.
		29.	...	69	255.50	G. D. Morris.
	Aug.	4.	...	19580	112.	J. F. Kelley.
	Apr.	3.	95	19700	22.	Robt. Bennett.
	May	10.	...	24	56.50	John Ahewer.
	Apr.	5.	...	26	220.	Howard Fair.
	May	11.	...	29	145.	M. Ross.
	Mch.	24.	...	41	100.	Ben J. Naikligall.
	May	20.	...	45	20.	C. O. Morrison.
		19.	...	46	30.	C. K. Evans.
		20.	...	47	10.	W. P. Troutman.
		24.	96	55	569.20	Ida M. Bennett.
		5.	...	6	35.	W. H. Ellis.
	June	4.	...	8	70.20	O. M. Miller.
		9.	...	73	58.	T. Hubert.
	Feb.	25.	...	83	35.	Ulrich Wochmer.
		26.	97	19815	85.	H. P. Gue.
		18.	...	16	50.	J. P. Worthington.
.....		.....	...	17	37.	J. F. Wells.
.....		.....	...	18	35.	W. Willis.
.....		.....	...	19	145.50	H. Badler.
.....		.....	...	820	606.	G. Everts.
.....		.....	...	21	28.	J. Z. Wens.
'86,	Feb.	18.	97	19822	46.	Aug. Engelton.
.....		.....	...	23	10.50	F. B. Yates.
.....		.....	...	24	89.50	M. Ross.
.....		.....	...	25	40.	D. F. Bennett.
.....		.....	...	26	40.75	J. B. Bennett.
.....		.....	...	27	102.	B. Price.
.....		.....	...	28	11.	D. Price.
.....		.....	...	29	40.75	W. Price.
.....		.....	...	830	108.75	R. B. Price.
.....		.....	...	31	270.	Aug. Engelton.
	Feb.	8.	...	32	150.	F. P. Baker.
	Mch.	9.	...	46	147.	T. M. Parsons.
.....		.....	...	47	5.80	A. W. Luffer.
.....		.....	...	48	28.25	V. M. Sterns.
.....		.....	...	49	13.	G. W. Mason.
	Feb.	10.	98	53	25.	J. L. Druir.

Apr.	17.	...	881	165.95	W. Keekly.
.....		...	82	107.20	L. S. Lesh.
.....		...	83	1,179.70	M. A. Meagher.
Nov.	5.	...	98	11.	J. Flynn.
.....		...	99	27.	Thos. Rearders.
5, Nov.	5.	99	19900	47.	P. Donahue.
.....		...	1	25.	E. Kibble.
.....		...	2	26.50	Jas. H. Smith.
8					
85, Nov.	5.	99	19903	120.	P. Flynn.
.....		...	4	168.	J. Manning.
.....		...	5	147.75	C. Munsers.
.....		...	6	24.	T. Blackburn.
.....		...	7	34.	J. Neville.
.....		...	8	37.50	R. E. Meagher.
.....		...	9	1,000.	M. C. Frank.
.....		...			
	28.	...	19916	40.	S. C. Twarling.
Dec.	1.	...	17	100.	Olivee J. Moffet.
86, July	5.	...	36	460.65	James Bauer.
.....		...	37	138.10	do.
Aug.	10.	101	20002	113.50	L. S. Summer.
.....		...	3	116.10	R. M. Dickson.
Aug.	16.	...	16	163.90	R. P. Meek.
Sep.	13.	...	15	15.20	L. C. Nolan.
Aug.	19.	...	49	148.50	L. S. Summers.
.....		102	93	3,320.10	M. C. Frank.
Sept.	1.	103	20108	108.70	C. D. Sharp.
.....		...	11	91.10	Jos. Clabby.
.....		...	12	105.10	John B. Clabby.
Sep.	25.	105	20206	26.25	S. F. Wood.
	20.	...	7	340.80	Oliver Baggs.
	29.	...	214	253.20	W. H. Cook.
	30.	...	17	192.45	W. A. Cate.
Oct.	2.	...	30	10.50	J. H. Crawford.
	1.	...	37	300.	John C. Kilner.
	6.	106	20254	168.30	W. F. Miller.
	11.	...	62	115.	John Widle.
.....		...	63	260.70	Wm. Stafford.
	12.	...	65	190.20	J. C. Everts.
	13.	...	72	100.	W. A. Foster.
	14.	...	74	31.	John Sirrs.
	16.	...	85	382.10	Amos Miller.
	15.	...	97	84.50	H. N. Logan.
	26.	107	20319	277.35	O. N. Kelley.
	25.	...	20	63.	Nathaniel Pierce.
	27.	...	23	26.	Gust Nisser.
.....		...	20330	25.	M. Mace.
'86, Oct.	24.	107	20335	615.90	J. T. McConaughey.
	29.	...	42	10.50	J. M. Walker.
	30.	...	43	200.	L. T. Sorntwich.

		29.	...	44	1,178.68	H. M. Woolman.
		30.	...	45	10.50	J. H. Crawford.
		29.	...	46	679.70	Wm. McDoual.
.....			...	47	275.20	W. R. Myers.
.....			...	48	369.20	Chas. Vanburg.
		28.	...	49	56.	G. H. Spear.
		30.	108	20350	7.	S. A. Gesseck.
.....			...	1	103.20	Geo. D. Elliott.
		29.	...	2	141.	J. Hubert.
	Nov.	1.	...	3	200.	E. H. Jackson.
.....			...	4	100.	Carl Retz.
		2.	...	6	100.	Anton Kreabbe.
		1.	...	7	177.95	J. E. Phillips.
		8.	...	20362	16.20	G. W. Ellis.
		1.	...	5	910.90	John Price.
		10.	...	6	51.	do.
		12.	...	9	250.80	O. M. Miller.
	May	5.	110	20464	67.50	Wm. Holmes.
		1.	...	5	75.	W. H. Barslow.
	Feb.	24.	...	74	300.	John Price.
	June	5.	...	90	57.50	Henry Poor.
		4.	...	1	119.20	S. D. Brumbach.
		8.	...	6	120.	J. Gilmore et al.
	Mch.	10.	111	20534	95.	S. M. McConaughy.

1809

'86,	Feb.	10.	111	20539	25.	J. L. Druir.
'85,	Dec.	31.	112	83	250.	P. Wenns
'86,	Apr.	7.	...	4	20.	C. Moline.
'85,	Dec.	23.	...	9	210.	G. H. Kelly.
'85,	Dec.	23.	112	20590	100.	G. Mason.
'86,	Jun-	24.	...	8	100.	James Kildil.
	Aug.	30.	114	20658	109.	J. Sanders.
	Sept.	3.	...	71	68.60	J. H. Rush.
		1.	...	77	73.20	John Chadd.
		10.	115	20715	331.20	F. B. Stark.
		13.	...	6	12.	M. Meehan.
		15.	...	7	28.20	J. R. Mulluer.
		14.	...	8	27.50	G. H. Spear.
		13.	...	9	18.75	A. H. Campbell.
		18.	...	48	103.	L. Naber.
.....			...	49	107.50	G. Groser.
		21.	116	20763	26.95	F. A. Bacon.
		27.	117	20816	275.	R. Sanders.
		29.	...	25	162.	John Sirrs.
.....			...	32	372.40	S. J. Wagner.
	Oct.	2.	...	47	30.20	L. Nolan.
.....			...	48	200.	J. J. Burnhamer.
		1.	118	20851	61.50	J. Linquist.
		4.	...	2	159.70	John H. Wende'l.
.....			...	3	17.20	Henry Allcock.

		7.	70	120	.....	Allen Halstead.
	May	8.	...	5	27.	Paul Fox.
	Oct.	9.	...	20881	60.	James R. Brisbin.
.....		.....	...	2	320.20	John Neville.
		16.	119	20909	75.	M. H. Westerbaugh.
		10.	...	10	150.25	A. W. Rowns.
		19.	...	23	70.80	Thos. Joers.
		26.	...	46	277.35	Oscar Kelley.
		27.	...	49	105.	W. G. Wood.
.....		.....	220	20950	289.20	J. A. Wilson.
		27.	220	20964	300.	C. E. Farstburg.
		17.	...	81	58.	Frank Baird.
		19.	...	2	112.	J. F. Kelley.
	Nov.	1.	...	3	39.70	C. Mouson.
.....		.....	...	4	51.25	John Neilson.
.....		.....	...	8	8.50	John Meradith.
		6.	221	21010	28.25	D. M. Stern.
.....		.....	...	11	31.	W. B. Kibble.
		9.	...	17	114.80	J. B. Trickey.
		10.	...	23	875.20	W. H. Barstow.
		11.	...	27	52.50	Amos Miller.
		12.	222	66	100.	W. W. Foster.
		20.	...	78	36.	Chas. Vanburg.
		22.	...	81	10.75	Wm. Westbaugh.
.....		.....	...	82	68.	E. P. Elleson.
		25.	...	91	31.20	J. A. Brumsey.
		23.	...	92	7.35	Allene Halstead.
		27.	...	99	108.70	C. C. Vagar.
		30.	223	21103	345.	Olliver Briggs.
	Dec.	1.	...	7	402.	John Price.
		9.	...	8	40.	John Linquist.
.....		.....	...	21120	60.	Henry H. Tolk.
		18.	...	27	163.20	Jennie Poper.
		29.	224	21157	40.70	Chas. Monson.
		28.	...	8	195.	Grafton Everits.
		29.	...	21160	354.	Allen Baggs.
'87,	Jan.	1.	...	6	200.	Francis Wilkins.
		12.	...	21188	50.75	C. H. Spear.
'86,	Apr.	24.	225	21200	77.65	R. G. Middleton.
		6.	...	1	30.	Sam R. Allen.
	May	1.	...	21211	350.20	Henry T. Shipley.
1810						
'86.	May	10.	225	21214	26.	John Barney.
.....		.....	...	15	150.20	F. Mirricke.
.....		.....	...	16	150.	R. G. Middleton.
		8.	...	17	130.	Arthur M Stark.
		20.	...	21234	150.20	Wm. Blunion.
		29.	...	39	280.	S. A. Lesseek.
	June	2.	...	21240	118.70	Peter Kelley.
	Feb.	22.	226	21257	150.	G. W. Dixon.
		24.	...	58	125.	Jno. Osborn.

		25.	...	59	250.	V. M. Selever.
		25.	...	63	40.	V. M. Selever.
	Mch.	23.	...	21270	75.	W. J. Miller.
		27.	...	5	110.	J. Bosselman.
		30.	...	6	145.	W. Man.
.....		.....	...	7	125.	T. C. Nolan.
		31.	...	21280	225.	E. Andrews.
		2.	...	82	275.	M. Moore.
'85,	Oct.	10.	...	89	175.	W. McDaniel.
	Nov.	5.	...	21290	29.50	R. W. Himinishick.
.....		.....	...	1	29.	T. H. Cattle.
.....		.....	...	2	13.45	E. J. Fosler.
.....		.....	...	3	156.75	T. Hughes.
.....		.....	...	4	74.50	W. A. Shoemaker.
.....		.....	...	5	56.55	Scott & Bros.
.....		.....	...	6	110.	O. P. Rose.
.....		.....	...	7	56.	J. Thompson.
.....		.....	...	8	46.75	J. W. Greenmill.
.....		.....	...	21299	21.70	do.
.....		.....	227	21300	21.50	P. J. Plants.
.....		.....	...	1	85.	P. S. Augustine.
.....		.....	...	2	47.	W. Miller.
.....		.....	...	21303	18.25	J. W. Muskiller.
'85,	Nov.	5.	227	21303	18.25	J. W. Muskiller.
'86,	Apr.	4.	...	4	160.	W. C. Fitzpatrick.
		15.	...	5	120.	E. A. Emerson.
		13.	...	6	85.	A. J. Moore.
		19.	...	7	85.20	E. Fees.
	Feb.	12.	...	11	230.20	J. E. Stiner.
	Apr.	22.	...	12	75.20	G. B. Heam.
'85,	Oct.	3	...	17	75.	S. Soan.
'86,	Jun-	25.	...	21324	60.20	T. N. Brumbaugh.
	Jul-	11	...	32	225.	Daniel Heclonia.
	Oct.	13.	37	.....	173.30	W. A. Pursell.
		14.	...	21340	33.10	G. E. Morton.
	Aug.	14.	228	50	127.50	A. L. Johnson.
	Oct.	9.	...	21399	82.20	A. J. Gilman.
	Oct.	1.	229	21435	105.	H. I. Wright.
.....		.....	...	6	100.	W. F. Morrison.
.....		.....	...	7	236.20	K. Towers.
	Oct.	2.	...	21441	26.25	Patrick Kennedy.
		4.	...	2	220.65	S. M. Foster.
.....		.....	...	3	400.	Henry White.
		5.	...	45	161.25	M. Tooly.
		6.	230	21456	75.20	S. F. Stromments.
		1.	...	7	4,000.	France & Harlan.
		2.	...	8	93.20	J. W. Underhill.
		7.	...	9	69.	H. C. Grimes.
		9.	...	21483	107.50	E. W. Quinn.
		12.	...	86	83.50	Geo. K. Evert.
.....		.....	...	7	108.20	Chas. Hohmence.
		18.	231	21531	181.20	T. A. Heck.
		19.	...	37	525.	H. H. Thurman.

	22.	232	21565	135.70	F. W. Clark.
	23.	232	21572	133.	W. B. Kibble.
	26.	...	79	81.80	M. C. Beabort.
	27.	...	83	56.50	John Ahewn.
1811					
'86, Oct.	26.	...	21584	133.20	P. Raymond.
	27.	233	21507	33.	T. C. Moore.
	30.	...	621	35.50	Wm. Sanderson.
	1.	...	2	129.35	A. S. Litchdenberg.
	30.	...	3	32.70	Geo. Nohan.
.....		...	4	150.	John Gumell.
.....		...	5	100.	O. L. Thorpe.
.....		...	6	132.50	T. Raferty.
	Nov. 1.	...	7	80.20	E. W. Smith.
.....		...	8	213.20	Andrew Anderson.
	Oct. 1.	...	9	280.50	G. V. Moore.
.....		...	30	77.75	L. H. Donaldson.
	Oct. 15.	...	35	344.10	John Meradith.
	Nov. 1.	...	36	8.75	do.
	Oct. 1.	...	37	70.	G. W. Ellis.
	Apr. 16.	234	21664	50.	Jacob Andrewson.
	Nov. 11.	...	691	11.	H. B. Gue.
	12.	235	21723	38.20	M. S. Sweet.
	13.	...	727	76.60	T. M. Galloway.
	8.	...	28	72.90	T. L. Loomis.
	13.	...	29	145.50	Henry Butler.
	15.	...	21735	25.	Morris Man.
	19.	236	21752	46.25	N. A. Dean.
	23.	...	21776	100.	Jos. Harkthal.
	26.	...	785	61.50	John Willis.
.....		...	786	54.25	S. F. Wood.
	24.	...	787	15.50	C. Wheeler.
	27.	...	21795	159.70	John H. Wendell.
'86, Nov.	26.	236	21796	9.	D. C. Cortley.
	27.	...	97	372.40	First N. B. York.
	29.	237	21803	68.60	J. H. Rush.
	20.	...	6	382.10	Amos Milton.
	30.	...	7	615.90	J. F. McConaughy.
	29.	...	13	37.25	G. H. Spear.
	Dec. 1.	...	14	41.	W. A. Dean.
	3.	...	21845	190.20	J. C. Everts.
	Nov. 3.	...	46	81.25	W. H. Barstow.
	Dec. 4.	...	47	91.10	Jos. Clabby.
.....		...	48	120.20	John Neville.
	6.	...	49	1,000.	Fred Schmidt.
	7.	238	21881	200.	Phil Beaty.
	8.	...	82	174.20	Wm. Tidanyner.
	10.	...	87	52.50	A. Nyer.
.....		...	88	112.	John F. Kelly.
	8.	...	89	92.	Hiram Bonnell.
	13.	...	21894	42.20	Jos. Cabby.

		10.	239	21900	875.20	W. H. Barston.
		16.	...	14	25.75	Nathaniel Pierce.
	Nov.	1.	...	15	105.10	J. B. Clabby.
	Dec.	20.	...	23	454.70	O. N. Kelley.
		21	...	25	15.50	C. S. Hessen.
.....			...	26	200.	W. A. Cate.
		22.	...	29	13.25	T. Hurlbut.
		27.	...	21945	40.	D. F. Clark.
		28.	...	46	81.25	Richard Brook.
.....			...	47	200.	Jane Bouer.
	June	2.	240	21958	19.	G. O. Donaldson.
	Mch.	20.	...	962	125.	F. Gross.
	Aug.	28.	...	21974	226.60	T. C. Nolan.
	Sep.	24.	240	21983	118.25	John Hyland.
	Oct.	7.	...	95	934.80	J. W. Underhill.
		5.	...	21997	85.[illegible]	Jos. Allison.
	Oct.	30.	241	22016	163.95	A. & P. Thierson.
	Nov.	1.	...	17	54.50	John Nilson.
		10.	242	74	173.55	Wm. Jones.
		13.	...	89	13.	G. W. Morrison.
1812						
		15.	...	22093	246.30	Hugh Kelley.
		13.	...	4	54.50	J. F. Kelley.
		15.	...	5	54.	D. Hutchinson.
		18.	243	22123	40.	Wm. Pierce.
		24.	...	138	153.20	D. Scudder.
	Oct.	5.	...	9	275.88	C. M. Rogers.
	Dec.	26.	244	22154	422.50	Willard Jackson.
	Nov.	18.	...	66	83.60	Wm. Willis.
		29.	...	67	16.50	Cameron & Kennedy
		5.	...	68	29.50	E. T. Kibble.
		30.	171	171	122.20	Wm. Jacks.
.....			...	172	14.20	E. Hamilton.
	Dec.	3.	...	22197	30.20	S. C. Nolan.
				98	15.20	do.
.....			...	99	53.50	T. M. Galloway.
.....			...			
		1.	245	22200	800.	H. H. Woolman.
		10.	...	24	52.75	S. R. Weir.
	Nov.	23.	...	5	19.45	M. Kennedy.
.....			...	6	3.10	John Heller.
.....			...	7	23.42	J. H. Rush.
.....			...	8	14.20	L. P. Vance.
.....			...	9	29.03	J. W. Rush.
.....			...	22230	26.38	G. W. Gilmore.
.....			...	1	8.20	W. C. Gilmore.
.....			...	2	25.92	do.
.....			...	3	36.55	do.
.....			...			
'86,	Nov.	4.	245	22241	112.30	Geo. D. Elliott.
	Dec.	13.	...	44	58.	Frank Laird.
		15.	...	45	75.	Geo. Parrish.
.....			246	22260	210.75	J. A. Smith.

	16.	...	1	64.20	J. B. Clabby.
	17.	...	2	312.25	S. P. Buckmaster.
.....	...	...	3	32.20	Wm. A. Thomas.
Nov.	20.	...	9	21.	J. P. Lloyd.
	1.	...	22270	200.	J. L. Burnheimer.
Dec.	22.	...	84	68.	E. P. Ellison.
	24.	...	22296	331.20	J. R. Stark.
	31.	247	22302	142.	J. E. Phillips.
	30.	...	3	52.20	Peter Kelley.
.....	...	...	4	118.70	do.
'87, Jan.	1.	...	22312	52.50	Amos Miller.
	4.	13	13	200.	Phil Beatty.
.....	...	...	14	75.20	S. F. Stracamerel.
	3.	...	15	159.70	J. H. Wilder.
	5.	...	22321	108.20	Chas. Hohemsen.
	1.	24	75	.....	W. J. Miller.
	6.	...	48	382.10	A. Miller.
	1.	...	22349	90.	John Neville.
	17.	248	76	36.	C. C. Hager.
	1.	...	7	38.20	M. S. Sweet.
	18.	...	8	102.65	D. Pierce.
	19.	...	382	11.	C. F. Johnson.
	15.	...	3	416.	L. J. Ganda.
	20.	...	8	283.43	W. D. Camp.
	21.	...	9	61.	Wm. Noland
	24.	...	22399	95.30	Robt. Fliser.
	22.	249	22400	25.	do.
	25.	...	2	12.50	O. B. Lidtke.
'86, Dec.	1.	249	22408	233.25	John Devine.
Oct.	16.	...	9	61.45	W. C. Fitzpatrick.
'87, Jan.	27.	...	12	25.	Jacob Butler.
Feb.	11.	...	19	57.	W. R. Cole.
'86, Mch.	16.	255	22707	32.	W. H. Miller.
June	5.	...	8	185.70	Henry Cole.
Mch.	8.	...	18	224.95	T. A. English.
	16.	...	29	220.	S. A. Tusick.
Aug.	30.	256	22761	68.05	D. Heaton.
1813					
Sep.	11.	...	67	346.20	Briah Bourstadt.
.....	...	...	68	34.50	do.
	25.	...	22781	188.95	W. H. Blakley.
	30.	...	85	697.20	S. W. Tidwell.
	10.	...	22791	35.	J. R. Stolls.
	25.	...	92	30.	Wm. Hammerman.
	17.	...	93	25.	Herman Pepo.
Oct.	16.	257	22807	218.	J. P. Miller.
	18.	...	8	96.	J. G. Sanders.
	26.	...	13	150.15	John Walkup.
	29.	...	14	62.65	L. Tulevely.
Sep.	25.	...	17	25.	L. C. Nolan.
	28.	...	18	35.28	J. E. Furgeson.

	Oct.	2.	...	19	333.90	Chas. F. Johnson.
	Nov.	9.	...	29	108.70	August Engblow.
		10.	...	22832	573.20	A. C. Truburg.
		13.	...	39	315.20	David Price.
	Sep.	20.	...	43	108.70	C. D. Thorpe.
		18.	...	45	200.	John C. Kilner.
	Nov.	29.	258	22863	54.	B. F. Willis.
		30.	...	6	420.	M. C. Frank.
		29.	...	7	9.95	R. H. Fair.
		"	...	8	6.75	W. H. Ellis.
		"	...	9	23.60	J. Conron.
'86.	Dec.	4.	258	22890	215.	John Neville.
		3.	259	929	19.	Henry Alcock.
		10.	...	33	44.80	J. A. Corcanan.
.....			...	4	10.50	J. W. Walker.
		9.	...	44	52.25	Chas. Brandeburg.
		13.	260	22950	17.	John Foley.
		14.	...	61	28.50	C. H. Young.
		15.	...	5	54.	Wm. Richen.
		2.	...	79	514.13	Wm. Hice.
		15.	...	80	107.50	G. Greaver.
.....			...	1	106.	H. Nebur.
.....			...	2	42.20	H. S. Hohrulone.
		12.	3	.....	58.70	W. W. Foster.
		22.	261	23014	231.20	W. S. Mock.
		27.	...	40	109.	C. H. Hemming.
		26.	...	1	105.	W. G. Wood.
		27.	...	2	67.50	W. Holmes.
		28.	3	3	100.	Henry Butler.
		28.	...	4	60.20	L. S. Wilson.
		29.	49	16	.....	J. W. Campbell.
		29.	262	23050	85.	A. J. Moore.
		31.	...	4	300.	C. E. Fandenburg.
.....			...	5	21.50	H. J. Porter.
.....			...	6	100.	John F. —.
.....			...	7	210.50	do.
		30.	...	8	48.60	J. H. Rush.
'87.	Jan.	3.	...	23067	105.	H. O. Wright.
		1.	...	8	100.	W. F. Morrison.
		8.	...	85	103.70	Hulstead & Smith
		10.	263	23109	326.90	J. L. Enslow.
		12.	...	10	200.	D. M. Foster.
		12.	136	.....	82.50	T. Roberts.
'87.	Jan.	18.	263	21137	312.50	Southworth & Fosleberg.
		13.	...	9	70.78	L. H. Donelson.
		15.	...	40	966.45	W. H. Barstow.
86.	Dec.	21.	...	23141	80.	Thos. Biggs.
'87.	Jan.	19.	264	51	147.17	G. F. Ingals.
		22.	...	59	129.35	A. S. Sitbenberger.
		24.	...	60	170.	E. Vandeventer.
		"	...	1	193.	John Sims.

1814

'87,	Jan.	25.	...	65	185.	O. B. Lidtke.
'86,	Nov.	1.	...	8	13.65	W. O. Baum.
	Sep.	25.	...	9	58.25	M. G. Coons.
'87,	Jan.	12.	...	70	27.80	R. C. Ferris.
		27.	...	1	514.80	J. B. Trickey.
		28.	...	74	54.25	S. F. Wood.
	"		...	5	103.20	do.
	Feb.	1.	...	23197	41.20	J. Martin.
		2.	...	8	159.07	J. H. Wendel.
	Jun-	31.	265	203	615.90	J. F. McConaughy.
	"		...	4	150.	do.
	"		...	5	145.75	J. E. Phillip.
	"		...	6	166.20	J. Raper.
		29.	...	7	21.50	M. Mow.
	"		...	8	133.	H. P. Kelder.
'86,	Dec.	4.	...	23211	50.50	H. J. Levitt.
'87,	Feb.	7.	...	23	31.	W. R. Meyers.
	Jun-	29.	...	4	189.20	H. Mitchell.
		22.	...	6	619.	W. A. Dean.
	Feb.	9.	2	233	100.	L. H. Donaldson.
		12.	...	5	141.80	I. D. Devin.
		10.	...	6	382.10	A. Miller.
'86,	Nov.	20.	...	43	36.50	K. M. Lloyd.
'87,	Feb.	10.	...	8	52.50	A. Miller.
		19.	...	9	1,000.	H. M. Erskin.
		22.	266	23278	153.20	D. Scudder.
		17.	...	9	102.65	N. Pierce.
		26.	...	80	100.	W. Seidel.
	"		287	40	.....	J. H. Wendell.
	Mar.	1.	...	9	116.84	H. N. Robbit.
		19.	267	23313	50.	W. C. Freeburg.
'86,	Feb.	5.	270	450	35.20	D. Thompson.
	Sep.	27.	...	8	175.20	C. M. Rurner.
	Oct.	1.	...	60	79.20	J. M. Brumbaugh.
		5.	...	2	84.20	P. M. do.
	Dec.	8.	...	7	260.	J. W. Underhill.
	Sep.	6.	...	8	63.	A. C. Freeburg.
	Oct.	8.	...	9	154.65	N. A. Dean.
		14.	...	71	117.80	C. F. Spelman.
		16.	...	6	420.20	James Heaton.
	"		...	23477	195.20	Wm. Wahl.
		18.	...	80	116.80	Jacob Heinrichs.
	"		...	1	111.	H. F. Stubbs.
		17.	...	3	34.	E. W. Heinricks.
		16.	...	4	56.	John Lett.
	Nov.	10.	271	23509	425.20	F. P. Baker.
		12.	...	10	298.52	David Meley.
		10.	...	3	319.	P. H. Wilson.
	Oct.	11.	...	15	111.55	James Campbell.
	Dec.	8.	...	524	90.20	L. M. Grinnell.

		9.	...	6	56.	I. G. Middleton.
		11.	...	7	1,200.	John Price.
		14.	...	8	7.35	Allen Halstead.
		"	...	9	58.60	do.
		15.	...	23531	126.85	G. R. Meredith.
		18.	...	3	34.	Nelson Dart.
		22.	...	7	216.	L. S. Loomis.
	Dec.	22.	271	23538	23.50	P. Kennedy.
		27.	...	42	81.	W. H. Fisher.
	Apr.	9.	...	3	185.	C. Bowersock.
	Dec.	28.	...	4	98.	Wm. Feidmeyer.
		29.	272	60	109.20	S. C. Keen.
		31.	...	4	18.72	A. H. Campbell.
1815						
'87,	Jan.	1.	272	23588	56.50	John Shorn.
		1.	...	9	244.75	J. A. Decker.
		5.	...	95	328.20	Geo. W. Mayo.
		6.	273	23695	239.95	R. H. Fair.
		8.	...	16	54.	Jos. Andrews.
		7.	...	48	287.90	
		11.	...	9	107.50	
		1.	274	685	33.75	J. B. Carlisle.
		5.	...	6	107.75	J. Haskenstal.
		"	...	7	22.10	T. W. Masteller.
		1.	...	8	54.	Wm. Miller.
		18.	...	9	152.	Geo. W. Dixon.
		15.	...	23695	272.70	N. Pierce.
		24.	275	716	27.20	A. C. Peburg.
		"	...	20	22.50	Chas. Van Burg.
'86,	Dec.	12.	...	2	41.55	P. Hardman (Hardin).
	Sept.	1.	...	3	40.	M. N. Boon.
'87,	Jan.	27.	276	23759	143.50	Chas. Bowersock.
		29.	...	75	75.	N. S. Sweet.
'86,	Oct.	6.	...	781	175.	W. B. Graves.
'87,	Feb.	1.	277	23812	800.	H. M. Woldeman.
		1.	...	22	200.	John J. Bingham.
	Mar.	1.	...	47	966.45	
	Feb.	28.	...	8	176.70	
		"	278	23859	112.26	J. E. Phillip.
	Mar.	7.	...	61	15.50	R. G. Middleton.
		12	...	79	25.80	J. P. Lloyd.
		1.	...	80	166.20	Jennie Raper.
		12.	...	6	85.	A. J. Moore.
		"	...	7	161.45	S. F. Wood.
		15.	...	92	394.60	A. Miller.
		19.	279	23913	312.50	Southworth & F.
		"	...	4	1,192.20	A. Trickey.
		18.	...	5	200.	J. C. Kilner.
		"	...	6	43.05	R. D. Devine.
		19.	...	21	153.20	C. M. Cartel.

		22.	...	2	77.	J. M. Frank.
'86,	Nov.	10.	280	23965	319.	P. Wilson.
	May	8.	285	24201	175.	A. S. Johnson.
	Oct.	26.	...	12	972.70	Harry B. Gue.
	Nov.	1.	...	17	60.	Jacob Henricks.
		6.	...	8	1,125.	John Peters.
		"	...	9	361.20	A. Woleman.
		8.	...	20	2,501.63	M. A. Meagher.
		"	...	2	146.20	L. C. Noleen.
		13.	...	5	72.76	Geo. Flock.
		"	...	6	95.20	A. C. Mahaffey.
		2.	...	24235	152.20	W. R. Meyers.
		20.	...	6	318.20	Chas. Danburg.
		13.	...	9	103.20	W. H. Brown.
		26.	...	43	16.	James E. Gallagher.
		15.	...	4	115.	John Widle.
		26.	...	5	425.	
		11.	...	6	145.	
'86,	Nov.	27.	286	24260	500.	O. M. Miller.
		26.	...	5	150.	Daniel Peters.
		"	...	6	150.	Jacob Peters.
		12.	...	7	40.	A. Kumbbe.
	May	27.	...	8	30.	L. R. Miller.
	Dec.	22.	...	9	35.	John Bif.
'87,	June	1.	...	24275	190.	Wm. Meredith.
		7.	...	81	940.	James Baur.
		8.	...	2	11.75	W. Meredith.
	Jan.	1.	...	90	22.	Wm. Stuart.
		4.	...	1	80.	W. S. Jeffrey.
1816						
'86,	Dec.	22.	286	24292	81.80	
'87,	Jan.	24.	...	7	334.20	
		"	...	8	11.50	
		21.	287	24300	109.	J. E. Russel.
'86,	Oct.	1.	...	1	42.25	T. S. O'Brien.
'87,	Jan.	1.	...	2	38.75	C. E. Marble.
'86,	May	19.	...	3	23.25	S. K. Gilbert.
'87,	Jan.	26.	...	4	83.20	A. Lindsey.
		28.	...	16	50.	A. Frickey.
		26.	...	17	331.20	F. B. Stark.
	Feb.	5.	288	24351	108.20	G. H. Campbell.
		7.	...	72	175.20	Julia A. Corcoran.
	Jan.	29.	...	73	163.95	A. P. Hanson.
	Feb.	8.	...	76	163.20	Martha & Robt. Ross.
.....		...	...	77	65.75	Ben Price.
	Feb.	13.	...	83	163.	Anton Wuff.
	Nov.	1.	...	93	148.30	B. B. York.
'86,	Oct.	10.	...	94	69.80	W. P. Frontman.
	Nov.	...	...	95	71.85	
'87,	Feb.	15.	289	24402	112.	John F. Kelley.
		17.	289	24409	39.	G. M. Walker.

		19.	...	33	12.75	A. B. Gue.
'86,	Dec.	22.	...	41	50.	John Price.
'87,	Feb.	22.	...	42	27.	Henry Bislos.
		23.	...	43	114.20	George D. Elliott.
.....			...	44	1,170.	Henry White.
.....			...	45	105.	
	Feb.	17.	290	24456	90.	Peter Kline.
		26.	...	59	105.30	C. A. Post.
	Mch.	1.	...	70	112.60	Chas. Baulauly.
.....			...	71	226.	John Neville.
	Feb.	28.	...	83	62.65	L. Zullhody.
	Mar.	1.	...	84	21.50	A. J. Porter.
.....			...	96	19.	
		7.	...	99	200.	
	Mch.	12.	291	24516	26.50	J. H. Crawford.
.....			...	22	16.35	J. P. Lloyd.
.....			...	23	16.	J. W. Campbell.
	Feb.	23.	...	41	29.78	John W. Rush.
	Mch.	21.	...	46	158.17	
		22.	292	24555	26.65	J. S. Hoenfritz.
		25.	...	62	300.	C. S. Foresbury.
		14.	...	82	70.78	L. H. Donaldson.
	Apr.	1.	...	86	35.	Olson Duth.
	Mch.	1.	...	87	12.50	Wm. Heinneman.
.....			...	88	696.50	J. F. McConaughy.
		31.	...	89	41.	C. F. Moore.
	Apr.	1.	293	24608	966.45	W. H. Barneston.
.....			...	9	337.20	G. W. Mayo.
		6.	...	45	239.95	
		18.	...	46	82.90	
		15.	294	24659	394.60	Amos Miller.
		18.	...	79	153.20	Dreston & Scudder.
		30.	...	80	140.50	N. B. Kibble.
.....			...	81	50.	Chas. F. Johnson.
		11.	...	24691	830.75	L. C. Nolan.
	Sep.	24.	300	24961	42.50	D. B. Huff.
'86.		21.	...	62	30.	B. B. Brabham.
.....			...	63	28.50	T. E. Larson.
		26.	...	64	47.50	T. H. O'Brien.
		21.	...	65	85.75	Mike Foley.
.....			...	66	121.50	A. Hitchcock.
.....			...	67	237.50	O. C. Fritz.
.....			...	68	23.75	
.....			...	69	71.25	J. F. Hitchcock.
.....		5.	...	24972	63.70	Geo. Lock.
1817						
	Nov.	29.	...	77	1,000.	Wm. McDoual.
	Dec.	1.	...	81	119.20	S. D. Baumbaugh.
		4.	...	82	325.	T. Hurlbut.
	Nov.	30.	...	83	800.	Mary A. Magger.
		29.	...	84	1,000.	Wm. McDoual.

	Dec.	8.	...	24993	80.	J. R. Morrison.
		6.	...	94	80.	
		9.	...	95	80.	
.....		..	...	96	80.	
		7.	...	97	80.	
		8.	...	98	80.	
		6.	...	99	80.	
.....		..	301	25000	80.	A. B. Lest.
		9.	...	1	80.	O. P. Hoger.
		8.	...	2	80.	O. V. Marble.
.....		.....	...	3	80.	D. Broadwell.
'86.	Dec.	10.	301	25004	118.	F. P. Owen.
		11.	...	5	1,187.70	John Price.
		2.	...	11	500.	Wm. Hice.
		13.	...	12	80.	F. O. Payne.
		15.	...	13	80.	August Engbloom.
		14.	...	14	80.	T. W. Smith.
		16.	...	15	80.	Gust Manderson.
.....		..	...	16	80.	L. S. Wheeler.
		17.	...	25017	5,493.60	Stark & Mosher.
		20.	...	18	11.20	E. Farmer.
.....		...	...	21	35.	T. J. Brunner.
		18.	...	22	40.	C. A. Morgan.
.....		...	...	25030	185.	F. W. Clark.
		23.	31	.....	170.95	O. Lang.
		24.	...	32	212.	T. Halbart.
		27.	...	25043	80.	L. H. Mason.
		29.	44	44	80.	
		28.	..	45	75.	
.....		.....	...	.....	80.	
'87.	Jan.	1.	302	25055	18.	A. J. Weinburg.
		18.	...	64	57.20	M. A. Bowe.
		1.	...	65	80.	Thos. Barber.
		9.	...	66	80.	John Piper.
		3.	...	67	80.	Fred Bittinger.
'86.	Dec.	21.	...	68	80.	John Schalter.
		20.	...	69	80.	John Renquist.
		28.	...	25070	80.	Geo. H. Troutman.
'87.	Jan.	20.	...	1	19.70	C. H. Young.
		17.	...	74	80.	S. R. Lillibertsen.
		18.	...	75	80.	D. J. Hunter.
'86.	July	1.	...	77	11.50	C. H. Davenvarger.
'87.	Jan.	1.	302	25078	143.05	Wm. C. Fen.
		28.	...	79	224.20	Jacob Gilmore.
	Feb.	5.	...	85	10.	E. Farmer.
'86.	Dec.	6.	...	89	200.	N. M. Smith.
'87.	Feb.	5.	...	25090	85.95	Joseph Allison.
		9.	...	93	280.20	
		11.	...	96	79.20	
		14.	...	98	112.20	
'86.	Oct.	2.	...	99	83.25	

'87,	Jan.	1.	303	25100	177.85	S. F. Wagner.
'86,	Oct.	1.	...	1	112.05	S. H. Mapps.
'87,	Feb.	21.	...	8	109.20	L. M. Galling.
.....			...	9	178.20	J. Worsentein.
.....			...	25110	84.20	Wm. Jacobson.
		22.	...	13	39.20	W. E. Churchill.
		25.	...	17	34.20	G. W. Arlem.
		26.	...	23	100.	W. F. Morrison.
	Mch.	1.	...	25136	70.20	C. H. Young.
1818						
.....			...	25137	220.	James A. Tucker.
.....			...	38	180.	Wm. Wahl.
	Mch.	2.	...	42	47.80	Thomas E. Rea.
	Feb.	28.	...	44	220.	
.....			...	45	100.	
.....			...	46	135.20	
	Mch.	4.	304	25162	98.	Wm. Wetterburg.
		1.	...	9	38.60	J. H. Rush.
		7.	...	70	107.20	G. Graves.
.....			...	71	106.	H. Neiehlor.
		8.	...	77	82.	T. E. Hunt.
.....			...	78	105.35	Wm. Jones.
		12.	...	25191	73.20	Sarah A. Lamb.
.....			...	92	11.50	F. Chadd.
'87,	Mch.	10.	305	25201	14.80	T. A. Corcoran.
		12.	...	2	79.95	Jos. Ellis.
		14.	...	7	55.20	John J. Wade.
		1.	...	8	78.05	W. G. Wood.
		15.	...	9	200.	John Rogers.
		16.	...	25219	192.20	P. Wilson.
.....			...	20	100.	B. T. Willis.
		15.	...	21	64.60	F. A. Bacon.
		16.	...	22	34.20	J. Mageth.
		19.	...	33	218.20	Daniel Heaton.
.....			...	34	15.20	Frank Gross.
		22.	306	25254	53.	James H. Bill.
		23.	...	62	87.20	John Hampton.
		28.	...	76	159.20	S. C. Kline.
		25.	...	77	65.	Robt. Flossen.
		30.	...	25291	153.	G. W. Nixon.
.....			...	92	33.75	J. B. Clish.
		1.	307	97	3,500.	
	Apr.	1.	...	25307	151.30	Jos. Clabby.
.....			...	8	45.	M. N. Brown.
.....			...	26	81.	A. R. Fisher.
.....			...	27	503.	L. S. Lormer.
		5.	44	44	29.50	
		19.	...	25345	108.70	E. F. Kibble.
		30.	308	78	1,242.20	Adam Frichey.
.....			...	79	300.	C. E. Fwrosburg.
		18.	...	25380	312.50	Southworth & F.

	May	2.	...	85	1,200.	John Price.
	Apr.	1.	...	88	800.	H. N. Woolman.
	May	5.	...	25394	65.70	
		1.	309	25417	348.20	G. W. Mayo.
		15.	...	18	394.60	Amos Miller.
'87.	May	15.	309	25438	733.	Jas. Bower.
		20.	...	43	187.95	S. F. Woods.
		1.	310	44	561.20	
		18.	...	25455	153.20	Dustin & Scudder
	June	1.	...	72	353.70	G. W. Mayo.
		6.	...	78	1,000.	W. H. Barstow.
		7.	...	79	1,432.50	T. W. Marsteller.
'86.	Oct.	2.	...	25707	73.10	Martha Rose.
.....		...		8	38.70	M. Decker.
.....		...		9	36.	J. M. Carter.
.....		...		10	91.90	D. E. Foristall.
.....		...		11	100.	do.
.....		...		12	28.	do.
.....		...		13	107.25	Thomas Porter.
.....		...		14	77.40	J. W. Wahl.
	Dec.	21.	...	25718	173.70	Sarah M. Bostad.
		22.	...	19	117.20	P. H. Friesen.
		28.	...	20	216.20	Jacob Brukle.
.....		...		21	80.	Chas. Rhodes.
		21.	...	22	80.	John W. Huff.
1849						
	Dec.	30.	310	25723	80.	P. Harden.
		29.	...	24	80.	Adam Frickey.
.....		...		25725	80.	Henry Treble.
'87.	Jan.	1.	...	25	11,810.97	Stark & Mosher.
'85.	Dec.	28.	...	28	129.90	T. W. Arkin.
'87.	Jan.	4.	...	29	71.20	M. Moore.
		1.	...	25730	135.	W. H. Jud.
		6.	...	2	70.	C. R. Dayton.
.....		...		3	56.	F. Wilkins.
		4.	...	4	16.70	A. Anderson.
		1.	...	25740	81.20	A. Fabrielle.
		5.	...	41	60.20	T. M. Brunbaugh.
		10.	...	25748	59.20	
.....		...		49	155.	
		8.	...	25750	286.	Samuel C. Kline.
		11.	...	54	80.	F. W. Klute.
		1.	...	55	37.50	S. T. Mermerald.
	Jan.	15.	...	58	116.20	Andrew Anderson.
		19.	...	59	225.	K. P. Townes.
		12.	...	25762	349.20	S. L. Young.
		21.	...	63	226.	Belle Seeley.
		21.	...	66	80	John Bishop.
		25.	...	67	415.20	G. Fast.
		1.	...	68	392.15	W. T. Scott.
		27.	...	25781	440.	W. Frelmeryer.

		1.	...	83	152.55	S. D. Jaynes.
		12.	...	84	83.20	Geo. K. Everts.
	Feb.	18.	...	86	144.20	A. Woehner.
		19.	...	87	700.	J. H. Pardew.
	Mch.	1.	...	25836	108.70	Aug. Engblom.
		30.	...	37	75.	M. S. Sweet.
	Apr.	1.	...	25842	25.	P. Kennedy.
.....			...	43	22.50	Chas. Vanburg.
	Mch.	31.	...	45	56.50	
	Apr.	5.	...	25884	84.20	P. M. Bramban.
		1.	...	85	79.20	J. M. do.
	Mch.	26.	...	86	109.	E. H. Hennings.
		30.	...	25895	150.15	
	Apr.	16.	...	25929	55.	Henry Jeffers.
		30.	...	95	133.50	
		30.	...	6	335.50	
	May	1.	...	26051	331.20	J. B. Stark.
	Apr.	12.	...	61	298.52	David Melg.
	May	6.	...	26065	239.95	R. H. Thayer.
		1.	...	75	83.20	Aug. Linsley.
		1.	...	26081	2,625.65	M. A. Meagher.
		1.	...	118	153.45	L. C. Nolan.
	June	1.	...	24	178.20	Jacob Workenstine.
		25.	...	26165	50.70	B. B. York.
		"	...	6	1,322.50	Adam Frickey.
		23.	...	7	60.	John Peters.
		14.	...	8	394.60	A. Miller.
		20.	...	9	84.50	T. J. Hunter.
		"	...	170	41.20	E. Farmer.
		27.	...	8	26.	Halstead & Smith.
		28.	...	9	70.05	H. F. Stibbs.
		30.	...	26182	312.50	Southworth & F.
		29.	...	3	363.70	G. W. Mays.
		28.	...	4	86.	W. B. Troutman.
'86.	Oct.	8.	...	26455	20.	Thos. C. Fagg.
'87.	Jan.	17.	...	57	490.	J. Peters.
		19.	...	8	165.20	C. F. Johnson.
		21.	...	9	72.	J. Barnston.
		22.	...	460	90.	E. D. Parson.
		24.	...	1	342.20	P. M. Blair.
		"	...	2	118.	J. Flynn.
1820						
'87,	Jan.	23.	...	26463	172.95	Jno. Boshman.
		28.	...	4	299.70	H. A. Johnson.
	Feb.	1.	...	65	100.	L. Worden.
		2.	...	6	173.70	Wm. Douty.
	Jan.	31.	...	7	118.23	Jos. Clabby.
		"	...	26468	299.20	S. E. & F. Mesick.
		29.	...	76	213.20	Wm. James.
	Feb.	9.	...	8	83.20	H. B. Gue.
'87,	Feb.	9.	...	26480	85.	B. Brabst.

.....	...	1	150.	R. Thesing.
	11.	...	3	50.	C. Casey.
	1.	...	4	100.	S. J. Bingham.
	12.	...	5	265.	D. Heaton.
	"	...	6	159.90	T. M. Galway.
	22.	...	26491	211.50	Peter Kelley.
	1.	...	2	140.	Butler.
Jan.	15.	...	3	20.	
	24.	...	4	43.	
	31.	...	26500	14.92	Geo. Flock.
Mar.	1	...	1	29.70	C. S. Holmbaum.
Apr.	28.	...	19	272.60	John Neville.
	29.	...	532	325.	O. P. Frank.
	28.	...	3	35.	L. M. Gunnell.
Mar.	7.	...	4	119.	H. Osterlock.
	7.	...	26567	175.20	Julia Corcoran.
Apr.	29.	...	76	319.	P. M. Wilson.
May	1.	...	7	65.70	W. Jacks.
	13.	...	26611	163.	Anton Wulff.
	1.	...	25	163.95	A. P. Hansen.
	19.	...	35	23.25	S. K. Gilbert.
	1.	...	26657	334.20	W. B. Rowalt.
	28.	...	70	107.77	Geo. F. Ingalls.
	31.	...	26693	65.	
June	1.	...	709	159.20	S. C. Kline.
	3.	...	10	105.29	H. O. Wright.
May	20.	...	11	29.78	J. W. Rush.
June	4.	...	13	24.25	Jos. Huskenthal.
	1.	...	14	300.	C. E. Fustellarg.
May	11.	...	23	145.	Martha Ross.
	9.	...	24	163.20	do.
June	1.	...	26725	29.50	E. C. Bibble.
	15.	...	26756	465.	Darrill & Heaton.
	1.	...	7	82.25	W. G. Wood.
	15.	...	8	237.70	Darrill & Heaton.
	13.	...	63	200.	C. M. Rogers.
	25.	...	75	100.	Henry Butler.
	28.	...	8	31.	B. Price.
	30.	...	784	513.90	J. F. McConaughy.
	29.	...	5	21.80	Oliver Baggs.
July	1.	...	26797	19.	
	9.	...	26804	20.	Jos. Bus.
	5.	...	5	299.95	R. H. Fair.
	7.	...	6	70.78	L. H. Donelson.
Jun-	14.	...	7	112.20	Jos. Smasalt.
Jul-	9.	...	8	1,000.	W. H. Barstow.
	1.	...	26816	210.75	J. A. Smith.
	1.	...	22	178.20	John Wolverstein.
	16.	...	3	10.50	Wm. Wertsband.
	14.	...	4	394.60	Amos Miller.
Aug.	1.	...	26852	32.60	John Neville.

'86.	Sep.	22.	...	27212	20.	V. H. Elery.
		"	...	3	71.50	J. C. Heinzman.
		"	...	4	41.	James Willes.
		"	...	27215	36.50	A. P. Meck.
		"	...	6	40.	do.
1821						
'86.	Sep.	23.	...	27217	78.	Emil Mungrush.
		"	...	8	190.	John Pierce.
		"	...	9	34.	do.
		"	...	222	340.	Elvi Dean.
	Oct.	2.	...	4	22.	D. B. Perrin.
	Sep.	17.	...	5	25.	H. Otterbach.
		25.	...	6	97.50	Martha & R. Ross.
		25.	...	7	64.	Wm. Price.
		"	...	8	16.75	N. Lackey.
		23.	...	27231	88.75	B. Keef.
		"	...	2	150.	N. Elliot.
		29.	...	3	89.50	J. A. Buckmaster.
		"	...	4	165.	P. Sewrtzer.
		"	...	35	275.	E. W. Newton.
		11.	...	7	45.	J. R. Stols.
		23.	...	8	85.75	Wm. Price.
		"	...	9	150.	Chas. Hattel.
		"	...	40	94.50	J. A. Woodruf.
	Nov.	9.	...	1	50.	
	Sept.	1.	...	2	15.	
	Dec.	21.	...	27241	80.	
'87.	Jan.	14.	7	80	.....	
		3.	...	8	80.	
		6.	...	9	80.	
	Apr.	1.	...	27305	117.70	John Vick.
	Mar.	17.	...	12	313.16	T. F. Carrol.
		1.	...	19	42.25	T. B. O'Brien.
		27.	...	28	75.	Jos. Allison.
		28.	...	37	574.13	Wm. Hice.
		30.	...	27344	47.80	
	June	1.	...	49	43.50	
	May.	30.	...	45	325.30	
		25.	...	27358	220.	H. Metz.
	Jun-	13.	...	91	502.75	—— Wolman.
		13.	...	27404	52.20	J. J. Wade.
		14.	...	5	103.	Nobes & Graw.
	"		...	6	107.50	G. Gross.
		1.	...	23	39.20	H. C. Churchill.
	May	25.	...	27452	23.90	
	Jun-	27.	...	27456	95.50	J. Pafferty.
		17.	...	7	192.20	P. Wilson.
		23.	...	8	354.	O. Bagg.
		1.	...	9	100.	W. J. Morrison.
		16.	...	60	34.20	J. Ingvelt.
		27.	...	27472	83.20	J. Chadd.

		18.	...	3	153.20	D. Scudder.
		27.	...	4	114.10	L. H. Mapps.
		6.	...	84	75.25	A. Probaska.
	July	1.	...	27516	24.	Chas. Vanburg.
		16.	...	7	100.	B. T. & W. H. Willis
		1.	...	8	3,500.	M. A. Frank.
		7.	...	46	212. 2	
		9.	...	7	171.	
		16.	...	27552	173.95	
	Jun-	20.	...	8	65.	Robt. Lloyd.
	Jul-	18.	...	9	2,387.20	John Price.
		30.	...	583	212.50	Southworth & Co.
		26.	...	4	84.66	C. Rhonds.
		4.	...	27594	225.	
	Aug.	5.	...	613	58.50	C. D. Hasp.
		6.	...	14	82.	J. E. Hunt.
	"		...	15	11.75	Sarah Bingham.
	Sept.	1.	...	25	82.05	W. G. Wood.
		9.	...	6	331.20	L. B. Stark.
		9.	...	7	82.20	A. J. Gillman.
1822						
	Sept.	1.	...	27632	519.36	J. F. McConaughy.
	Aug.	15.	...	53	10.50	
		13.	...	27672	394.60	Amos Miller.
		15.	...	3	110.37	Geo. F. Ingals.
		29.	...	77	167.20	Porter M. Blair.
	"		...	8	104.38	G. W. Mayo.
'87.	Sep.	2.	...	27688	63.	Johan Peters.
'86.	Oct.	1.	...	27959	31.70	W. A. Tomas.
	Sept.	25.	...	62	30.	Wm. Hammerman.
	Oct.	11.	...	28003	775.	
		2.	...	5	20.	—— Jennings.
		25.	...	15	271.	Samuel Runyan.
		28.	...	16	325.	S. R. Frazier.
	Nov.	6.	...	19	86.	F. Fratro.
	Oct.	27.	...	28026	125.	Burnhart & Kirker.
	Dec.	7.	...	7	160.	Sam B. Allen.
'87.	Jan.	12.	...	28031	100.	D. M. Russell.
		13.	...	33	80.	Wm. Beatty.
		12.	...	34	80.	John Dahlgren.
	"		...	35	80.	J. S. Keith.
		23.	...	28039	80.	
	Feb.	5.	...	41	100.	
	Jan.	22.	...	3	88.10	
	Oct.	2.	...	4	177.	
	Feb.	9.	...	45	221.25	
		10.	...	6	100.	
	"		...	7	27.75	
	"		...	8	60.	
	"		...	28049	18.	
		10.	...	51	71.50	

	"		...	2	53.35	
	"		...	3	71.	
	Jan.	27.	...	56	360.	W. Fredmeyer.
	Feb.	23.	...	7	100.	A. E. Pierce.
		22.	...	8	50.	W. H. Cramer.
		10.	...	28062	28.25	Jos. Boss.
		28.	...	82	4.	Geo. Ingals.
		3.	...	3	27.	O. P. Hager.
	"		...	4	26.50	N. Stockton.
'87,	Feb.	3.	...	28085	25.50	F. H. Nickerson.
	"		...	6	84.43	J. W. Hebrick.
	"		...	7	20.50	A. W. Hayes.
	"		...	8	38.	W. C. Churchill.
	"		...	9	15.30	
	"		...	28090	20.	
	Mar.	31.	...	3	160.20	
	Apr.	18.	...	28131	116.80	Jacob Heinricks.
	May	15.	...	3	115.	John Widle.
		23.	...	5	45.	J. H. Madison.
		10.	...	7	358.20	Chas. Dunburg.
	June	1.	...	8	101.50	W. Meredith.
	"		...	9	101.50	do.
	"		...	28140	119.20	
	May	31.	...	54	29.20	
	Jun-	15.	...	56	140.	J. Hullstead.
		28.	...	69	38.60	J. H. Rush.
		29.	...	74	89.90	C. H. Young.
	July	1.	...	8	395.20	G. Fast.
	"		...	9	56.50	John Ahsen.
	"		...	28195	29.45	
		5.	245	245	87.70	
		1.	...	28290	144.20	
	Aug.	1.	...	315	300.	C. E. Fassleberg.
	"		...	6	41.50	Jacob Butler.
		3.	...	28	232.80	L. S. Loomis.
		1.	...	28339	200.	C. Neville.
1823						
'87,	Aug.	8.	...	28351	116.20	
		22.	...	84	29.50	E. T. Kibble.
		26.	...	92	89.20	
		23.	...	3	159.90	
		26.	...	4	40.	
		22.	...	28395	16.	
		27.	...	28396	492.70	
		29.	...	405	187.95	
		30.	...	6	185.	O. Donald.
	Sept.	1.	...	18	42.50	F. P. Baker.
		1.	...	431	513.90	J. F. McConaughy.
		2.	...	2	225.	K. Treves et al.
		10.	...	33	142.95	E. Vandeventer.

	12.	...	28445	320.	
	"	...	7	82.	
	10.	...	8	27.50	
	16.	...	64	14.50	Herman Moyer.
	5.	...	5	212.	J. L. Enslow.
	17.	...	6	50.	Geo. D. Morris.
Jun-	5.	...	28473	525.45	Wm. Hesse.
Sept.	14.	...	8	167.20	Porter & B.
Sep.	22.	...	488	183.	—— Rush.
	13.	...	28499	349.20	
'86. Mar.	3.	...	702	175.	
Nov.	1.	...	21	419.70	Allen Hullstead.
'84. Jul-	8.	...	742	150.	
'86. Nov.	6.	...	3	376.25	
	10.	...	4	62.50	
	23.	...	28745	51.50	
	27.	...	69	52.50	Fred Southard.
	26.	...	70	230.	Robt. Ross.
	8.	...	9	30.	E. H. Jackson.
	12.	...	80	35.	Fenton Krabb.
	25.	...	28781	100.	J. A. Ellis.
'87. Jun-	11.	...	9	40.	
	12.	...	90	22.70	
	"	...	1	35.20	
	"	...	28792	36.50	
'87. Jan.	12.	...	28794	41.75	
	"	...	5	45.50	
	"	...	6	75.	
	"	...	7	36.70	
	"	...	8	25.50	
	"	...	9	80.30	
	"	...	28800	85.50	
.....		...	1	140.	
.....		...	2	80.	
	Feb. 3.	...	28806	100.	
	17.	...	21	86.50	A. C. Mahaffey.
	"	...	2	64.75	Wm. Aldrich.
	"	...	3	116.	G. W. Bowen.
.....		...	4	27.	James Beebee.
.....		...	25	33.75	W. H. Cook.
.....		...	6	27.	V. Deich.
.....		...	7	41.50	L. H. Donaldson.
.....		...	8	33.	L. O. do.
.....		...	9	34.75	F. J. Fergeson.
.....		...	30	33.85	S. P. Gregor.
.....		...	1	38.	Henry Grobe.
.....		...	2	148.	S. P. From.
.....		...	3	60.	Frank Moyer.
.....		...	28834	75.65	Jos. Boyer.
	May 27.	...	952	57.20	
	June 1.	...	54	160.	
	Aug. 1.	**...**	**74**	619.	James Beaur.

1824

'87,	Aug.	1.	...	28987	90.	E. D. Parsons.
		"	...	28909	213.20	W. Jones.
	June	6.	...	10	100.	Sarah Bingham.
	Aug.	11.	...	935	163.	Anton Wulff.
		1.	...	6	31.	Ben Price.
		"	...	7	334.20	W. B. Kunald.
		15.	...	29070	129.90	Patrick Haney.
		25.	...	99	76.	
		29.	...	29108	100.	
		1.	...	9	118.	Jas. & Jno. Flynn.
	Sept.	1.	...	15	220.	A. L. Johnson.
	Aug.	31.	...	16	173.	Wm. Dowley.
		21.	...	29138	1,345.50	—— White.
		1.	...	9	163.95	—— Hanson.
	Sep.	5.	...	29140	117.70	
		15.	...	64	31.50	F. O. Noogan.
		19.	...	71	159.20	S. C. Kine.
.....			...	72	115.20	do.
		22.	...	29181	161.	Jacob Wuskanten.
		26.	...	29194	239.	
		29.	...	201	70.78	
		30.	...	2	220.	
	Oct.	1.	...	17	320.	W. H. Cook.
		12.	...	29239	29.35	
		1.	258	300	300.	
		1.	...	29279	82.	E. Hunt.
		20.	...	87	31.	E. A. Spears.
		31.	...	88	368.	
	Nov.	1.	...	94	68.50	
'86,	Dec.	6.	...	29475	67.50	N. A. Dorsen.
		8.	...	6	15.	I. Whisleter.
		"	...	7	48.75	W. H. Willis.
		13.	...	8	342.90	W. H. Churchill.
		14.	...	9	80.	N. H. Willis.
'87,	Dec.	27.	...	29484	80.	W. H. Meyers.
	Jun-	14.	...	5	80.	J. H. Harmon.
	Feb.	4.	...	29487	125.	D. Mulhart.
'86,	Dec.	9.	...	89	116.50	
'87,	Feb.	10.	...	490	50.	
		"	...	1	16.85	
		16.	...	29496	8.	
		"	...	7	30.	
		"	...	8	42.	
		"	...	9	22.	
		16.	...	29501	13.	
		"	...	2	16.50	
		"	...	3	8.75	
		"	...	4	10.90	
		16.	...	5	50.50	
		"	...	6	31.	

.....	...	7	13.90		
.....	...	8	102.10		
.....	...	9	103.25		
.....	...	29510	37.50		
.....	...	1	25.		
'86, Dec.	11.	...	514	90.57	W. S. Ru-h.
'87, Mar.	7.	...	15	20.	Chas. A. Swan.
Apr.	2.	...	22	56.	Wm. Dotty et al.
	13.	...	29538	77.	
'86, Dec.	9.	...	51	60.	
'87, May	31.	...	54	614.20	
June	1.	...	569	300.	M. C. Frank.
		...	70	1 000.	do.
.....		...	71	700.	do.
	Aug. 26.	...	29599	697.20	
	27.	...	601	100.	
1825					
'87, Aug.	29.	...	29659	300.	G. Mavo.
	31.	...	29636	88.65	J. B. Trickey.
Sep.	12.	...	63	50.	G. Gross.
	15.	...	64	50.	H. Nobes.
	1.	...	67	65.20	L. M. Johnson.
	15.	...	68	21.50	O. Gillman.
	"	...	69	106.	B. F. Lewis.
	17.	...	29682	298.52	David Meloy.
	23.	...	709	74.40	
	29.	...	756	211.50	
Oct.	3.	...	768	47.80	Thos. Rea.
	18.	...	29801	200.	
	15.	...	2	24.75	
	8.	...	3	31.50	
	1.	...	11	29.50	E. F. Kibble.
	1.	...	12	187.95	S. F. Wood.
	26.	...	29	60.65	I. E. Phillip.
	18.	...	29830	116.80	Jacob Heindricks.
	28.	...	47	105.20	
	"	...	48	163.20	
	"	...	49	145.	
	31.	...	29852	513.90	
Sep.	18.	...	53	65.	
Nov.	1.	...	58	142.95	
	4.	...	29873	27.	John Bick.
	14.	...	87	322.60	
	16.	...	88	200.	
	17.	...	29889	27.20	
	28.	...	914	82.	J. E. Hunt.
	21.	...	15	31.	G. H. Spears.
Jun-	12.	...	992	80.	
.....		...	3	80.	
'87, Jun-	**13.**	**...**	**30327**	**80.**	**C. Burgess.**
	14.	**...**	**8**	**80.**	**W. M. Wabriah.**

		8.	...	9	80.	H. M. Diedrick.
		10.	...	30	80.	J. W. Parker.
		3.	...	1	80.	K. B. Brabham.
		15.	...	2	80.	F. Beatty.
		13.	...	3	80.	do.
		9.	...	4	80.	Bartholomew.
		20.	...	30336	80.	
		22.	...	39	88.	
	Feb.	3.	...	46	75.	
	Dec.	27.	...	41	500.	
		"	...	42	400.	
'85.	Apr.	1.	...	46	200.	
'87.	Feb.	23.	...	30356	125.	
	Mar.	8.	...	345	100.	
		7.	...	366	157.70	
		9.	...	30370	175.	Edmund Smith.
	Apr.	1.	...	402	115.	
	Mar.	1.	...	424	33.	Philip Kennedy.
	Total				338,844.14	

Total amount notes in Register "A"	$338,844.14
"2"	159,465.12
"3"	98,743.22
"4"	123,865.86
Grand total of	$720,918.34

1826 Q. Under the column which you designate as "name" to what do you refer?

A. That is the makers of the various notes.

Q. Mr. Jones you have heard the testimony here with reference to the credit to the account of R. C. Outcalt, treasurer under date of April 30th, 1891, and with reference to a purported transaction which the bank had with the Lincoln Gas Company, which it is claimed accounts for this credit, have you not?

A. I have.

Q. And did you hear the testimony of some of the witnesses for the defendants,—I think Mr. Thompson, in which he stated that on the first day of May, he on behalf of the Gas Company took a note for $10,000 into the Capital National Bank for rediscount, and that the Capital National Bank did rediscount it with the Cadiz, Ohio, bank, and that some four or five days later they were notified that the amount of the discount which was $375.00 was charged to the account of the Gas company. Did you hear that testimony?

A. I did.

Q. Have you examined the books of the bank, Mr. Jones, to ascertain if they show that a note for $10,000 was rediscounted by the bank on the 1st day of May, or within a few days after that, on behalf of the Gas company?

A. The books of the bank show no note of that kind at that date

or any other date near thereto received by the Capital National Bank.

Q. Do the books of the bank indicate that a note for $10,000 was rediscounted on or about the first day of May, or within a few days thereof?

A. They do not; neither do they show—I looked up the payment as they stated of $375.00 interest, both at the time that the
1827 note was given and at the time the note was paid and the books of the bank show that the bank received no interest on either date.

Q. Mr. Jones, did you hear the testimony of Mr. Yates with reference to a conversation you claim occurred in the Capital National Bank during the Fall of 1890?

A. I think I did.

Q. I will ask you if you can recall at this time any conversation that took place between you and Mr. Yates that calls to your mind the fact as to whether or not you did have a conversation with Mr. Yates at the time you spoke of?

Mr. BISHOP: Each of the defendants objects as incompetent, immaterial; not proper rebuttal, and as already gone into in chief.

Objection overruled.

Each of the defendants excepts.

A. Yes sir.

Q. What was it, give the circumstances.

Mr. BISHOP: The defendant Yates objects as incompetent, immaterial, and as gone into in chief and not proper rebuttal.

Objection overruled.

Each of the defendants excepts.

A. We were talking about our lameness; we are both of us a little crippled and I remember distinctly of talking about it, and the cause of our lameness, and I think he made the remark that we would make a good team,—in kind of a joking way, on account of our lameness.

Q. At what time did that conversation take place, Mr. Jones?

Mr. BISHOP: Each of the defendants objects as incompetent, irrelevant and immaterial, and not proper rebuttal.

Objection overruled.

Each of the defendants excepts.

A. It was the same time we were talking about the purchase of this stock in the million dollar bank.

1828 Q. Now, Mr. Jones, you heard the testimony of some of the witnesses for the defendants with reference to a room in the back end of the Capital National Bank, have you not?

A. I have.

Q. I will ask you if you were ever in the room at the back end of the room in which the Capital National Bank had its offices?

A. Yes sir, several times.

Q. Do you remember any particular time when you were there,—any particular instance?

A. I do.

Q. Well you may state when you were in that little room and tell how you happened in there, and how you remember it.

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, and not rebuttal.

Objection overruled.

Each of the defendants excepts.

A. The one instance I refer to was during the Republican State Convention at Lincoln at the time the candidates were Crounse and Tom Majors; they were both candidates for the nomination for Governor, and in the early evening the convention took a recess and I was requested to come over to the Capital National Bank during the evening and I did so.

Q. Give us enough of that to show what fixes the occurrence in your mind.

A. Well I was just requested to come there and talk it over and see if they couldn't get more of the Seward county delegation to vote for Mr. Majors; I was a Crounse delegate at the Convention.

Q. And you had a meeting in that regard?

A. We did.

Q. Where was that meeting held?

A. It was in this private room in the back part of the bank.

1829–1831 Q. The one that has been testified to as being next to the vault at the south end of the lobby?

A. Yes sir, it was used by customers for going in and looking over their papers, who had boxes there, and also I have been in that room several times and transacted business with both the president and the cashier. Sometimes I would be in Lincoln—on Saturday the banks closed at 1 o'clock; the front door would be locked, and any time after banking hours I would always go to this side door, and after banking hours business as a rule would be transacted in this back room,—I don't mean the business of the clerks of the bank, but if you wanted to see the president or cashier after banking hours that is where I have met them several times.

Q. Now at this political meeting how many were there,—as near as you can remember, in that room at that time?

Mr. Bishop: Each of the defendants objects as incompetent, irrelevant and immaterial, and not proper rebuttal.

Objection overruled.

Each of the defendants excepts.

A. I am satisfied that there were as high as ten or twelve in that room at that time.

Q. You may state what your best recollection is as to the size of that room.

Mr. Rose: Each of the defendants objects as the witness is not

qualified; incompetent, irrelevant and immaterial, and not proper rebuttal.

Objection overruled.

Each of the defendants excepts.

A. To the best of my recollection I would say that room was in the neighborhood of 10 x 12, or 12 x 14 feet.

* * * * * * *

1832 Q. I will ask you to turn to the account of the Farmers & Merchants Insurance Company with the Capital National Bank, the last week the Capital National Bank was open for business.

Exhibit "16-a" identified.

Q. Is Exhibit "16-a" contained in book identified as Exhibit x-64, the account to which I refer?

A. It is.

Q. And does that show the account of the Farmers & Merchants Insurance Company carried in the name of C. W. Mosher treasurer on Saturday, January 21, 1893?

A. It does.

Mr. THOMAS: We offer in evidence Exhibit "16-a."

Mr. ROSE: No objection to that.

Exhibit "16-a" received in evidence.

(Copy at next page.)

1833 "EXHIBIT 16-A."

Saturday, Jan. 21, 1893.

	Checks in detail	Total Dr	Balance.
	261.21		
Mosher, C. W., Treas.	300.		
	4.50		
	3,000.		
	3,082.65		
	3,000.	9,648.36	1,834.13"

Q. Now I will ask you, Mr. Jones, what the items, the following items appearing under the column "Checks in detail" namely, 3,000–3,082.65– and 3,000 indicate?

A. It indicates that checks of those several amounts were paid on the 21st day of January 1893 and charged to that account.

Mr. THOMAS: In addition to the offer we have made I want to include the indications at the top of the column in which the figures appear to show the nature of the items contained in the particular column, being the words "Checks in detail," "Total Dr." "Credits" and the "Balance" and ask to have the exhibit show the figures under those words.

(No objection.)

Q. I will ask you if on the 21st day of January, 1893, there appeared on the books of the Capital National Bank an account of D. E. Thompson, also indicated with the words "Hotel"?

A. Yes sir.

Q. What do the books show as the balance due that depositor on January 21, 1893?

A. Fifty-one cents.

Mr. THOMAS: We offer in evidence now Exhibit "a-17" together with the endorsement on the back of it.

Mr. ROSE: We have no objection to that.

Exhibit received (Being "Trust" Certificate, No. 88). (Certificate of stock, held in trust for Lora A. Thompson.)

(Here follows certificate of stock marked Exhibit A-17 at page 1834.)

Exhibit a-17

STATE OF NEBRASKA

THE CAPITAL NATIONAL BANK OF LINCOLN, NEB.



No. 88 — 20 Shares

This is to Certify that C. W. Mosher Trustee is entitled to Twenty Shares of **ONE HUNDRED DOLLARS** each of the Capital Stock of THE CAPITAL NATIONAL BANK transferable only on the books of the Bank in person or by Attorney on the surrender of this Certificate. subject to endorsement hereon

Witness the Seal of the Bank and the signatures of the President and Cashier this 22nd Day of November A.D. 1886

R. E. Outcalt Cash^r C. W. Mosher Pres^t

SHARES $100 EACH

This certificate is to be held by C. W. Mosher os his successor, as trustee, and the income from it paid to D. E. Thompson yearly or half yearly as demanded for the support and education of Lora A. Thompson, now about nine years old) until she is twenty years old, unless she marrries before that, and when she marries or arrives at twenty years of age this certificate is then to be delivered back to said D. E. Thompson, his heirs or assigns.

D. E. Thompson

I accept this trust,----------C. W. Mosher

1835 Witness Jones excused temporarily.

Mr. D. E. THOMPSON, recalled.

By Mr. THOMAS:

Q. I want to ask Mr. Thompson just a question or two at this time. Calling your attention to Exhibit "a-17" I will ask you to state if on the back of that is a contract which bears your genuine signature, and also that of Mr. Mosher?

A. Yes sir, I think so.

Q. You remember about that trust agreement do you?

A. Yes sir, I remember. Mr. Marquette drew that trust agreement.

Mr. Thompson excused and Mr. JONES recalled:

Q. I hand you Exhibit "X-27" being the stock book of the Capital National Bank and containing the stubs of the certificates, and also some of the certificates of stock, and ask you if you have examined that book?

A. I have.

Q. And the certificates in that book do they begin at No. 101 and numbered thereon consecutively throughout the book, as far as they are issued?

A. Yes sir.

Q. Up to what number?

A. 156 is the last certificate issued.

Q. And each stub from number 101 to 156 is numbered consecutively in their regular order?

A. I think they are.

Q. Now I will ask you if the certificates beginning with stub number 135 and continuing to 156 inclusive appear to have been issued and the stubs filled out showing that the certificates were issued?

1836 A. Yes sir.

Q. And what does stub No. 136 indicate?

A. It shows that the certificate of stock for 10 shares was issued to D. E. Thompson, November 14th, 1891.

Q. And what does No. 137 indicate?

A. That 180 shares of stock was issued to Mosher and Outcalt on November 14th, 1891.

Q. And then the stubs show certificates issued thereafter from time to time up to January 1893 to various parties?

A. Yes sir.

Q. Have the original certificates been separated from the stubs from number 128 to 134 inclusive?

A. No sir, they have not.

Q. They still appear in the original *sotck* certificate book?

A. They do.

Q. And you are examining them at this time while you are testifying?

A. They are, and I am.

Q. Referring then to the preceding number,—stub number 127, what does that indicate as to the issuance of the stock cetrificate?

A. No. 127 shows issued for 50 shares to James M. Miller, December 17th, 1891.

Q. What does stub No. 126 show?

A. That certificate was issued for 130 shares to Mosher and Outcalt on December 17th, 1891.

Q. And what does stub No. 125 show?

A. That 10 shares of stock was issued to J. B. Dodd, December 16th, 1891.

Q. And what does stub number 124 show?

A. That certificate was issued for 10 shares to J. B. Dodd December 16, 1891.

1837 Q. I will ask you in a general way if the stubs from number- 120 to 123 inclusive each show certificates of stock issued on December 16th, 1891?

A. They do.

Mr. THOMAS: We now desire to exhibit the stub book and the certificates to the court for examination.

Mr. ROSE: Each of the defendants objects as immaterial to any issue in this case, and not proper rebuttal.

Objection overruled.

Each of the defendants excepts.

(Stubs and certificates are shown to the court.)

Mr. THOMAS: We offer in evidence Exhibit X-1059 being a certified copy under the seal of the county clerk of Lancaster county, of a Bill of Sale from Mr. Outcalt to Mr. Thompson; also Exhibit No. X-1060, being a certified copy under the seal of the County Clerk of Lancaster County or a Chattel Mortgage given by L. P. Mosher and C. W. Mosher to D. E. Thompson; also offer in evidence Exhibit X-1060½ being a certified copy under the seal of the County Clerk of Lancaster county of the same chattel mortgage given by L. P. Mosher and C. W. Mosher to David E. Thompson; all these offers to include the endorsements and the certificates of the clerk and the statements showing the date of filing of the several instruments in the office of the county clerk of Lancaster county.

Mr. ROSE: To each of these exhibits each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid; too remote from the transactions of Mr. Thompson involved in this action, and not rebuttal?

Objection overruled.

Each of the defendants excepts.

Exhibits "X-1059," "X-1060" and "X-1060½" Received in evidence.

(Copies follow on succeeding pages.)

1838

Ex. 1060. O. P. H.

#51904.

Chattel Mortgage.

L. P. Mosher and C. W. Mosher
to
D. E. Thompson.

Filed Jan'y 23, 1893, at 8:30 A. M.

J. D. Woods, County Clerk.

Know all men by these presents: that we L. P. Mosher and C. W. Mosher, of Lincoln, Nebraska, for and in consideration of $2,500 to us in hand paid, by D. E. Thompson, of Lincoln, Neb., the receipt whereof is hereby acknowledged have bargained, sold and conveyed to said D. E. Thompson, his heirs and assigns the following mentioned goods, chattels and personal property towit: at present situated in the reception room in the dwelling house now occupied by the undersigned, at the corner of Fifteenth and K streets, in the city of Lincoln, Neb., this property viz:

2 Onyx top gilt table. 1 mahogony table, 1 mahogony cabinet, 1 blue satin corner chair, 1 gold colored reception chair. 1 oval back, red and gold easy chair. 1 large upholstered velvet trimmed lounge. one large upholstered velvet trimmed chair. 1 blue platform rocker. 1 brass reception chair. 1 yellow seated tete-tete chair. 1 hat rack. 1 small round mahogony table, 1 Marble statue called "Cat & Bird." 2 Marble statutes, called "dancing boy and girl." 1 large blue rug. 3 small rugs.

The following now situated in the Library in said house, viz: 1 Wall clock. 1 Corduroy upholstered lounge. 1 Marble top center table. 1 Copper, revolving chair. 1 Large rug. 3 small rugs. 1 Silver ebonized image of Columbus.

The following at present located in the sitting room in said house, viz:

1 Corduroy cushion, for window seat. 5 down pillows 1 "Karmick & Bach" piano and stool. 1 Blue upholstered arm chair. 1 Willow rocker. 1 red willow chair. 2 red leather bottomed rockers. 1 upholstered platform rocker. 1 large yellow rug. 1 Student lamp. The following at present located in the dining room and kitchen in

in said house, viz:

1839 1 Large oak dining room table. 8 Oak dining room chairs. 1 Large rug. 3 Small rugs, 1 Gas range and fixtures. 1 Coal Range and fixtures. 1 large ice box or refrigerator. 1 Small gas stove and fixtures. All cooking and kitchen utensils, crockery, and table ware, chinaware all silver and plated ware all table linen, 1 large mirror over mantel. Also the following, at present located in south bed room, in said house, viz:

1 large blue rug. 2 small rugs. 1 Large walnut bedste-d with mattresses, springs, bedding, pillows, sheets, blankets and covers of all kinds. 1 Walnut marble top dresser. 1 Walnut top washstand. 1 Set blue wash bowl and pitcher. 1 upholstered easy chair. 1 Upholstered chair. 1 Onyx top, silver trimmed table. 1 statute "Three Graces." 1 Red bottomed chair. all combs, brushes, hankerchief boxes in said room.

Also at present located in West bed room, the following, viz:

1 Large carpet rug. 2 Small rugs. 1 Brass bedstead with springs mattrasses, covers and bedding. 1 Large red upholstered platform rocker. 1 Large red upholstered easy arm chair. 1 Red upholstered lounge. 1 Large pier glass. 1 Mahogany dresser. 1 upholstered rocker. 1 Marble top table. 2 Marble Statues "Gladiators."

Also in the East bed room, in said house, the following, viz:

1 Walnut bedstead with springs, mattresses, covers and bedding. 1 Walnut dresser. 1 Cane bottom rocker. 1 Blue and Red upholstered corner chair. 1 Small book case. Also the following chattels in said viz: 1 Blue hassock. all hall and stair carpets and rugs. iron bedstead with mattrass and springs in girls' room, and all bedding therewith. Bedstead in man's room with springs, mattrass and bedding. all furniture in room occupied by hired man, and furniture in room occupied by servants. 1 Billard table, with
1840 balls and cues, and curtains window curtains and shades, portiers and curtain fixtures. All gas and electric light fixtures. All mantel ornaments, Clocks, 6 Common chairs. 1 Common rocker. All bath room furniture and appliances. The intention being to hereby sell and convey all the furniture and personal property in said house of every kind and description, save personal ornaments and clothing, whether herein specifically enumerated or not, and excepting therefrom family pictures and personal presents; also the following other personal property now in the barn adjacent to said dwelling house.

1 Phaeton, two seated, 1 Light buggy. 1 Pony cart. 1 Small sleigh. 3 sets single harness. 2 Sets double harness. All curry combs, brushes, and horse furniture and belongings, in said barn. 1 horse, bay, called "Doc". 1 Bay mare called "Cora." Said horses now being used by undersigned. 2 Small ponies, called Tom and Don. 2 Geldings now with W. H. Dorgan, and bought of Church Howe, at his auction held at fair grounds near Lincoln. 1 Cow. 1 iron yard sette-. 1 iron yard chair. 2 Iron porch chairs. 2 Iron porch settees. All yard ornaments. Lawn mowers, rakes, wheel barrows, yard and barn tools. To have and to hold said property unto said D. E. Thompson, his heirs and assigns forever.

The conditions of this conveyance is that whereas heretofore the said D. E. Thompson, caused a certificate of stock of the Capital National Bank of the face value of $2,000 being certificate No. 88, to be issued and delivered to said C. W. Mosher, as Trustee for Lora A. Thompson said Mosher to hold said certificate and to pay the income thereof and dividends thereon to said Lora A. Thompson, until she should ar-ive at the age of 18 years and then to deliver said certificate to said D. E. Thompson, his heirs or assigns. Now if the

said Mosher shall pay to the said Lora A. Thompson, the
1841 dividends on said stock, which said Mosher guarantees shall equal $200 per year and when said Lora A. Thompson arrives at the age of 18 years, shall return said stock or its par value $2000 to said D. E. Thompson, and shall save and hold harmless, the said Lora A. Thompson, from any loss whatever on account of said stock, and shall pay to her said dividends or $200 per year until she arrives at the age of 18 years and shall then return said stock *or* its par value of $2,000 as said D. E. Thompson may elect to said D. E. Thompson, then this instrument shall be void, otherwise in full force and effect. If the said D. E. Thompson shall at any time feel himself insecure or unsafe then he may take and sell said property either at public or private sale, and from the proceeds thereof pay to said Lora A. Thompson the sum she would be entitled to, to be arrived at by multiplying the number of years that must elapse before she arrives at the age of 18 years, by $200 and pay said sum to her or to such other person as he may select for her, and also pay to himself the sum of $2,000.

In Testimony whereof said parties have hereunto set their hands this 27 day of December 1892.

Signed in duplicate.

LOUISE P. MOSHER.
C. W. MOSHER.

STATE OF NEBRASKA,
Lancaster County, ss:

No. 51904.

I, A. M. Trueble County Clerk of said County, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County this 27th day of February A. D. 1899.

[SEAL.] A. M. TRUEBLE.
County Clerk.
WELLS, *Dep.*

1842 Ex. 1059. O. P. H.

51908.

Bill of Sale.

R. C. Outcalt to D. E. Thompson. Filed Jan'y 23rd, 1893, at 8.30 a. m. J. D. Woods, County Clerk.

Bill of Sale.

Know all men by these presents: that I R. C. Outcalt of Lincoln, Nebraska, for and in consideration of the sum of $12,500 to me in

hand paid by D. E. Thompson, do hereby sell, assign, transfer and set over unto said D. E. Thompson the following described personal property to-wit: One Stallion, called "Industry," bay color, small strip in face, white hind ankles, foaled May 18, 1886; One bay colt, small star, both hind feet white, foaled March 14, 1890, called "Burlock."

One dark bay mare, without marks, foaled May, 1877, called "Edna."

One chestnut mare, foaled in 1877 called "Lena Carey."

One bay mare, star, two hind feet white, foaled April, 1882, called "Bettie Medium."

One bay filly, one hind foot white, foaled 1887, "Allice McMahan."

One bay mare, hind feet white, foaled 1886, "Tremont Queen."

One bay filly, little white on hind foot, foaled 1887, "Medium."

One bay filly, blaze face, hind legs white, foaled 1887. "Lady Burnham."

Bay mare foaled 1882, "Dollie McGregor."

Chestnut filly, foaled 1887, blaze face, "Girly King."

Bay filly, foaled 1888, "Jennie McAfham."

Chestnut filly, not named, foaled October, 1889.

Bay filly, foaled July, 1889, called "Gracie."

Bay filly, one hind foot white, foaled 1889, called the "Dutchum."

Bay filly, no name, no white, foaled June 9, 1890, called the Druse filly.

Bay filly, foaled May 17, 1890.

Bay sucking filly.

Chestnut filly, called "May Stoddard."

1843–1847 Chestnut yearling filly, called Kate Leonard.

Chestnut filly, foaled June 30/90, called Mary Beeber.

One bay filly, foaled June 7/91 called Emma De Forrest.

On dark bay filly, foaled Apl. 12/92, called George Moore.

One bay filly called Brownie Bess, foaled Mch. 22/92.

One bay filly foaled Apl. 14/92, called Nashville Queen.

One bay filly, foaled Apl. 3/1892, called Louisa Burnham.

One bay colt, foaled June 22/92, not named.

One brown mare, 12 years old, called Jennie Lynn.

Five carts. (Road.)

One light wagon.

One hundred tons timothy hay, baled and unbaled.

Two thousand (2,000) bushels oats.

All harness, horse boots, two sulkies.

Black filly, 2 years old.

All of the foregoing personal property being on the farm of the undersigned, about 5 miles south of the city of Lincoln, known as Grassland stock farm. To have and to hold the said property unto the said party of the second part, his heirs and assigns forever.

And I do hereby covenant to warrant and defend said property against the lawful claims of all persons whomsoever.

Witness my hand this 24 day of Dec., 1892.

RICHARD C. OUTCALT.

STATE OF NEBRASKA,
Lancaster County, ss:

I, A. M. Trueble, County Clerk of said County, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office.

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said County this 27th day of February, A. D. 1899.

A. M. TRUEBLE,
County Clerk.
WELLS, *Deputy.*

* * * * * * *

1848 Q. I will ask you if you have examined the books of the Capital National Bank to ascertain if the First National Bank of Crete, Nebraska, had an account with the Capital National Bank, or any money on deposit with it at or about the time of the failure of the Capital National Bank?

A. No, sir, it had not; the account had been closed out some two months, or such a matter, prior to the closing of the bank.

Q. I will ask you if you have examined the bank of the Capital National Bank to ascertain if the First National Bank of Fairbury, Nebraska, had an account with the Capital National Bank, or any money on deposit with it at or about the time of the failure of the Capital National Bank?

A. It had not.

Q. Did you examine to see?

A. I did.

Q. And it had no money on deposit with the Capital National Bank?

A. No, sir, not at the time of the failure.

Mr. ROSE: Had it previously?

A. That account I ran back three months; I didn't go back of three months.

Q. Hadn't had any within three months?

A. No, sir.

Q. Have you examined the books of the bank with reference to the day that the two notes of $6,500 each executed by Walter T. Scott appear to have been taken into the bank?

A. Yes, sir, I did.

Q. What was the date that the books show those two notes to have entered the bills receivable of the bank?

A. August 29th, 1891.

1849 Q. I will ask you to state if you have examined the books of the bank to ascertain if any notes of this same party, Walter T. Scott, are shown by the books of the bank to have been paid and cancelled?

A. Yes, sir, I did.

Q. You may state the result of that examination.

Mr. ROSE: Each of the defendants ofject- as immaterial.

Objection overruled.

Each of the defendants excepts.

A. The books show that notes of Mr. Scott was paid on that day aggregating $18,133.53.

Q. Can you give the items of that aggregate?

A. I can.

Q. First I will ask you,—you ascertained this from an examination of the books of the bank that are here in court at this time?

A. Yes, sir.

Q. May may state the items that constitute that aggregate.

Mr. Rose: Each of the defendants object as immaterial.

Objection overruled.

Each of the defendants excepts.

A. $3,839.16—$2,500.47—$2,788.80—$5,291.90 and $680.20.

Q. Do each of those items refer to a separate note?

A. Yes, sir.

Q. Do the books of the bank show that the Capital National Bank had that date and prior thereto held those several notes as a part of its assets and bills receivable?

A. It does.

Q. And show them to have been notes executed by Mr. Scott?

A. The books show the notes in the name of Scott, yes, sir.

Q. The books show that?

A. Yes, sir.

1850 Cross-examination.

By Mr. Rose:

Q. You went all through the Scott transactions, didn't you?

A. I can't say that I did.

Q. Did you go far enough back when his indebtedness first initiated on or about May 25, 1887, when Mr. Scott left the bank; it was then some $7,463 wasn't it?

A. As far back as I went in Mr. Scott's account was at the time that the mortgages which he gave for the purchase of Block, I think No. 24 in Kinney's "O" street addition, was purchased by the bank and assigned to the bank.

Q. First,—did you go far enough back to see when his first note went into the bank?

A. No, sir.

Q. Do you know when his first note went into the bank? Or what the amount of it was?

A. I have no recollection.

Q. You spoke of the Thompson hotel account. Isn't it a fact that the 51¢ balance had shown there from the date of January 14th, 1893, without any change? That is to say, beginning on the 15th day of January?

A. Yes, sir, it was checked down to that, and shows on January 16th.

Q. What was the balance of his hotel account on January 3rd?

A. The opening or close of the day's balance?

Q. At the close,—at the time of the balance?
A. $1,532.51.
Q. What was it on January 4th, at the time the account was balanced that day?
A. $1,459.14.
1851 Q. What was it on January 5th of that same month?
A. $1,414.66.
Q. And on the 6th?
A. $1,404.66.
Q. Mr. Jones, you found that three checks aggregating upwards of nine thousand dollars had been withdrawn from the account of the Farmers & Merchants Insurance Company on the 21st day of January, 1893?
A. I showed that there were three checks paid and charged to the account.
Q. Now did you check out Mr. Thompson's statement far enough to see whether the Union Savings Bank took credit for one of those items on the same day, the item of $3,035 or $3,082.65 on that day?
A. It did.
Q. You may examine the books and see if the Lincoln Savings Bank took credit for an item of $3,000 on that same day?
A. There is a credit of $3,000.
Q. Now did you examine the books and check out to see as to whether the Aurora State Bank, of which Mr. Thompson was President, had a balance at the time this bank suspended—had a credit of $7,245.65?
A. I think that is correct.
Q. Did the Lincoln Gas Company, or R. C. Outcalt treasurer have a large balance?
A. $13,823.82.
Q. You examined the books that Mr. Honeywell left pertaining to the item of the Cadiz National Bank of $10,000; took a recess and examined the books pertaining to that item, didn't you?
A. No, I was in the room there with Mr. Thomas; he was examining the books, and they were carried away and I haven't
1852 seen them since.
Q. Well you examined them with reference to that item?
A. I was in the room with Mr. Thomas and the books, but he done the most of the looking.
Q. Did you check up to see whether the Cadiz item was entered and charged to the Capital National Bank?
A. No, sir, I didn't check out the account; I didn't have time.
Q. You found the item entered there?
A. I made no examination that day.
Q. But you made enough to find the item entered there?
A. No, sir, but understand me to say that I don't say it isn't there.
Q. You don't say that it is not there.
A. Oh, no.
Q. In commercial usage along in the year 1891—I guess that was the year—three days of grace were allowed for payment on all commercial paper?

A. Yes, sir.

Q. What would be the amount of discount on a $10,000 note six months at 8%?

A. Four hundred dollars.

Q. That would be exclusive of the three days of grace?

A. Three days' interest is customary to be added to; never deducted from.

Q. That's what I mean.

A. Yes, sir.

Q. So that three days' interest would be added to the $400?

A. Yes, sir.

Q. So the discount if the note was 8% would be over $400?

A. Now then here, so we won't misunderstand one another,—where a note is made and interest figured up it is to a certain

1853 date,—the three days' interest would be added to the amount of interest; if a note was given for rediscount, and the bank would rediscount it, they would figure the note as it appeared without the three days' grace, I would think.

Q. I am talking about the original discount, would it be six months and three days?

A. Yes, sir, I think that is right.

Q. Now suppose the Cadiz National Bank had been the original payee of the note, and Mosher had taken it and forwarded it as an intermediary or broker, and the item had never been taken in as an asset of the Capital National Bank, then it should not be entered on the books of the Capital National Bank should it?

A. Oh, no.

Q. That wouldn't be a rediscount would it?

A. No, sir.

Q. And if it was carried in that way by the Cadiz National Bank there would be no interest earnings to the Capital National Bank?

A. I would think so, for the reason that I understand that no bank has a right to rediscount and guarantee without receiving some compensation for it.

Q. I am assuming there is no rediscount and no guarantee.

A. But in this instance it was so stated that the note was given the Capital National Bank for rediscount.

Q. You are evidently overlooking the testimony of Mr. Honeywell. I am saying that supposing it wasn't a rediscount and the Capital National Bank never assumed any liability as endorser, but the money was borrowed primarily from the Cadiz bank and the Cadiz bank was the payee named in the note then there would be no interest earnings to the Capital National Bank?

A. No, sir.

1854 Q. So in that case the register of bills receivable wouldn't show the transaction, and no interest item would enter into the records of the Capital National Bank legitimately?

A. No, bills receivable wouldn't show any notes in that account unless they belonged to the bank, or had been rediscounted by the bank.

Q. Now, if you haven't examined those books—we didn't offer

them in evidence. But I refer to this book, the correctness of which Mr. Honeywell verified. Under date of May 1st did you find an entry that indicates a rediscount, or an original discount to the First National Bank of Cadiz?

A. The line to which you refer says "Capital National Bank 6 months, 8 per cent, First National Bank, Cadiz, Ohio," to Bills payable $10,000.

Q. So the charge is made of the cash on the date, in the Journal, to the Capital National Bank, isn't it?

A. I would say that was the intention of that entry.

Q. And a counterbalancing charge is to Bills Payable, indicating the particular note?

A. Yes, sir.

Q. So that one item indicates the deposit of $10,000, and the other indicates the source from which the deposit was made?

A. One shows a credit of $10,000, and the other specifies a note of $10,000.

Q. They counterbalance. Now turn to May 30, '91, and see if you find an entry in the books of the Gas company indicating interest paid on the Cadiz note.

A. The line to which you have called my attention says "Cadiz note, Capital National Bank, $406.67."

Q. What account took credit for it?

A. It says "Interest."

1855 Q. It is charged to interest and credited to the Capital National Bank?

A. Yes, sir, there are two such items as you speak of.

Q. Now check over the description of the note, a six months 8% and see if that item of interest would exactly correspond with the interest for the term with three days of grace added.

A. Without figuring my judgment would be that it would be very close; but the item to which my attention was called was $375, and not this item at all.

Q. The $375 couldn't have covered the interest on that; it would have been deficient.

A. Yes, sir.

Q. Did you examine the books of the Capital National Bank far enough to see whether they indicate that the construction work of the Gas company had been financed by the Capital National Bank out of the bank's funds?

A. I have not.

Q. I also refer you to the ledger, the entries in which are verified by Mr. Honeywell and shown to have been in his hand, at page 81 in the Interest account. Do you find any reference to the item of $375?

A. I see it says "note do. 57 $375," and then opposite that has been written in in lead pencil the word "error."

Q. See if you find any counterbalancing entry on account of the error, and see when it is made and see what the entry is?

A. Do you want me to look down and find an amount that will agree with that?

A. Yes, sir.

A. Under date of the 17th, Cadiz interest charged $375.

Q. That counterbalances the first charge doesn't it?

A. There is nothing to indicate that that is the same; there is simply the word "note" written in there and in lead pencil the word "error."

1856 Q. That is the original charge and this is the credit back of the item isn't it?

A. The amounts agree, that is all I can say; there is nothing on the book to indicate it is the same transaction.

Q. Do you find the Cadiz note?

A. The line to which you now point says "May 30, Cadiz note, 57, $403.67."

Q. And that would be the interest for six months, as we have stated. What made you assume that this was a rediscount, Mr. Jones?

A. Just what the record shows.

Q. No record in the books that shows it is there?

A. The testimony in this case,—that is my recollection of it.

Q. You refer to some testimony that was given by Mr. Thompson on cross examination, and not to the examination in chief, or the testimony of Mr. Honeywell?

A. That was my recollection as to the testimony; I couldn't say whether it was in chief or cross examination, but it was on that that I made the investigation, because I saw at a glance that the amount wasn't the correct amount of interest.

Q. Do the books of the Capital National Bank show that the collateral securities as such were listed in the discount register?

A. In many cases it will show. I suppose you have reference to——.

Q. Whether when a principal note that is an asset of the bank is listed on the register was there any indication that it bears collateral security,—are the collateral securities also listed on the discount register?

A. I have never found any list of collateral securities what

1857 I mean—opposite the note on your discount register it shows in many cases whether it is by endorsement collateral,—if collateral it is simply the word "coll".

Q. And the discount register is used so far as you observed to record the paper which purports to be a primary asset of the bank?

A. Yes sir.

Q. So that it would not be proper in that register to record the primary asset and also the security; that would tend to greatly increase the colorable assets of the bank?

A. If they were charged in both instances, it would.

Q. And at that time it wasn't the general custom of banks, in keeping their records,

A. No sir, I should say if that was done it would be the exception, but I will say further it is easy to detect whether it is collateral, or one of the notes of the bank, because if it is one of the notes of the bank it bears the bills receivable number, and if it is collateral, it wouldn't.

Q. At least it couldn't bear any other number than the number of the primary note?

A. I don't get your meaning.

Q. That is if you had note number 5200 secured by collateral, the collateral could only bear the number 5200.

A. No sir, it never would bear a number like that.

Q. There was no system of registering collateral in any account in this bank, so far as you have discovered?

A. No sir, I have never discovered an account of that kind.

Mr. ROSE: That is all.

1858 Redirect examination.

By Mr. THOMAS:

Q. Mr. Jones, referring to this same transaction of the Gas company account, let me ask you this? If a transaction were as supposed in the interrogatory of counsel, that is, if the Gas Company had brought their note into the bank on the first day of May 1891 and asked the Capital National Bank to discount it at the Cadiz bank as a mere accommodation, would there have to be some entry on the books, and if so what would there be?

A. There would have to be a counter entry to take the place of the credit given to the Gas company.

Q. If the Gas company were credited with $10,000 and the Cadiz bank were not charged with a like amount, how would that have to be carried in the bank in order to keep the books in balance, or the cash in balance?

A. It could only be done by a fraudulent entry of some kind.

Q. How could it be done?

A. The easiest way would be by a cash slip carried in the cash until something would take its place.

Q. You mean if $10,000 was credited to the Gas company and they had taken a note to negotiate for them as an accommodation that they would have to carry a slip for $10,000 as cash until they received returns from the Cadiz bank?

A. Yes sir, or in some other way. There must be some corresponding entry for the credit given to the Gas Company, or the books would be out of balance to the amount that they had credited the Gas company.

Q. The notes under the head of Stark & Mosher, or E. W. Mosher that were referred to in the schedule identified this morning—do you say those are entered as original notes or as collateral?

1859 Q. What do you mean then by the discrimination of collateral, that is when a note is entered on the register and is secured, by a notation it is marked "coll." as an abbreviation for collateral?

A. In some instances.

Q. Have you ever found anything more than that to indicate collateral for bills receivable in the bank?

A. As I stated I have never found any list of collaterals in the books that I have examined of the Capital National Bank.

Q. Now when you were on the stand before the noon recess you were asked something with reference to having made investigations as to bills receivable of Walter T. Scott that entered into the bank prior to 1887. Have you since then made any investigation of that kind?

A. A little. Just a few minutes that I had time before they called me in court.

Q. And did you find that any bilss receivable of Mr. Scott entered the Capital National Bank?

A. Yes sir. I found record of several Scott notes prior to the date which he called my attention to.

Q. Prior to May 1887?

A. Yes sir.

Q. And you spoke this morning with reference to some real estate transaction. Do you know when it was that the real estate you spoke of which went to the bank ultimately when it was that that came to Mr. Scott?

1860 Q. You may state what you know about that.

A. I examined the records of Lancaster county and traced the notes and mortgages from Mr. Scott to the persons they were payable to and to the bank and one of them was assigned direct to the bank and the other was assigned to Mr. Richards and then to the bank.

Q. When did Mr. Scott first get a deed to this block in Kinney's addition?

A. The record shows that the Charles B. Pickrell deed to Walter Scott of an undivided one half interest in Block 24 Kinney's "O" street addition,—the date of the deed is July 5th, 1886; acknowledged the same day, and filed March 8th.

Q. What is the consideration recited?

A. $5,000.

Q. Do you know when he bought the other undivided one half?

A. I do.

Q. When was that?

A. The date of the deed was February 11, 1888, and filed March 7th, 1888.

Q. What was the consideration?

A. $5,500.

Mr. THOMAS: I wish to recall the witness.

1861 Q. Now Mr. Jones, when did you first meet Mr. Scott since the last trial, or since the failure of the Capital National Bank?

A. I met Mr. Scott a number of times, just to pass him on the street and pass the time of day, and so forth, but I suppose what you have reference to is in regard to this trial.

Q. Yes, that's what I mean.

A. That was, I should say, the early part of November.

Q. Of what year?

A. Of last year, 1910.

Q. Prior to that time had you ever talked with Mr. Scott anything concerning this case or of any evidence with reference to it?

A. I never was able to get him to talk in regard to it until this conversation.

Q. How long after that was it that Mr. Scott came to Seward?

A. Just a few days.

Q. Where did you meet him at that time?

A. On "O" street.

Q. In Lincoln?

A. Yes sir.

Q. Well had you had any pre-arranged meeting, or just met him casually?

A. No sir, it was an accidental meeting, and we passed the time of day and I went to talking to him about the Capital National Bank and made some statement in regard to some things that the books showed, knowing that he had been a bookkeeper in the Capital National Bank at one time.

1862 Mr. BISHOP: That has all been gone into.

A. —And it drifted along until I made some statement and he said he didn't think they would show that and I told him I thought they would.

A. And he said he didn't think the books would show that or he could remember it, or something of the kind, and if he could see the books—and I told him I had the books at Seward, and the result of the conversation was that he came to Seward.

Q. How did he happen to come to Seward, who arranged to have him come, and give the circumstances.

A. It was the outgrowth of that conversation: I made some statements of what—thought the books showed and he didn't think they did and I told him I had the books and he said he would like to see them, and I told him I would like to have him, and he came down in a few days.—I think two or three days after that.

Q. At that time, Mr. Jones, had you had any conversation with him or had he said anything to you with reference to the evidence that he gave at this trial?

A. No sir.

Q. When did you first know that he knew anything about the history of the Capital National Bank?

Q. Or the testimony that he gave here at the trial?

1863 A. It took place in this way——

Q. Can you give the circumstances?

A. Yes sir. He came to Seward and examined the books in that little room there (indicating) for some little time, he and I together and he went to telling about the bank in different ways and I called Mr. Thomas over and the three of us talked together and then it developed during that conversation that there was some cases on and he made the statement that if he had known that he never would have come down here, and I was going to say the testimony that he

gave was,—I don't know, brought out in the conversation just as between people referring to any subject they are talking about.

Q. What I want to get at is to tell the Court whether the matters that he testified to here was elicited by you or anyone else or just came out while he was telling the story of his life and the time he went to Lincoln, or Lancaster county, and his troubles and things of that kind?

A. It had to come from him because I knew nothing about his transactions and many things in the book or anything about it until he told of it and it was all news to me and I want to say that I was surprised at the amount of knowledge that he seemed to have in regard to the bank affairs.

1864 Q. Prior to the talk with Mr. Scott had you ever heard anything about any meeting of the board of directors to which he testified, or his transactions with Mr. Mosher in regard to getting these notes of his?

A. No sir, it was the first I ever heard of it.

Mr. THOMAS: That is all.

Recross-examination.

By Mr. ROSE:

Q. You and Mr. Whitmore were both in the room when Mr. Scott was there, weren't you?

A. Part of the time.

Q. And you had Scott come back again before this trial?

A. Yes sir.

Q. How many times had he been here before this trial?

A. Two or three times,—that is my recollection.

Q. So you pur-ued him a little, after the time of the first talk did you, to get him to come back again?

A. Yes sir.

Q. And you got him back here with Whitmore, didn't you—was Whitmore here the first time he was here?

A. I am inclined to think that he was.

Q. And you and Mr. Whitmore assisted him to look over the books and tried to get him to explain some entries didn't you?

A. To a certain extent, yes sir.

Q. But you couldn't get anything out of him about his conduct with the bank, could you?

A. Yes sir.

Q. Well you got so little out of him that you thought he
1865 was either a knave or a fool?

A. Oh no, I wouldn't put it that way.

Q. And didn't you say so among your-elves, that he was either a knave or a fool?

A. No sir.

Q. You considered among yourselves whether he was a knave or a fool?

A. No sir.

Q. All the circumstances of his conduct, from those books in-

dicated to you that the fellow wasn't quite right somehow, didn't they?

A. No sir.

Q. Now when he was here testifying, you got a list of his notes, kind of a schedule of them, and gave it to him didn't you?

A. No sir.

Q. Took him into the room there and checked over dates before he testified?

A. In that little room?

Q. Yes sir.

A. Yes sir, he was in there.

Q. You took him in there and checked over the entries of his own notes, didn't you?

A. I remember that he brought some notes with him that I went in there with him and checked over those notes to see whether the paid stamp agreed with the date on which they were carried on the journal. The reason of that was that sometimes all the business of the bank doesn't appear on the books of the bank of that date; if the transaction occurred near the close of the day that transaction might be carried over for the following day.

Q. They would just keep them in suspense until the next day and enter it on the next day's business.

1866 A. Yes, sir.

By Mr. THOMAS:

Q. Mr. Jones, when Mr. Scott was here the first time did he have the old notes that he brought up later, that he had here at the trial?

A. Oh, no.

Q. They were brought up at a subsequent trip?

A. Yes sir.

Q. Now Mr. Jones, when Mr Scott first told you about the details of his transactions with the Capital National Bank, when he bought the property and gave these notes and all the circumstances had you then examined the records either of the bank or anywhere else, or shown them to Mr. Scott or given him any information whatever as to when they occurred or what they were?

A. No sir. I want to change that answer in this respect: I did talk to him about his two $6,500 notes, but that is the only thing that I had talked to him about.

Q. Had you at that time said anything to him, or did you then know anything whatever about his transactions preceding that with reference to having bought real estate and given mortgages, and conveyed real estate to the bank, or anything concerning anything that he testified to here?

A. No sir, I never knew anything of it until he told me about it here in the court house at Seward, Nebraska.

1867 By Mr. ROSE:

Q. I want to ask Mr. Jones one more question. Did you examine the records to see who conveyed to the city of Lincoln and whose deed recited the consideration?

A. I don't understand your question. Who conveyed what?

Q. Who conveyed portions of this property, lots seven and eight, in the city of Lincoln, for the engine house?

A. I don't know as I understand yet what you mean by that.

Q. This same block you have testified to, Block 24 Kinney's "O" street addition. Did Richard C. Outcalt convey lots seven and eight to the city of Lincoln?

A. I think that is right. I think Mr. Scott made a deed to the bank as security for what he was owing the bank, and later it was conveyed back and he gave a mortgage.

Q. Who deeded to the city of Lincoln, Outcalt?

A. That would be my impression.

Q. Who deeded to Crandall,—who executed the warranty deed to Crandall for $7,000?

A. I couldn't say, Mr. Rose. I noticed there were two conveyances made out of this block, but I didn't make a memorandum of that because I thought it wasn't anything that concerned the Capital bank.

Q. It might show how this $18,000 of indebtedness was reduced to $13,000.

A. It might, but I didn't follow up those deeds.

Witness excused.

1868 Mr. DENNIS SAYLOR, called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. THOMAS:

Q. State your name.

A. J. H. Saylor.

Q. What official position,—are you the county clerk of Hamilton county at this time?

A. Yes sir.

Q. How long have you been county clerk of that county?

A. I was elected in the Fall of 1907.

Q. Have you with you and now in your possession any of the records of Hamilton County, Nebraska?

A. Yes sir.

Q. I hand you a book which purports to be Book of Registration of Hamilton County, and will ask you if that is one of the books and documents and records of your office as county clerk of Hamilton county?

A. Yes, sir, it is.

Q. And is it one of the books and records that is kept in the regular routine of your office?

A. Yes sir.

Q. You may state what sort of entries are made in that book, what it contains?

A. It contains the entries of mortgages and deeds and releases.

Q. And what does that book show in that regard?
A. It shows the name of the grantor and grantee.
Q. And character of instruments?
A. Character of instrument, and the date of filing, and the kind of instrument and the date of mailing out.
1869 Q. Does it show to whom delivered?
A. Yes sir.
Q. And the date delivered?
A. Yes sir.
Q. Now I will ask you to examine that book and see if you can point out to us if there were any deeds filed in the office of the county clerk,—first, I will ask you in whose handwriting that book was kept?
A. Mr. L. W. Shuman, county clerk at that time.
Q. You knew him to be county clerk at that time?
A. Yes sir.
Q. I will ask you to see if there were any deeds filed for record in the office of the county clerk of January 19, 1893?
A. Yes sir.
Q. You may give the description.
A. There is one deed here from the Capital National Bank to Charles W. Mosher, Quit Claim deed, recorded in deed record "Q," page 355.
A. The date of the filing was January 19th, 1893. After it was recorded it was mailed back to George Sanford, York, Nebraska.
1870 Q. On what date?
A. On February 7th, 1893.
Q. Do you find any more filed on that date?
A. On the same date, January 19th, 1893——
A. —two warranty deeds from Charles W. Mosher and others to the Capital National Bank, filed January 19th, 1893; mailed back February 17th, 1893, to George Sanford, York, Nebraska.
Q. Where were they recorded?
A. Recorded in deed record 11, page- 416 and '17.
Q. Was there any other deed filed that day?
A. Yes sir. Another warranty deed by Charles W. Mosher and wife to D. E. Thompson, recorded in deed record 11, page 418.
Q. To whom was that mailed?
1871 A. Mailed to George Sanford, York, Nebraska.
Q. Now I will ask you if the book I hand you now is the fee book of the office of county clerk of Hamilton county?
A. Yes sir.
Q. And does that show the current fees, and is it a book that is regularly kept and part of the documents and files of the office of county clerk?
A. Yes sir.
Q. And what is entered up on that book?
A. This book shows the fees paid for filing of certain instruments on the days that the filings were made.
Q. Does it give the date of payment?

A. It gives the date of payment.
Q. And from whom received?
A. And from whom received.
Q. And the nature of the instrument?
A. Yes sir.
Q. And the amount received?
A. Yes sir.
Q. Is that book kept in the handwriting of Mr. Shuman, who was the county clerk at that time?
A. Yes sir, it is.
Q. And is a part of the records and files of your office as county clerk?
A. Yes sir.
Q. And you have continued to use that book or a similar one?
A. A similar one.
Q. Now I will ask you if it appears on that book that any deeds were filed on the 19th day of January, 1893?
1872 A. Yes sir.
Q. Does it show that on that day four deeds were filed by George Sanford, for which he paid a fee of $4.00?
A. Yes sir.
Q. Does the book show that any other deeds were filed that day, and if so how many?
A. One other deed, from the Nebraska Mortgage Company.
Q. And were there two instruments filed by that company that day?
A. Yes sir, one mortgage, and one deed.
Q. What was the total fee received from them that day?
A. The total fees were $2.75.

Mr. THOMAS: I offer in evidence the following portion of the book identified by the witness as the record of the office of the county clerk of Hamilton county, Nebraska,—the entry I refer to being as follows,—under date of January 19, 1893, under the column "From whom received," George Sanford; under the column of "Cr. Amount" $4.00; under the column "For what services" the words "4 deeds."
1873 Mr. THOMAS: Now I offer the following portions of the books identified by the witness as the Book of Registration, No. 2, for Hamilton County, Nebraska, the following line appearing on page 263:
Mr. Thomas reads: "Book of Registration, Hamilton county, Nebraska. Page 263.
Under the first column, "Grantor," Charles W. Mosher, et al.
Under the next column, "Grantee," Capital National Bk.
Under the next column, "Character of Instrument," "2 W. D's."
Under the next column, "Recorded" "Book" 11, "Page-" 416, 417.
"Date of Filing": "Month," Jan.; "Day," 19; "Year," 1893.
"Delivered" 2-17-93. "Mailed to Geo. Sanford, York, Neb."
Mr. THOMAS: I also offer the following line:
(Mr. Thomas reads:) Grantor, Charles W. Mosher and wife;

Grantee, D. E. Thompson; Character of instrument, W. D.; recorded, Book 11, page 418; Date of filing, January 19, 1893; Delivered, "do." "do."

Mr. THOMAS: Also the following on page 41:

1874 (Mr. Thomas reads:) The top line on page 41—Grantor, Capital National Bank; Grantee, Charles W. Mosher; Character of Instrument, Q. C. D.; Recorded, Book "Q," page 355; Date of filing, January 19, 1893; under the column "Delivered," 2/7/93, mailed to Geo. Sanford, York, Nebr.

Cross-examination.

By Mr. ROSE:

Q. Did you make any search and follow out these instruments that you find reference made to in this book?
A. No more than in making kind of an abstract.
Q. You did make an abstract?
A. Yes sir.
Q. What disposition did Mr. Thompson make, if any, of any property described in the deed in which he purports to have been grantee? Did he convey it by Quit Claim, or otherwise to somebody?
A. Which property do you have reference to?
Q. There is only one deed to Mr. Thompson; there was no description give- there. Did you follow that out?
A. No sir.
Q. You don't know what disposition he made of it?
A. No sir.
Q. You don't know whether he acted on that, or claimed any rights under it, or took possession of the land?
A. No sir.
Q. Or quit claimed to the Receiver, or what if anything he ever did?

1875 A. No sir.
Q. You don't know anything about it?
A. Only what the records show?
Q. Do you know what the records show?
A. I couldn't state for sure what the records show now.

Mr. ROSE: That is all.

Redirect examination.

By Mr. THOMAS:

Q. Did you make a certificate to the paper I hand you now?
A. Yes sir.
Q. Under the seal of your office?
A. Yes sir.
Q. And did you prepare that from the records of your office?
A. Yes sir.

Exhibit "18-a" Identified.

Q. Is Exhibit "18-a" an abstract of certain conveyances that appear on the records of Hamilton county, Nebraska, in your office?

A. Yes sir.

Q. Was that made by you?

A. Yes sir.

Q. That is the one to which you have just testified and bears your signature and the seal of your office?

A. Yes sir.

Q. I call your attention to an instrument which purports to have been executed by D. E. Thompson and wife to Reuben C. Newman and Nancy V. Middleton, under date of March 29, 1893, and I will ask you if that describes the same property as the deed from Charles W. Mosher and wife to D. E. Thompson, which was filed for
1876 record in the office of the county clerk of Hamilton county, Nebraska, on January 19th, 1893?

A. Yes sir, it does.

Q. There was but one deed filed on January 19th, 1893, that purported to convey any real estate to Mr. Thompson?

A. Yes sir.

Q. And if that was the deed conveying the North east quarter of 12-12-5, if that was the deed containing that description that then was the same property conveyed by Mr. Thompson to Newman and Middleton?

A. Yes sir.

Q. Under date of March 29th, 1893?

A. Yes sir.

Mr. THOMAS: I want to offer the following portions of Exhibit "18-a," which is identified by the witness, under the seal of his office; we want to offer on page 4 of that exhibit the entries which I have marked as entries "A," "B," "C" and "D."

Mr. ROSE: Each of the defendants objects as incompetent, irrelevant and immaterial, not the best evidence and no foundation laid.

Objection overruled.

Each of the defendants excepts.

Entries offered received in evidence as follows:

(*Entry A.*)

Capital National Bank, by C. W. Mosher, Pres't,
to
Charles W. Mosher.

N. E. ¼ 12-12-5.

Quit Claim Deed. Cons., $1.00.

Date, Jan. 18, 1893.

Ack. Jan. 18, 1893, before Hal C. Young, N. P., Lancaster Co., Neb. (Seal.) 1 wit.

Filed Jan. 19, 1893. Book Q, page 355.

(*Entry B.*)

Charles W. Mosher and Wife, Richard C. Outcalt and Wife
to
Capital National Bank.

N. E. ¼ 12-12-5.

Warranty Deed. Cons., $1.00.
Date, Jan. 7, 1893.
Ack. Jan. 7, 1893, before Hal C. Young, N. P., Lancaster Co., Neb. (Seal.) 1 wit.
Filed Jan. 19, 1893. Book 11, page 416.

1877

(*Entry C.*)

Charles W. Mosher and Wife
to
D. E. Thompson.

N. E. ¼ 12-12-5.

Warranty Deed. Cons., $4,000.00.
Date Jan. 18, 1893.
Ack. Jan. 18, 1893, before Hal C. Young, N. P., Lancaster Co., Neb. (Seal.) 1 wit.
Filed Jan. 19, 1893.
Book 11, page 418.

(*Entry D.*)

D. E. Thompson and Wife
to
Reuben C. Newman and Nancy V. Middleton.

N. E. ¼ 12-12-5.

Warranty Deed. Cons., $2,400.00.
Date March 29, 1893.
Ack. March 17, 1893, before H. Mansfield, Jr., N. P. Lancaster Co. Neb. (Seal.) 1 wit.
Filed March 30, 1893.
Book 11, page 586.

1878 Exhibits "19-a" to "24-a" identified.

Mr. THOMAS: We offer in evidence Exhibits No. "19-a," "20-a," "21-a," "22-a," "23-a," "24-a," being certified copies of instruments.

Mr. ROSE: Each of the defendants objects to Exhibit "24-a" as

incompetent, irrelevant and immaterial, not binding upon anyone of the defendants; and to Exhibit "23-a" as incompetent, irrelevant and immaterial, and not binding upon anyone of the defendants, and to Exhibit "19-a" as incompetent, irrelevant and immaterial, and having no bearing upon any issue in this case; and to Exhibit "20-a" as incompetent, irrelevant and immaterial, and having no relevancy to any issue; to Exhibit "22-a" as incompetent, irrelevant and immaterial, and not relevant to any issue, and to Exhibit "21-a" as incompetent, irrelevant and immaterial, and having no bearing upon any issue.

Objections overruled.

Each of the defendants excepts.

Exhibits "19-a," "20-a," "21-a," "22-a," "23-a" and "24-a" received in evidence as follows:

(Copies on next succeeding pages.)

Witness excused.

Mr. THOMAS: That is our case.

1879 *Warranty Deed.*

D. E. Thompson & Wf.
to
Alexander M. Landon.

Filed for record and entered on numerical Index at 9:30 o'clock A. M. May 26th A. D. 1893. Fee $1.00. W. H. Reader, County Clerk, By M. A. Hill, Deputy.

Know all men by these presents: That D. E. Thompson and Jeannette M. Thompson Husband and wife of the county of Lancaster and state of Nebraska for and in consideration of the sum of Twelve Thousand dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Alexander M. Landon of the county of York and state of Nebraska the following described Real Estate, situated in New York Twp*t*. in York County and State of Nebraska, to-wit: The south east quarter (S. E. ¼) and south half of the north east quarter (S. ½ N. E. ¼) of section Nineteen (19) Town Eleven (11) North Range Two (2) West of the Sixth Principal Meridian York County, Nebraska.

Subject to real estate M'tg'e on said premises of $4,200.00 and interest on same from and after May 1" 1893.

Subject also to taxes of 1893 and thereafter, and we do hereby covenant with the said Alexander M. Landon and his heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrance except as above stated, that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever, except as above stated.

And the said Jeannette M. Thompson hereby relinquishes all right, title and interest in and to the above described premises.

Signed this 9" day of May 1893.

D. E. THOMPSON.
JEANNETTE M. THOMPSON.

In presence of

W. E. PAINTER.

THE STATE OF NEBRASKA,
Lancaster County, ss:

On this 25th day of May A. D., 1893 before me, W. E. Painter, a Notary Public duly commissioned and qualified for and residing in said county, personally came D. E. Thompson and Jeannette M. Thompson, to me known to be the identical persons described in, and who executed the foregoing conveyance as grantors and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and Seal the day and year last above written.

[W. E. Painter, Notarial Seal. Lancaster County, Nebraska.]

W. E. PAINTER,
Notary Public.

Register od Deeds' Certificate.

STATE OF NEBRASKA,
York County, ss:

I W. W. Feaster Register of Deeds within and for said County, hereby certify that the within and foregoing is a true and correct copy of a certain Warranty Deed executed by D. E. Thompson & Wf. to Alexander M Landon filed for record in this office May 26th 1893 at 9:30 o'clock A. M. and recorded in Book 39 of Deeds at page 524 of the records of said county.

In witness whereof I have hereunto set my hand and affixed my official Seal this 14th day of February A. D. 1911.

[SEAL.]

W. W. FEASTER,
Register of Deeds.

Endorsed: Exhibit 19-*a*. Warranty deed from —— —— to —— ——. The State of Nebraska, —— County, *ss*. Entered on Numerical Index and filed for record in the office of — of said county the — day of —— 190– at — o'clock — Minutes — M., and recorded in Book — of Deeds on Page —. —— —— Register of Deeds. —— —— Deputy. Republican, York, Neb.

1880 *Warranty Deed.*

David E. Thompson & Wife
to
K. K. Hayden, Receiver.

Filed for record and entered on Numerical index at 3:15 o'clock P. M. Nov. 16" A. D. 1895. Fee $1.00. W. H. Reader, County Clerk, M. A. Hill, Deputy.

Know all men by these presents: That we David E. Thompson and Jeannette M. Thompson husband and wife of the county of Lancaster and state of Nebraska for and in consideration of the sum of One 00/100 dollars in hand paid, do hereby grant, bargain, sell, convey, and confirm unto K. K. Hayden Receiver of the Capital National Bank of Lincoln of the county of Lancaster and state of Nebraska the following described Real Estate, situated in Stewart Precinct in York County and State of —— to-wit: The North West Quarter of Section Number Nineteen (19) in Township Number Twelve (12) North of Range Number One (1) West of the 6th Principal Meridian containing One hundred and sixty acres more or less subject to all encumbrances, and we do hereby covenant with the said K. K. Hayden, Receiver & C and his successors and assigns, that we are lawfully seized of said premises; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever, by through or under us.

And the said Jeannette M. Thompson hereby relinquishes all right of dower in and to the above described premises.

Signed this 12" day of November A. D. 1895.

DAVID E. THOMPSON.
JEANNETTE M. THOMPSON.

In presence of
C. P. MULLEN.

THE STATE OF NEBRASKA,
Lancaster County, ss:

On this 12th day of November A. D. 1895 before me, J. K. Honeywell a Notary Public duly commissioned and qualified for and residing in said county, personally came David E. Thompson and Jeannette M. Thompson to me known to be the identical persons described in, and who executed the foregoing conveyance as grantors and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and Notarial Seal the day and year last above written.

[J. K. Honeywell, Notarial Seal, Lancaster County, Nebraska.]

J. K. HONEYWELL,
Notary Public.

Commission expires April 22, 1901.

Register of Deeds' Certificate.

STATE OF NEBRASKA,
York County, ss:

I, W. W. Feaster, Register of Deeds within and for said County, hereby certify that the within and foregoing is a true and correct copy of a certain Warranty Deed executed by David E. Thompson and Wife to K. K. Hayeden, Receiver of the Capital National Bank of Lincoln filed for record in this office Nov. 16, 1895 at 3:15 o'clock P. M. and recorded in Book 43 of Deeds at page 122, of the records of said County.

In witness whereof I have hereunto set my hand and affixed my official seal this 14 day of February A. D. 1911.

[SEAL.]

W. W. FEASTER,
Register of Deeds.

Endorsed: Exhibit 20-*a*. Warranty Deed. From —— —— to —— ——. State of Nebraska, —— County, *ss*. Entered on Numerical Index and filed for record in the office of — of said county the — day of —— 190–, at o'clock, — Minutes — M., and recorded in Book — of Deeds on Page —. —— —— Register of Deeds. —— —— Deputy. Republican, York, Neb.

1881

Warranty Deed.

Charles W. Mosher and Wife
to
D. E. Thompson.

Filed for record and entered on municipal Index at 3:40 o'clock P. M., Jan. 19th A. D. 1893. Fee $1.00. W. H. Reader, County Clerk, By M. A. Hill, Deputy.

Know all men by these presents: That Charles W. Mosher and Louise P. Mosher his wife of the county of Lancaster and state of Nebraska for and in consideration of the sum of Four Thousand Dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto D. E. Thompson of the county of Lancaster and state of Nebraska the following described Real Estate, situated in York in *Nebraska* County and State of Nebraska, to-wit: North West Quarter (N. W. ¼) Section Nineteen Township Twelve Range One West 6 P. M. Subject to record Liens and we do hereby covenant with the said D. E. Thompson and his heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrance, that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Louise P. Mosher hereby relinquishes all Her Right of Dower in and to the above described premises.

Signed this 18th day of January A. D. 1893.

CHARLES W. MOSHER.
LOUISE P. MOSHER.

In Presence of
HAL C. YOUNG.

THE STATE OF NEBRASKA,
Lancaster County, ss:

On this 18th day of January A. D. 1893 before me, Hal C. Young a Notary Public duly commissioned and qualified for and residing in said county, personally came Charles W. Mosher & Louise P. Mosher his wife to me known to be the identical persons described in, and who executed the foregoing conveyance as grantor and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and Seal the day and year last above written.

[Hal C. Young, Notarial Seal, Lancaster County, Nebraska.]

HAL C. YOUNG,
Notary Public.

Register of Deeds' Certificate.

STATE OF NEBRASKA,
York County, ss:

I, W. W. Feaster, Register of Deeds within and for said County, hereby certify that the within and foregoing is a true and correct copy of a certain Warranty Deed executed by Charles W. Mosher and Wife to D. E. Thompson filed for record in this office Jan. 19th 1893 at 3:40 o'clock P. M. and recorded in Book 39 of Deeds at page 215, of the records of said County.

In witness whereof I have hereunto set my hand and affixed my official seal this 14th day of February A. D. 1911.

[SEAL.]

W. W. FEASTER,
Register of Deeds.

Endorsed: Exhibit 21-*a*. Warranty Deed. From —— —— to —— ——. The State of Nebraska, —— County, *ss*. Entered on Numerical Index and filed for record in the office of — of said county the — day of —— 190–, at — o'clock — Minutes — M., and recorded in Book — of Deeds on Page —. —— —— Register of Deeds. —— ——— Deputy. Republican, York, Neb.

1882 *Warranty Deed.*

Charles W. Mosher & Wf. and Richard C. Outcalt & Wf.
to
D. E. Thompson.

Filed for record and entered on Numerical Index at 2:30 o'clock P. M., Jan. 11th, A. D. 1893. Fee $1.00. W. H. Reader, County Clerk, By M. A. Hill, Deputy.

Know all men by these presents: That Charles W. Mosher & Louise P. Mosher his wife Richard C. Outcalt & Sarah C. Outcalt his wife of the county of Lancaster and state of Nebraska for and in consideration of the sum of sixteen Thousand Dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto D. E. Thompson of the County of Lancaster and state of Nebraska the following described Real Estate, situated in York, County and State of Nebraska, to-wit: South East One Quarter (S. E. ¼) and the south one half of the North East Quarter (S. ½ of the N. E. ¼) of Section Number Nineteen (19) Township Number (11) Eleven Range Two (2) West of the 6th P. M., Subject to recorded liens. Also the South West Quarter (S. W. ¼) of Section Thirteen (13) Township Twelve (12) Range two (2) and we do hereby covenant with the said D. E. Thompson and his heirs and assigns, that we — lawfully seized of said premises; that they are free from incumbrance, that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Louise P. Mosher and Sarah C. Outcalt hereby relinquish all their right of dower in and to the above described premises.

Signed this 28th day of December A. D. 1892.

CHARLES W. MOSHER.
LOUISE P. MOSHER.
RICHARD C. OUTCALT.
SARAH C. OUTCALT.

In Presence of
HAL C. YOUNG.

THE STATE OF NEBRASKA,
Lancaster County, ss:

On the 28th day of December A. D., 1892 before me, Hal C. Young a Notary Public duly commissioned and qualified for and residing in said county, personally came Charles W. Mosher & Louise P. Mosher his wife and Richard C. Outcalt & Sarah C. Outcalt his wife to me known to be the identical persons described in, and who executed the foregoing conveyance as grantors and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and Seal the day and year last above written.

[Hal C. Young, Notorial Seal, Lancaster County, Nebraska.]

HAL C. YOUNG,
Notary Public.

Register of Deeds' Certificate.

STATE OF NEBRASKA,
York County, ss:

I, W. W. Feaster Register of Deeds within and for said County, hereby certify that the within and foregoing is a true and correct copy of a certain Warranty Deed executed by Charles W. Mosher and Wife and Richard C. Outcalt and Wife To D. E. Thompson filed for record in this office January 11th A. D. 1893 at 2.30 P. M. and recorded in Book 39 of Deeds at page 191 of the records of said County.

In witness whereof I have hereunto set my hand and affixed my official Seal this 14th day of February A. D. 1911.

[SEAL.]

W. W. FEASTER,
Register of Deeds.

Endorsed: Exhibit 22-a Warranty Deed. From —— —— to —— ——. The State of Nebraska ——, County, ss. Entered on Numerical Index and filed for record in the office of — of said county the — day of —— 190–, at — o'clock, — Minutes — M., and recorded in Book — of Deeds on Page —. —— —— Register of Deeds. —— —— Deputy. Republican, York, Neb.

1883 *Warranty Deed.*

Edwin W. Mosher and Wife
to
Chas. W. Mosher and Richard C. Outcalt.

Filed for record and entered on numerical index at 9:25 o'clock A. M. Dec. 18th, A. D. 1892. W. H. Reader, County Clerk. By M. A. Hill, Deputy.

Know all men by these presents: That Edwin W. Mosher and Minnie M. Mosher Husband & Wife of the county of York and state of Nebraska for and in consideration of the sum of Eight Thousand 00/100 Dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Chas. W. Mosher & Richard C. Outcalt of the county of Lancaster and state of Nebraska the following described Real Estate, situated in —— in York County and State of Nebraska to-wit: South East One Quarter (S. E. ¼) and the South one half of the North East Quarter (S. ½ of N. E. ¼) of section number Nineteen (19) Township number Eleven (11) Range two (2) west of 6th P. M.

Subject to recorded liens, and we do hereby covenant with the said Chas. W. Mosher & Richard C. Outcalt and their heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrance except as above stated that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Minnie M. Mosher hereby relinquishes all her right & dower in and to the above described premises.

Signed this 16th day of Sept. A. D. 1892.

EDWARD W. MOSHER.
MINNIE M. MOSHER.

In Presence of—
GEO. SANFORD.

THE STATE OF NEBRASKA,
York County, ss:

On the 16 day of September A. D. 1892 before me, A. S. Harlan a Notary Public duly commissioned and qualified for and residing in said county, personally came Edwin W. Mosher and Minnie M. Mosher to me known to be the identical person- described in, and who executed the foregoing conveyance as grantors and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and Notary Public the day and year last above written.

[A. S. Harlan, Notarial Seal, York County, Nebraska.]

A. S. HARLAN,
Notary Public.

Register of Deeds' Certificate.

STATE OF NEBRASKA,
York County, ss:

I, W. W. Feaster Register of Deeds within and for said County hereby certify that the within and foregoing is a true and correct copy of a certain warranty Deed executed by Edwin W. Mosher and Wife to Chas. W. Mosher and Richard C. Outcalt, filed for record in this office December 16th A. D. 1892 at 9:25 o'clock and recorded in Book 39 of Deeds at page 143 of the records of York County.

In witness whereof I have hereunto set my hand and affixed my official seal this 14th day of February A. D. 1911.

[SEAL.] W. W. FREASTER,
Register of Deeds.

Endorsed: Exhibit 23-a. Warranty Deed. From —— —— to —— ——. The State of Nebraska, —— County, ss. Entered on Numerical Index and filed for record in the office of — of said county the — day of ——, 190–, at — o'clock — Minutes —. M. and recorded in Book — of Deeds on page —. —— ——, Register of Deeds —— ——, Deputy. Republican, York, Neb.

1884 *Quit-Claim Deed.*

Capital National Bank

Charles W. Mosher.

Filed for record Jan. 19th, 1893, at 3:40 P. M. Fee 1.00. W. H. Reader, Co. Cl'k.

This indenture, Made this 18th day of January in the year one thousand eight hundred and ninety three between Capital National Bank of Lincoln of the first part, and Charles W. Mosher of the second part.

Witnesseth, That the said part of the first part, in consideration of the sum of One Dollars, to them duly paid, the receipt whereof is hereby acknowledged have remised, released and quit claimed, and by these presents do, for themselves, heirs executors and administrators remise, release, and forever quit-claim and convey unto the said party of the second part, and to his heirs and assigns forever, all their right, title, interest, estate, claim, and demand both at law and in equity, of, in, and to all Northwest quarter (N. W. ¼) Section Nineteen (19) Township Twelve (12) *Rang* Range One (1) west 6 P. M. situated in York County, Nebraska. Together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above described premises unto the said Charles W. Mosher his heirs, and assigns, so that neither the *the* said Capital National Bank or any person in its name and behalf, shall, or will hereafter, claim or demand any right or title to said premises or any part thereof: but they and every one of them shall by these presents be excluded and forever barred.

In Witness whereof, the said party of the first part have thereunto set their hand and seal the day and year first above written.

[Seal Capital National Bank, Lincoln, Nebraska.]

CAPITAL NATIONAL BANK.
By C. W. MOSHER, *President.*

Signed, sealed and delivered in presence of—
HAL C. YOUNG.

* * * * * * *

THE STATE OF NEBRASKA,
Lancaster County, ss:

On this 18th day of January A. D. 1893 before me Hal C. Young, a Notary Public duly appointed and qualified for and residing in said county, personally came C. W. Mosher, Prest. of Capital National Bank to me known to be the identical person described in and who executed the foregoing conveyance as grantor and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and Notarial Seal the day and year last above written.

[Hal C. Young, Notorial Seal, Lancaster County, Nebraska.]

HAL C. YOUNG,
Notary Public.

Register of Deeds' Certificate.

STATE OF NEBRASKA,
York County, ss:

I, W. W. Feaster Register of Deeds within and for said County hereby certify that the within and foregoing is a true and correct copy of a certain Quit Claim Deed executed by Capital National — to Charles W. Mosher filed for record in this office Jan. 19th, 1893 at 3:40 o'clock P. M. and recorded in Book 35 of Deeds at page 332 of the records of said county.

In witness whereof I have hereunto set my hand and affixed my official seal this 14th day of February, 1911.

[SEAL.] W. W. FEASTER,
Register of Deeds.

Endorsed: Exhibit 24-a. Quit-Claim Deed. From —— —— to —— ——. The State of Nebraska. —— County, ss. Entered in Nemerical Index and filed for record in the Clerk's office of said county, the — day of ——, 19–, at — o'clock and — minutes —. M., and recorded in Book — of Deeds on Page —. —— ——, County Clerk. —— —— Deputy. York Blank Book Co., York.

1885 Mr. D. E. THOMPSON recalled.

Direct examination.

By Mr. ROSE:

Q. Was Mr. Dorgan employed by you in any capacity whatever or authorized to represent you in any capacity whatever in the month of January 1893?

A. No sir, then nor no other time.

Q. He never was employed by you as agent in any capacity of any sort?

A. No sir.

Q. Did you have any knowledge prior to yesterday that it was even claimed that he had pretended to file any instruments in your behalf in Lancaster county, Nebraska?

A. I never heard of it before.

Q. Do you speak or read the German language, Mr. Thompson?

A. No sir.

Cross-examination.

By Mr. THOMAS:

Q. You were a party to the suit in which the Farmers'

& Merchants' Bank of Galva, Illinois was plaintiff and you and others were defendants, in Lancaster county, being the record about which we had some controversy in this case?

A. I think so; there were so many of them down there that it would be hard for me to differentiate.

Q. Wasn't Mr. Wood, the county clerk of Lancaster County called as a witness in that case?

A. I couldn't say as to that, I don't know.

Q. And in that case didn't he testify that on the morning of January 23, 1893, very early in the morning Mr. Mullen brought this Mosher chattel mortgage to the office for record, that is
1886 testified to in this case?

A. I couldn't say.

Q. And that in about half an hour afterwards Mr. Dorgan brought an exact duplicate of that chattel mortgage, with the exception that the date wasn't filled in?

A. Well I didn't hear a word of that testimony, so far as I remember; I have no recollection of anything of that sort.

By Mr. ROSE:

Q. Did you have any pre-arrangement of any sort with Mr. Mosher whereby he should secure his trust—this trust for your daughter—by this chattel mortgage before you went to Terre Haute?

A. No sir.

Q. In some of the deeds last offered in evidence, or some of the documentary proofs of some character, there appeared to be involved the North east quarter of 12 — 12 — 5 in Hamilton county, which purports to have been deed- first by the Capital National Bank to Charles W. Mosher, and by Mosher and wife to you. You may state what, if any, knowledge at the time of that transaction you had that that land or any other lands that were conveyed to you through Mosher or Outcalt were, or had been the property of the Capital National Bank?

A. I had no knowledge whatever. I had utter faith in Mosher throughout this whole transaction; had I not done so I certainly wouldn't have given up my gas stock that was ample security and right in hand, for all the trouble this thing has brought upon me.

1887–1900 Q. Now if at the time of those conveyances, even in December 1892, or January 1893, you had known that Mosher got title through the Capital National Bank would you have on that account felt any reason to question the integrity of the transaction?

A. No, I couldn't have questioned it, for I would have felt very certain that he had taken it under his right; I wouldn't have expected him to have taken anything that did not belong to him.

Witness excused.

End of testimony.

* * * * * * *

1901 In the Supreme Court of the United States.

Oct. Term, 1914, No. 501.

File No. 24240.

JONES NATIONAL BANK, Plaintiff in Error.
vs.
CHARLES E. YATES et al., Defendants in Error.

Oct. Term, 1914, No. 502.

File No. 24241.

BANK OF STAPLEHURST, Plaintiff in Error.
vs.
CHARLES E. YATES et al., Defendants in Error.

Oct. Term, 1914, No. 503.

File No. 24242.

UTICA BANK, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

Oct. Term, 1914, No. 504.

File No. 24243.

THOMAS BAILEY, Plaintiff in Error.
vs.
CHARLES E. YATES et al., Defendants in Error.

The plaintiffs in error in the above entitled cases severally request the Clerk of the United States Supreme Court to print the following designated portions of the Bill of Exceptions in the above entitled cases, numbered, File Nos. 24240, 24241, 24242, and 24243, which they think necessary for the consideration of the errors upon which they intend to rely, to-wit: (there being no assignments of error on account of the offer and rejection or admission of testimony all objections and exceptions to testimony in the bill of exceptions & rulings thereon are to be omitted from the printed record):

1902 1. Bill of Ex. p. 1; title, appearances and certificate of the Clerk of the District Court.

2. Bill of Ex. pp. 13 to 14; stipulation.

3. Bill of Ex. p. 15; first four lines at top of page.

4. Bill of Ex. p. 16 of the testimony of Mr. McDonald; the first second and third questions and answers.

5. Bill of Ex. p. 16; remainder of page 16 to page 45, inclusive omit in the printing.

6. Bill of Ex. p. 46, commencing at top of page and ending immediately before the words: "cross-examination" on page 53, inclusive.

7. Bill of Ex. p. 58 commencing with Exhibit "A1" and ending at the bottom of p. 60, inclusive.

8. Bill of Ex. p. 61; deposition of J. E. Hill, commencing at top of page and ending at bottom of page 71, inclusive.

9. Bill of Ex. p. 77; offer in evidence of Exhibits "A, B, C, D, E, F, G, H, I and J, inclusive.

10. Bill of Ex. p. 83 deposition of D. J. Carnes, commencing with top of page and ending near the bottom of page 88 with the words: "a good many thousands of dollars."

11. Bill of Ex. p. 91; commencing with the second question from the bottom of the page and ending with the signature of the witness on page 93.

12. Bill of Ex. p. 94; deposition of P. M. Alden, commencing at top of page and ending with the signature of witness on page 102.

13. Bill of Ex. p. 114; deposition of John W. McDonald, commencing with last question at bottom of page and ending with the first answer "yes" at the top of page 130.

14. Bill of Ex. p. 133; commencing with second question at top of page and ending at bottom of the same page.

15. Bill of Ex. p. 134; commencing at top of page and
1903 ending with the words: "free of expense."

16. Bill of Ex. p. 135; commencing with the second question and ending with the last answer "yes" on second line from bottom of page.

17. Bill of Ex. p. 142; commencing at the top and ending with the last answer "yes sir."

18. Bill of Ex. p. 146; commencing with the words: "by Mr. Thomas" and ending at the bottom of page 155, inclusive.

19. Bill of Ex. p. 167; commencing with the last question near bottom of page and ending at the bottom of page 168.

20. Bill of Ex. p. 169; commencing at the top of page and ending with the third answer "no" near the top of the page 172, inclusive.

21. Bill of Ex. p. 175; commencing with the second question near top of page and ending with the third answer "no" near center of page 176.

22. Bill of Ex. p. 177; commencing with the third question near top of page and ending with the second answer "no" in third line at top of page 179.

23. Bill of Ex. p. 186; commencing with the last question identifying Exhibits from 109 to 146 and ending at bottom of page.

24. Bill of Ex. p. 187 to 205, inclusive, including Exhibits "X109" to "X146" inclusive, may be omitted. See par. #149 hereof.

25. Bill of Ex. p. 206; the words "Exhibits 109 to 146 inc. received in evidence."

26. Bill of Ex. p. 218; commencing with second question and ending at bottom of page 219.

27. Bill of Ex. p. 222; testimony of Hal Young, omit in the printing.

28. Bill of Ex. p. 254; the first five lines at top of page offering deposition of Richard C. Outcalt.

29. Bill of Ex. p. 273; commencing with the words: "plaintiffs now offer in evidence" and ending with the 3d answer "yes" immediately preceding the cross-examination, on page 274.

1904 30. Bill of Ex. p. 278; commencing with "deposition of Luther P. Ludden" and ending on page 279 with the answer: "C. W. Mosher a member of the commission and treasurer."

31. Bill of Ex. p. 280; commencing with the last question and ending with the last answer near the bottom of the page 282.

32. Bill of Ex. p. 287; testimony of S. K. Hale, commencing at the top of p. 287 and ending at the bottom of p. 297.

33. Bill of Ex. p. 300; commencing with the 4th question and ending with the answer: "they could not" near the center of p. 301.

34. Bill of Ex. p. 321; commencing with the second question near center of page and ending at the bottom of the same page.

35. Bill of Ex. p. 336; testimony of A. E. Harvey may be omitted in printing.

36. Bill of Ex. p. 352; testimony of Leonidas M. Lawson, commencing at top of page and ending at bottom of p. 363.

37. Bill of Ex. p. 364; testimony of William Ayers Jr., commencing at top of page and ending at bottom of page 365.

38. Bill of Ex. p. 376; commencing with last question at bottom of page and ending with the second answer on p. 377.

39. Bill of Ex. p. 381; print the first question and answer, commencing with the words: "and why is there not some identification."

40. Bill of Ex. p. 392; testimony of Derwent Bigelow may be omitted from the printing.

41. Bill of Ex. p. 399; testimony of Augustus D. Lynch, commencing with top of page and ending at bottom of page 409 including Exhibits "942, 943, 944, 960 and 961."

42. Bill of Ex. p. 419; Exhibit 972.

43. Bill of Ex. p. 432; commencing at top of page and ending at bottom of p. 433 being exhibit 975.

44. Bill of Ex. p. 435; commencing at top of page and ending at bottom of p. 443 including exhibits 945, 946, 947, 948, omitting certificates of Comptroller.

45. Bill of Ex. p. 444; testimony of L. H. Morse, com-
1905 mencing at top of page and ending at bottom of p. 446.

46. Bill of Ex. p. 448; print all of page being Exhibit 978.

47. Bill of Ex. p. 450; print all of page being Exhibit 979.

48. Bill of Ex. p. 452; print all of page being Exhibit 980.

49. Bill of Ex. p. 453; commencing at top of page and ending with the words: "Acc'ts solicited, bankers and merchants"—including Exhibit 981.

50. Bill of Ex. p. 455; print all of page being Exhibit 982.
51. Bill of Ex. p. 457; print all of page being Exhibit 983.
52. Bill of Ex. p. 459; print all of page being Exhibit 984.
53. Bill of Ex. p. 461; print all of page being Exhibit 985.
54. Bill of Ex. p. 463; print all of page being Exhibit 986.
55. Bill of Ex. p. 465; print all of page being Ex. 987.
56. Bill of Ex. p. 467; print all of page being Exhibit 988.
57. Bill of Ex. p. 472; commencing with the words: "Mr. F. S. Johnson near top of page and ending with the last answer on p. 473.
58. Bill of Ex. p. 474; commencing with the word "George W. Post" at the top of page and ending near the center of page 476 with the answer "He was insolvent" being the end of the direct examination.
59. Bill of Ex. p. 478; commencing with the words: "Mr. A. L. Clark" at the top of page and ending at the bottom of p. 479.
60. Bill of Ex. p. 480; testimony of I. E. Baker may be omitted in the printing.
61. Bill of Ex. p. 503; testimony of G. W. Shreck, commencing at top of page and ending on p. 506.
62. Bill of Ex. p. 507; testimony of Edward Hurlbut, Jr., commencing at top of page and ending at bottom of page 509.
63. Bill of Ex. p. 522; commencing with the last question at bottom of page and ending near bottom of p. 523 immediately preceding the word: "redirect examination."
1906 64. Bill of Ex. p. 525; commencing with redirect examination and ending at bottom of page.
65. Bill of Ex. p. 526; testimony of C. W. Hamilton may be omitted in the printing.
66. Bill of Ex. p. 537; testimony of H. J. Whitmore, commencing at top of page and ending at bottom of p. 543, omitting of course objections of counsel and motions to strike testimony & omitting last two questions.
67. Bill of Ex. p. 545; commencing with 2nd question at top of page and ending at bottom of p. 547.
68. Bill of Ex. p. 548; commencing with the last question near bottom of page with the words: "now, Mr. Whitmore" and ending with the third answer on p. 553—with the words: "in these two accounts."
69. Bill of Ex. p. 555; commencing with the 3d question from the bottom with the words: "And how was the transfer made" and ending with the first answer at top of p. 559 with the words "that balances the account."
70. Bill of Ex. p. 560; commencing with the second question near top of page with the words "now I will ask you to state" and ending with the bottom of p. 573 except the last question and answer on that page.
71. Bill of Ex. p. 576; commencing at top of page and ending at bottom of page 577.
72. Bill of Ex. p. 581; testimony of H. T. Jones may be omitted from the printing.

73. Bill of Ex. p. 588; testimony of H. J. Whitmore, commencing at top of page and ending at the bottom of p. 595 except the last question and answer.

74. Bill of Ex. p. 596; commencing with 3rd question
1907 from the bottom with the words: "well now have you found" etc. and ending at the bottom of the page.

75. Bill of Ex. p. 600; commencing with the words: "By Mr. Thomas" and ending at bottom of p. 618.

76. Bill of Ex. p. 624; commencing with the 3d question from the bottom with the words: "have you examined the books" and ending with the second answer on page 630 with the words: "they made those two books agree".

77. Bill of Ex. p. 631; commencing with the words: "by the court" and ending at the bottom of page 632 except the last question.

78. Bill of Ex. p. 639; commencing with the words: "by Mr. Thomas" and ending at the bottom of the page omitting the last question.

79. Bill of Ex. p. 641; commencing at top of page and ending at the bottom of page 652, omitting the last two questions and one answer.

80. Bill of Ex. p. 654; commencing at the top of page and ending at the bottom of page 655 omitting the last answer.

81. Bill of Ex. p. 658; commencing with first question and ending at bottom of page 660.

82. Bill of Ex. p. 663; all of page being Exhibit "hh".

83. Bill of Ex. p. 65; all of page being Exhibit "II".

84. Bill of Ex. p. 670; all of page being Exhibit "JJ".

85. Bill of Ex. p. 672; all of page being Exhibit "kk".

86. Bill of Ex. p. 675; all of page being Exhibit "LL".

87. Bill of Ex. p. 678; all of page being Exhibit "MM".

88. Bill of Ex. p. 681; all of page being Exhibit "NN".

89. Bill of Ex. p. 682; all of page being Exhibit "1039".

90. Bill of Ex. p. 683; commencing at top of page and ending at bottom of p. 690.

1908 91. Bill of Ex. p. 693; Exhibit "X1044" entire page.

92. Bill of Ex. p. 700; commencing with last question at bottom of page and ending at bottom of p. 701.

93. Bill of Ex. p. 703; commencing at top of page and ending at bottom of page 704—being exhibit "X-1045".

94. Bill of Ex. p. 706; Exhibit 1047, commencing at top of page and ending at bottom of page 707.

95. Bill of Ex. p. 709; commencing at top of page and ending at bottom of page 713.

96. Bill of Ex. p. 715; commencing at top of page and ending at bottom of page 717.

97. Bill of Ex. p. 725; commencing at top of page and ending at bottom of page 727 including the schedule of Exhibit No. 147 to 923½.

98. Bill of Ex. p. 728; testimony of H. T. Jones commencing at top of page and ending at bottom of page 791.

99. Bill of Ex. p. 802; commencing with first question near top of page and ending with the first answer at top of page 804 "It did".

100. Bill of Ex. p. 822; commencing with the first question and second line and ending at bottom of page 837.

101. Bill of Ex. p. 842; commencing at top of page and ending with the 4th answer "no sir" near center of page 864.

102. Bill of Ex. p. 967; commencing at top of page and ending with the first answer at top of page 968 with the words: "what do you say Mr. Rose".

103. Bill of Ex. — 975; commencing with the last question at the bottom of page and ending with the first answer near top of page 978 with the words: "time of the over-draft".

104. Bill of Ex. p. 980; testimony of H. J. Whitmore, com-
1909 mencing at top of the page and ending with the answer "nothing on the following day" near the middle of the page 988.

105. Bill of Ex. p. 1001; Exhibit "AF" all of page.

106. Bill of Ex. p. 1024; commencing with second question at top of page and ending at bottom of page 1029.

107. Bill of Ex. p. 1031; commencing at top of page and ending at bottom of page 1032 including exhibit "AG."

108. Bill of Ex. p. 1038; commencing with the words: "Mr. Thomas; I want to offer in evidence" and ending at bot-om of page 1062—omitting the two proxies on page 1061.

109. Bill of Ex. p. 1091; commencing with the words "Q. I will ask you if you have made" and ending at bottom of page 1096, including exhibits "AJ," "1074 and 1075".

110. Bill of Ex. p. 1097; testimony of Walter T. Scott, commencing at top of page and ending at bottom of page 1136.

111. Bill of Ex. p. 1137; testimony of H. T. Jones, commencing at top of page and ending at bottom of page 1160.

112. Bill of Ex. p. 1178; testimony of Fritz Beckord and ending at bottom of page 1193.

113. Bill of Ex. p. 1194; testimony of E. Jacobs, commencing at top of page and ending at bottom of page 1198.

114. Bill of Ex. p. 1199; testimony of J. J. Thomas may be omitted in the printing.

115. Bill of Ex. p. 1204; testimony of E. Jacobs commencing at top of page and ending at bottom of page 1219.

116. Bill of Ex. p. 1221; testimony of Thomas Bailey, commencing at top of page and ending at bottom of page 1229.

117. Bill of Ex. p. 1243; commencing with the words "redirect examination and ending with the words: "witness excused" near the bottom of p. 1245.

1910 118. Bill of Ex. p. 1246; testimony of Mrs. Hamer, omit in the printing.

119. Bill of Ex. p. 1264; testimony of R. Dorgan commencing at top of page and ending at bottom of page 1268.

120. Bill of Ex. p. 1269; testimony of George Sanford, commencing at top of page and ending at bottom of page 1276.

121. Bill of Ex. p. 1277, testimony of D. E. Thomas commencing at page 1277 and ending at bottom of page 1376.

122. Bill of Ex. p. 1378, testimony of D. E. Thompson, commencing at page 1378 and ending at bottom of page 1452.

123. Bill of Ex. p. 1453; testimony of J. K. Honeywill, commencing at page 1453 and ending at bottom of p. 1471.

124. Bill of Ex. p. 1472; testimony of E. B. Stephenson may be omitted in the printing.

125. Bill of Ex. p. 1482; testimony of C. E. Yates, commencing at top of page and ending at bottom of page 1513.

126. Bill of Ex. p. 1517; commencing at top of page and ending at bottom of page 1544.

127. Bill of Ex. p. 1551; cross-examination of George Sanford commencing at top of page and ending at bottom of page 1553.

128. Bill of Ex. p. 1554; cross-examination of Mr. Dorgan, commencing at top of page and ending at bottom of page 1558.

129. Bill of Ex. p. 1559; cross-examination of Mrs. Hamer may be omitted in printing.

130. Bill of Ex. p. 1566; testimony of Ellis P. Hamer, commencing with the words: "Ellis P. Hamer being called on behalf of" and ending at bottom of p. 1580.

140. Bill of Ex. p. 1581; commencing at top of page and ending at bottom of page 1585.

1911 132. Bill of Ex. p. 1586; print the first three lines.

133. Bill of Ex. p. 1596; commencing with the second question from the bottom of the page with the words: "now you say you attended meetings" and ending with the second answer at top of page 1599: "I surely have no recollection of it".

134. The testimony of Sister Ida at page 1601, W. H. Mendenhall, commencing at page 1605, Mrs. R. A. White, commencing at page 1609, W. A. Sellick, commencing at page 1616, H. B. Miller, commencing at page 1624, William C. Rhode, page 1632, Fred Foster, page 1635 and Claude Wilson at page 1637 ending at page 1640 may be omitted in the printing.

135. Bill of Ex. p. 1642; commencing at top of page and ending at bottom of page 1650.

136. Bill of Ex. p. 1651; testimony of Major J. D. Woods, commencing at top of page and ending at bottom of page 1656.

137. Bill of Ex. p. 1661; testimony of J. F. Bookstrom, commencing at p. 1661; E. Hallet, commencing at p. 1665; Richard H. Corner, commencing at p. 1667; Frank Rawlings, commencing at p. 1669; Lawrence Fossler, commencing at p. 1673; Lew Franklin at p. 1677 and Otto Newberg, commencing at p. 1683 was offered to rebut the testimony of defendant's witnesses named in paragraph No. 134 hereof and designated as not to be printed. However should defendants in error request the testimony of their witnesses aforesaid to be printed then the plaintiffs in error desire the testimony of the witnesses named herein printed commencing at top of page 1601 and ending at bottom of p. 1683, inclusive.

138. Bill of Ex. p. 1684; first paragraph at top of page offering exhibits "a9" and "a10".

139. Bill of Ex. p. 1685; all of page.

140. Bill of Ex. p. 1686; first paragraph at top of page 1912 comprising eight lines.

141. Bill of Ex. p. 1688; commencing at top of page and ending with the last answer on page 1691 with the words: "before the bank failed".

142. Bill of Ex. p. 1766; testimony of George Dobson, commencing at top of page and ending at bottom of p. 1768.

143. Bill of Ex. p. 1769; testimony of H. T. Jones commencing at top of page and ending at the bottom of p. 1771.

144. Bill of Ex. p. 1772; commencing at top of page end ending at bottom of p. 1825, inclusive.

145. Bill of Ex. p. 1826; commencing at top of page and ending at the bottom of page 1834 including exhibit a17 and endorsements but omitting the last question on page 1829, all of page- 1830 and 1831 and the remainder of the answer at top of page 1832.

146. Bill of Ex. p. 1835; commencing at top of page and ending at bottom of p. 1843, including exhibits 1059 and 1060.

147. Bill of Ex. p. 1848, commencing at top of page and ending at bottom of page 1867.

148. Bill of Ex. p. 1868; testimony of Dennis Sailor, commencing at top of page and ending at bottom of page 1884 including exhibits.

149. Paragraph 24 hereof may be omitted, and in lieu thereof print Exhibit A hereto attached, being a schedule of Exhibits 109 to 146 inclusive, instead of the exhibits in full.

JONES NATIONAL BANK,
Pl'ff in Error;

BANK OF STAPLEHURST,
Pl'ff in Error;

UTICA BANK,
Pl'ff in Error;

THOMAS BAILEY,
Pl'ff in Error, Severally,

By J. J. THOMAS &
L. C. BURR, *Att'ys.*

Schedule of Ex. 109 *to* 146, *Inclusive, Stubs of Crtf. of Deposit Register, Contained on pp.* 187 *to* 205 *of Bill of Ex.*

Ex. No.	Date.	Crtf. No.	Payee.	Amount.	Stamped paid.
109	6/ 1/91	24653	C. Hammond	$5,000	June 20, 1892
110	8/13/92	27375	H. R. Krug	10,000	Nov. 21, 1892
111	5/15/91	24574	P. L. T. Ashton	1,500	June 3, 1892
112	6/27/91	24806	Cassius S. Weese	2,100	June 27, 1892
113	6/10/91	24707	Jno. A. T. Hibbs	3,000	July 8, "
114	1/ 2/92	25933	Mayer Bros.	11,000	Jan. 3, 1898
115	4/28/91	24471	D. B. Welch	10,000	Nov. 20, 1891
116	7/ 7/91	24866	Austin Humphrey	4,500	Oct. 10, 1891
117	6/25/91	24800	W. S. Lenard	1,500	June 27, 1892
118	7/27/91	24986	H. R. Krug	7,000	Illegible
119	7/27/91	24981	A. P. S. Stuart	2,000	Jan. 27, '92
120	8/ 8/91	25056	Harper Note	7,000	Oct. 2, '91
121	11/28/91	25691	D. B. Welch	10,000	Jun- 28, '92
122	7/18/91	24937	J. E. Hill, Treas	14,650	Aug. 6, '91
123	6/26/91	24801	Henry Townson	1,897.50	Illegible
124	7/20/91	24941	J. E. Hill	10,000	Aug. 6, '91
125	1/20/93	28588	1st Nat'l B'k	5,000	None
126	10/ 3/91	25380	Hattie E. Carson	1,100	Oct. 3, '92
127	7/28/91	24994	N. S. Richardson	1,100	Sept. 29, '91
128	6/ 3/91	24670	Dan Hopkins	1,500	Dec. 4, '91
129	7/ 1/91	24774	Mayer Bros	3,000	Jan. 2, '92
130	7/ 1/91	24773	" "	2,000	" "
131	7/ 1/91	24772	" "	2,000	" "

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1914

Ex. No.	Date.	Crtf. No.	Payee.	Amount.	Stamped paid.
132	7/28/91	24995	N. S. Richardson	1,100	Sep. 30, '91
133	12/31/88	19240	C. H. Willard, Treas	50,000	Jan. 7, 1889
134	do.	19241	do.	50,000	do.
135	8/28/91	25150	Bonds	45,000	Sept. 8, '91
136	1/ 6/93	#28473	St. Treas. of Nebr	100,000	Jan. 19, '93
137	1/ 6/93	28472	" " " "	35,357.85	Jan. 16, '93
138	1/ 6/93	28471	" " " "	150,000	
139	12/ 9/90	23593	J. E. Hill, St. Treas	40,000	Nov. 3, '92
140	4/24/91	24152	" Treas	100,250	Illegible
141	11/18/91	25636	" "	50,000	May 21, '92
142	12/22/91	25861	" "	38,114.75	Dec. 22, '91
143	do.	25862	" "	37,114.75	Dec. 13, '92
144	8/ 5/91	25047	" "	37,975.00	do.
145	7/17/91	25097	" "	50,000.00	Jan. 6, '93
146	12/23/89	21397	" "	50,000.00	Jan. 6, '93

THIS PAGE BOUND VERTICAL IN BOOK

1915 Received copy of above designations this 21st day of August 1914.

DAVID E. THOMPSON,
Def't in Error,
By STOUT, ROSE & WELLS,
His Attorneys.

1916 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamer, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank H. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska. Commission Expires Oct. 8, 1912.]

S. C. STONER,
Notary Public.

1917 [Endorsed:] 501/24240. 502/24241. 503/24242. 504/24243. In the Supreme Court of the United States. Jones Nat'l B'k, Pl'f in Error, v. Charles E. Yates et al., Def'ts in Error. (File No. 24,240.) Bank of Staplehurst, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. (File No. 24,241.) Utica Bank, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. (File No. 24,242.) Thomas Bailey, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. (File No. 24,243.) J. J. Thomas & L. C. Burr, Att'ys for Plaintiff in Error.

1918 [Endorsed:] File No. 24,240, etc. Supreme Court U. S. October term, 1914. Term No-. 501, 502, 503 & 504. Jones Nat'l Bank v. Yates et al., Bank of Staplehurst v. Yates et al., Utica Bank v. Yates et al., Bailey v. Yates et al. Designation by plaintiffs in error of parts of Bill of Exceptions to be printed, with proof of service of same. Filed August 25th, 1914.

1919 In the Supreme Court of the United States.

Term No. 501. General No. 24240.

JONES NATIONAL BANK, Plaintiff in Error,

v.

CHARLES E. YATES, et al., Defendants in Error.

Term No. 502. General No. 24241.

BANK OF STAPLEHURST, Plaintiff in Error,

v.

CHARLES E. YATES et al., Defendants in Error.

Term No. 503. General No. 24242.

UTICA BANK, Plaintiff in Error,

v.

CHARLES E. YATES et al., Defendants in Error.

Term No. 504. General No. 24243.

THOMAS BAILEY, Plaintiff in Error,

v.

CHARLES E. YATES et al., Defendants in Error.

Designations of Defendants Yates and Hamer for Printing Their Bill of Exceptions.

The defendants in error, Yates and Hamer, each designate the following portions of the bill of exceptions for printing, in addition to the portions of the bill of exceptions designated by the plaintiffs in error.

1. In connection with the plaintiffs' assignment 121, print the first paragraph, two questions and answers of page 1835, and page 1885 beginning at the top of page and ending at the bottom of p. 1887.

2. In connection with plaintiffs' designation 125, print exhibit a. x. P. 1514 and all of P. 1515, and Exhibit a. y. P. 1516.

3. In connection with plaintiffs' designation No. 105, print P. 1002 to the second question from the bottom of P. 1007; and commencing P. 1023 at the first question, to the end of the first answer at the top of P. 1024.

4. In connection with plaintiffs' designation 132, print from the top of P. 1586 to the end of the second answer on P. 1593, and the first three lines at the top of P. 1472; and beginning on P. 1476 with "By Mr. Bishop", to and including "Mr. Bishop; I offer in evidence Exhibit A. W.", P. 1477; and certificate No. 27, and assignment on the back, P. 1479; and certificate 82 and assignment on the
1920 back, P. 1480; and Exhibit A. W., six receipts, P. 1481.

5. Print, commencing on P. 1246 to and including P. 1247.

6. In connection with the plaintiffs' designation 130, print the first and last two paragraphs of P. 1565, and the first paragraph top P. 1566; also print objections, rulings and exceptions throughout Mr. Hamer's testimony from 1566 to the end of 1580.

7. These defendants join in designating for printing the same portions of the bill of exceptions as those designated by defendant David E. Thompson consisting of his points 1 to 37 inclusive.

FRANK E. BISHOP,
FRANK M. HALL,
As Attorneys for Defendants in Error
Charles E. Yates and Louisa Hamer, Adm'x.

1921 [Endorsed:] File Nos. 24,240, etc. Supreme Court U. S. October term, 1914. Term Nos. 501, 502, 503 & 504. Jones National Bank, Pl'ff in Error, v. Charles E. Yates et al. Bank of Staplehurst, Pl'ff in Error, v. Charles E. Yates et al. Utica Bank, Pl'ff in Error, v. Charles E. Yates et al. Thomas Bailey, Pl'ff in Error, v. Charles E. Yates et al. Designation of additional parts of record to be printed by defendants in error Yates and Hamer. Filed November 13, 1914.

1922 In the Supreme Court of the United States.

File No. 24,240.

October Term, 1914. No. 501.

JONES NATIONAL BANK, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

File No. 24,241.

October Term, 1914. No. 502.

BANK OF STAPLEHURST, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

File No. 24,242.

October Term, 1914. No. 503.

UTICA BANK, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

File No. 24,243.

October Term, 1914. No. 504.

THOMAS BAILEY, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

Designation by Defendant in Error David E. Thompson of Additional Parts of the Record to Be Printed.

David E. Thompson, one of the defendants in error in the above-entitled cases, being File Nos. 24,240 and 24,241, states that he thinks it material that the following additional parts of the bill of

exceptions comprised in the record, should be printed, and hereby designates and requests that the Clerk print and include in the printed record the following parts of the bill of exceptions therein, in addition to the parts thereof designated by the plaintiff in error, namely:

1923 1. All of page 15, including objections to introduction of evidence.

2. All of the proceedings found on page 447 in connection with the offering of exhibit No. 978.

3. All of the proceedings found on page 449 in connection with the offering of exhibit No. 979.

4. All of the proceedings found on page 543 in connection with the offering of exhibit No. 983.

5. All of the proceedings found on page 458 in connection with the offering of exhibit No. 984.

6. All of the proceedings found on page 460 in connection with the offering of exhibit No. 985.

7. All of the proceedings found on page 462 in connection with the offering of exhibit No. 986.

8. All of the proceedings found on page 464 in connection with the offering of exhibit No. 987.

9. All of the proceedings found on page 466 in connection with the offering of exhibit No. 988.

10. On page 664, part of the cross-examination of witness H. J. Whitmore, commencing at the top of page and ending with answer "so far as I know", near the center of the page.

11. Pages 669, 671, part of the cross-examination of witness H. J. Whitmore concerning the transactions between the bank and R. O. Phillips, commencing with last question on page 669 and ending with the last answer on page 671.

12. Pages 673, 674, part of the cross-examination of witness H. J. Whitmore commencing with the question: "Q. Now, Mr.

1924 Whitmore, you never found a period from the organization of the bank until it closed, when Mr. Yates had promissory notes in there aggregating at one time as much as $5,000, did you?" on page 673, and ending with the last answer on page 674.

13. Page 677, part of cross-examination of witness H. J. Whitmore, comprising the entire page.

14. All of the proceedings found on page 684 in connection with the offering of exhibit No. X 1040.

15. All of the proceedings found on page 686 in connection with the offering of exhibit No. X 1041.

16. All of the proceedings found on page 688 in connection with the offering of exhibit No. X 1043.

17. All of the proceedings found on pages 690, 692 in connection with the offering of exhibit No. X 1044.

18. All of the proceedings found on pages 701, 702 in connection with the offering of exhibit No. X 1046.

19. All of the proceedings found on pages 704, 705 in connection with the offering of exhibit No. X 1047.

20. All of the proceedings found on page 708 in connection with the offering of exhibit No. X 1048.

21. All of the proceedings found on page 711 in connection with the offering of exhibit No. X 1049.

22. All of the proceedings found on page 714 in connection with the offering of exhibit No. X 1050.

23. All of the testimony on cross-examination of witness H. T. Jones, commencing on page 876 and ending on page 936.

24. All of the testimony of witness H. J. Whitmore commencing on page 988 and ending on page 1019, including exhibits
1925 offered as a part of the cross-examination.

25. All of the testimony on cross-examination of witness H. J. Whitmore, commencing on page 1033 and ending on page 1038.

26. All objections to questions propounded to witness H. T. Jones, and the proceedings had thereon, found on pages 1141 to 1154, both inclusive.

27. All of the testimony on cross-examination of witness H. T. Jones, commencing on page 1160 and ending on page 1177.

28. All objections to questions propounded to witness E. Jacobs, and the proceedings had thereon, found on pages 1207 to 1212, both inclusive.

29. All of the testimony on cross-examination of witness Fritz Becker on page 1220.

30. All of the testimony on direct examination, of witness E. B. Stephenson, commencing on page 1472 and ending on page 1474.

31. All of the testimony on direct examination, of Sister Ida, commencing on page 1601 and ending on page 1602.

32. All of the testimony on direct examination, of witness W. H. Mendenhall, commencing on page 1606 and ending on page 1607.

33. All of the testimony on direct examination, of witness Mrs. R. A. White, commencing on page 1609 and ending on page 1610.

34. All of the testimony on direct examination, of witness Dr. H. B. Miller, commencing on page 1624 and ending on page 1625.

35. All of the testimony on direct examination, of witness William C. Rhode, found on page 1632.

36. All of the testimony on direct examination, of witness Fred Foster, found on page 1635.

1926 37. All of the testimony on direct examination, of witness Claude Wilson, commencing on page 1637 and ending on page 1638.

38. All of the proceedings shown on pages 1686 and 1687 upon the offering of testimony of R. C. Outcalt.

39. All of the testimony on direct and cross-examination, of witness D. E. Thompson, commencing on page 1885 and ending on

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson,
Defendant in Error.

1927 [Endorsed:] In the Supreme Court of the United States. File No. 24,240. Oct., 1914, Term. No. 501. Jones National Bank vs. Charles E. Yates et al. File No. 24,241. Oct., 1914, Term No. 502. Bank of Staplehurst vs. Charles E. Yates et al. File No. 24,242. Oct., 1914, Term. No. 503. Utica Bank vs. Charles E. Yates et al. File No. 24,243. Oct., 1914, Term. No. 504. Thomas Bailey vs. Charles E. Yates et al. Designation by defendant in error, David E. Thompson, of additional parts of the record to be printed. Stout, Rose & Wells, 524 Omaha National Bank B'ld'g, Omaha, Nebraska, counsel for David E. Thompson, defendant in error.

1928 [Endorsed:] File Nos. 24,240, etc. Supreme Court U. S. October term, 1914. Term Nos. 501, 502, 503 & 504. Jones National Bank, Pl'ff in Error, vs. Charles E. Yates et al. Bank of Staplehurst, Pl'ff in Error, vs. Charles E. Yates et al. Utica Bank, Pl'ff in Error, vs. Charles E. Yates et al. Thomas Bailey, Pl'ff in Error vs. Charles E. Yates et al. Designation by David E. Thompson, defendant in error, of additional parts of record to be printed. Filed Filed November 14, 1914.

Endorsed on cover: Bill of exceptions. Supreme Court of the United States, October Term, 1914. No. 501. Jones National Bank, plaintiff in error, vs. Charles E. Yates et al. No. 502. Bank of Staplehurst, plaintiff in error, vs. Charles E. Yates et al. No. 503. Utica Bank, plaintiff in error, vs. Charles E. Yates et al. No. 504. Thomas Bailey, plaintiff in error, vs. Charles E. Yates et al. In error to the Supreme Court of the State of Nebraska. Filed May 23, 1914. (24,240, 24,241, 24,242, 24,243.)

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

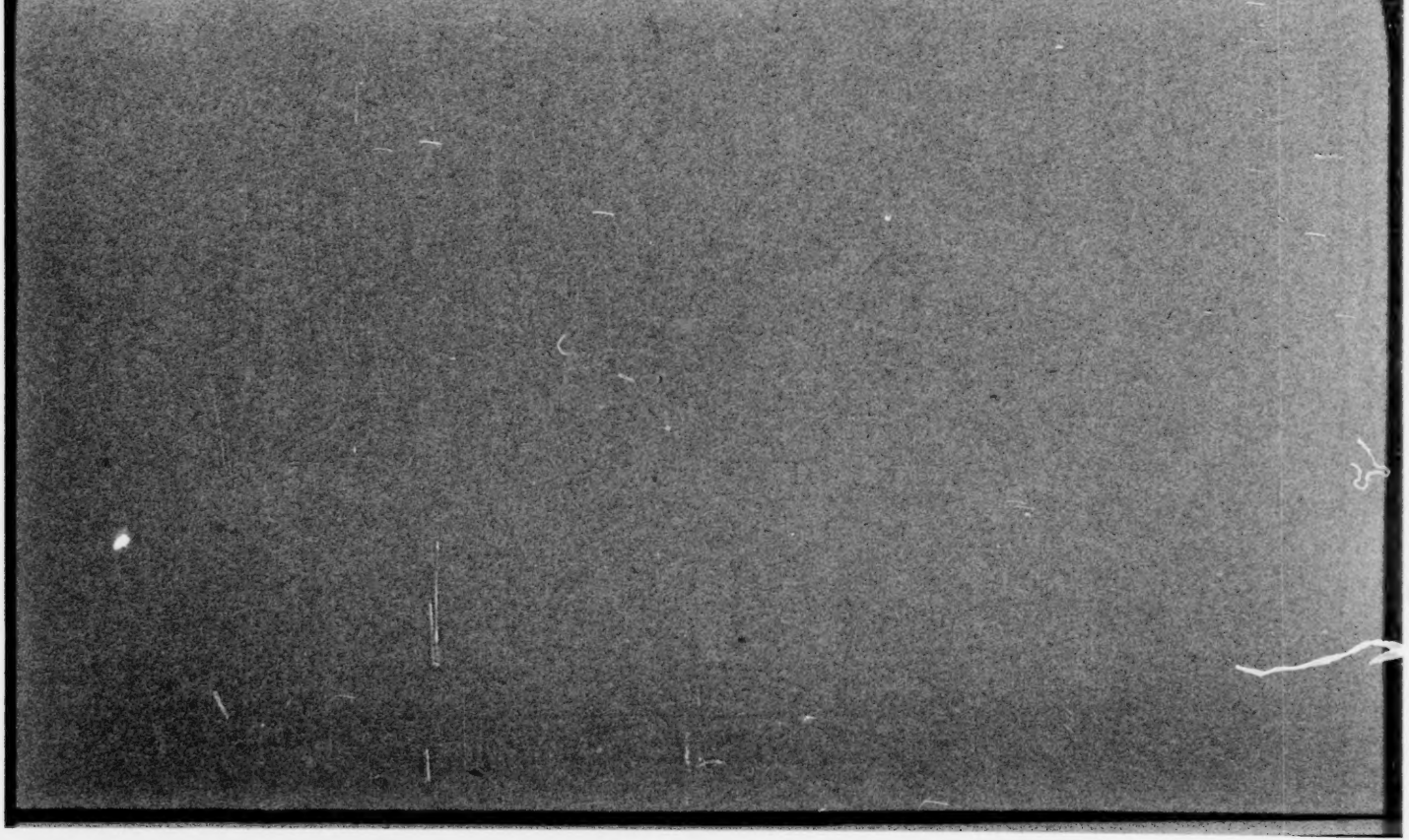
CHARLES E. YATES, D. E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(No. 24,240)

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(No. 24,240)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 19, 1915.

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1–5 No. 17276.

JONES NATIONAL BANK
v.
YATES.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 6th Day of January, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk*.

Be It Remembered, That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court, a certain Praecipe, in the words and figures following, to-wit:

* * * * * * *

6 "Afterwards, on the 16th day of March, A. D. 1895," there was filed herein a certain Amended Petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

THE JONES NATIONAL BANK, a Corporation Duly Organized and Doing Business at Seward, Nebraska, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, DAVID E. THOMPSON, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

The plaintiff for its amended petition complains of the defendants and alleges that the plaintiff is a corporation duly organized and doing a general banking business, with its principal place of business at Seward, Nebraska.

That on, prior, and subsequent to the 9th day of December 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they

acted as such officers and directors and as such had the control and management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska.

7 That acting as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said Bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements, to see that the valuable effects, assets, and other matters including the cash on hand and in other banks or depositories agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers and to those who were relatives and favorites of the defendants as officers or acting officers of the Bank.

That the books of said Bank were out of balance, that they allowed and permitted forced balances to be made and carried on the Bank Books, the deposit account was falsified, being greatly under stated, the real estate, bills receivable, and deposit account each being largely inflated; that they permitted to be carried on the books of the bank and permitted and caused to be printed and published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were

8 worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or over-due without taking steps to collect or secure the same, whereby the same were lost to the Bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless, and of no value, and from time to time they published, permitted, allowed, and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to

plaintiff and sent by defendants and their agents to plaintiff through the U. S. mails & otherwise that such notes, bills receivable and other worthless assets were good and collectable and part of the valuable resources and effects of said Bank when in truth and in fact they knew, and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the statements sent by defendants to Plaintiff as aforesaid and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements and the statements sent by defendants to Plaintiff as aforesaid showed that it was in good sound financial condition
9 when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and its said business and all of which said facts and circumstances the defendants, and each of them, had full knowledge and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made statements to the plaintiff and the public and sen*d* and deliver- to Plaintiff statements of its condition showing said Bank to be solvent, its capital stock unimpaired and a surplus on hand, and so continued to publish cause, allow, and permit, to be published and sen*t* and give- the Plaintiff said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after the said Bank became insolvent as aforesaid the *the* said defendants permitted said Bank to continue in business and receive deposits from plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known, by the exercise of ordinary care in the discharge of their duties as directors or acting as directors but of the insolvency of said Bank this plaintiff was at all times entirely ignorant.

That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertise-
10 ments and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers as aforesaid, caused, & permitted to be made and sent & delivered to Plaintiff statements of the Bank's condition, setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to deposit and keep money in said Bank, and the plaintiff replying upon said published statements, and upon the statements of its financial condition sent to & received by plaintiff as aforesaid

as it had the right to do, deposited and loaned its money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid it allowed the same to remain on deposit, when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said Bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants, for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made, caused, allowed and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement is hereto attached and marked "Exhibit A," which said statement was made, caused, allowed
11 and permitted to be made by the said defendants acting as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and to induce the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date, caused, allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers aforesaid were of general circulation in the State of Nebraska. And said defendants on or about said date sent & caused to be sent to & received by Plaintiff said false & untrue statements aforesaid.

Plaintiff further avers that on the 28th day of December 1886, the said defendants and each of them acting as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid and solvent, and to induce the plaintiff and others to do business with said bank as aforesaid made, caused, allowed, and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked "Exhibit B" and caused allowed and permitted said statement to be published in various newspapers in general circulation in the city of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska, and sent & caused to be sent to & received by Plaintiff said false & untrue statements aforesaid for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank, when in truth and in fact said Bank was not in a sound, solid, safe and solvent condition, but was wholly insolvent.

This plaintiff avers that on and between July 23rd, 1884 and Jan-

uary 21st, 1893, the defendants with the fraudulent intent
12 and purpose as aforesaid, during all of said time made allowed caused and permitted to be made at divers intervals false statements of the condition of said Bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed & permitted said false statements and each of them severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, and sent & caused to be sent to & received by Plaintiff said false statements aforesaid, through the U. S. mails & otherwise & which were received by Plaintiff.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements, represented that said Bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe Bank in which to make deposits and loans of money and said statements were prepared and published and were caused, permitted and allowed to be prepared and published and sent and delivered to plaintiff by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published and as sent and delivered to & received by Plaintiff stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the officers of the plaintiff corporation, which officers were in the full control and management of plaintiff's business and plaintiff avers that it believed them
13 to be true and correct statements of the condition and resources of said Bank, and that during said period of time,—the exact times of which plaintiff cannot at this time state,—the said defendants had conversations with the officers of plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st 1893, in which said conversations said defendants represented said Bank, of which they were directors and acting directors and officers was thoroughly safe and sound, and believing said published statements and advertisements and said statements of its financial condition so sent & received by plaintiff, as aforesaid and said verbal representations so made by said defendants to be true, and believing them to be true and replying upon the same that said Bank was sound, solid and solvent and doing a flourishing and prosperous business, as said published statements and advertisements and other statements as aforesaid showed, and as represented in said verbal statements, and statements sent to plaintiff by defendants and by Plaintiff received and examined, this plaintiff on the 23rd day of July, 1884, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money, and continued to loan and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, which said sums of

money so loaned and deposited with said Bank varied, as Plaintiff during all of said period withdrew and reloaned to said Bank said divers sums of money, and plaintiff avers that on the 2nd day of January, 1893, plaintiff had a balance to its credit amounting to Ten Thousand Four Hundred Twenty-nine and 90 100 ($10,429.90) dollars, money it had loaned to and deposited with said Bank, and from January 2nd, 1893, to and including Jany.
14 21st, 1893 (the day said Bank closed its doors and ceased to do business) the plaintiff loaned and deposited with said Bank the following sums of money, to-wit:—

January 4th, 1893		$5,660.60
" 6th,	"	233.35
" 7,	"	250 84
" 10,	"	254.40
" 13,	"	301.57
" 16,	"	162.15
" 19,	"	5,000.00
" 20,	"	400.79
Balance due plaintiff on January 1st, 1893		10,429.90

making total amount due plaintiff from Capital National Bank: $22793.11

That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $5,263.88, leaving still due and owing from said Capital National Bank to the plaintiff the sum of Seventeen Thousand Five Hundred Twenty-nine and 23/100 ($17,529.23) Dollars, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated.

Plaintiff avers that said statements so sent to and received by Plaintiff as aforesaid and advertisements, statements so published as aforesaid; and said statements as verbally announced to the officers of said plaintiff, were, as the defendants and each of them well knew and were in duty bound to know grossly exaggerated and wholly false and untrue and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated, and the resources inflated and exaggerated as hereinbefore stated.

15 That whereas said statements and advertisements and each of them as well as said verbal statements made, and caused allowed and permitted to be made to the officers of plaintiff as aforesaid, showed that said Bank was sound, solid and solvent, and doing a flourishing business, when in truth and in fact said Bank was not doing a flourishing and prosperous business and was in fact at the time said statements and advertisements were published and verbally made and said, statements so sent to and received by plaintiff in an unsafe, precarious and insolvent condition and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made said statements so sent

to & received by Plaintiff and advertisements as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting as directors and they and each of them willfully negligently and recklessly for the purpose and with the intent aforesaid made and caused, allowed, and permitted to be published said false statements and advertisements and sent to and caused to be received by plaintiff said false & untrue statements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

16 Plaintiff further avers that its knowledge of the condition of said Bank was wholly derived from said published statements and advertisements by said statements so sent to and received by Plaintiff and by said verbal statements so made to its officers by said defendants, and that had said statements and advertisements so published and said statements so sent to and received by Plaintiff and as verbally made as aforesaid set out and given the true condition of said Bank, it would have appeared, and would have been shown that said Bank was not sound, solid, and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit:—on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and sending to & causing to be received by Plaintiff said statements and making said verbal statements by said defendants to the officers of plaintiff as aforesaid insolvent and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had in said statements, advertisement, and verbal statements made as aforesaid, and that by reason thereof said Bank could not pay and did not pay this plaintiff any part of said sum of money loaned and deposited with said Bank, except the sum of $2,629.38, and that the remainder of said money so loaned and deposited with said Bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

17 Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty-five Thousand ($25,000) Dollars.

Wherefore plaintiff prays judgment against the defendants and each of them for the sum of Twenty-Five Thousand ($25,000) Dol-

lars, its damages, with interest thereon from January 21st, 1893, at 7 per cent and costs of suit.

THE JONES NATIONAL BANK, OF SEWARD, NEBRASKA, *Plaintiff.*
By BURR & BURR,
GEO. W. LOWLEY &
BIGGS & THOMAS,
Its Attorneys.

* * * * * * *

18 "EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and Discounts		$768,601.44
Overdrafts secured and unsecured		6,217.74
United States Bonds to secure circulation		50,000.00
Stocks, securities, etc		325.00
Due from approved reserve agents		107,090.01
Due from other National Banks		17,809.33
Due from State Banks and Bankers		5,394.72
Banking house, furniture and fixtures		5,770.00
Other real estate and mortgages owned		38,716.92
Current expenses and taxes paid		14,285.28
Checks and other cash items		3,398.56
Exchange for clearing house		8,841.16
Bills of other banks		2,355.00
Fractional paper currency, nickels and cents		298.71
Specie		24,789.50
Legal tender notes		17,431.00
Redemption fund with United States Treasurer (5 per cent of circulation)		1,350.00
Total		$1,074,867.37

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	
		643,632.24
Notes and Bills rediscounted		59,054.38
		$1,074,876.37

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

19 Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

Loans and Discounts	$737,462.12
Overdrafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stocks, bonds and mortgages	22,739.34
Due from approved and reserve agents	74,068.63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other cash items	13,742.02
Bills of other Banks	3,712.00
Fractional paper currency, nickels and cents	216.42
Specie	27,308.00
Legal tender notes	10,400.00
Redemption with U. S. Treasurer (5% circulation)	1,900.00
Total	$1,035,448.92

20 & 21 Liabilities.

Capital stock paid in	$300,000.00
Surplus fund	12,000.00
Undivided profits	28,439.38
National Bank notes outstanding	45,000.00

Individual deposits subject to check....	$414,962.35	
Demand certificates of deposit.....	40,859.56	
Due to other National Banks.....	107,648.27	
Due to State Banks and Bankers.....	37,448.86	
		597,918.94
Notes and bills rediscounted.....		52,090.30
Total		$1,035,448.92

STATE OF NEBRASKA,
Lancaster County, ss:

I. C. W. Mosher, President of the above bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

* * * * * * *

22 "Afterwards, on the 15th day of July, A. D. 1901," there was filed herein a certain Answer of David E. Thompson, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK
vs.
CHARLES W. MOSHER et al.

Separate Answer of David E. Thompson to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendant David E. Thompson, and in obedience to the order of the court, makes answer for himself to the plaintiff's petition as amended by interlineation on the 16th of March, 1899.

This defendant says that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, this defendant has not knowledge or information and he therefore denies that such deposits were made.

23 *First Defense.*

This defendant for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank, and the defendant David E. Thompson was a director for a short time in said Bank, but was not such director at the time any of the deposits were alleged to have been made by the plaintiff in the Capital National Bank, and during such time he was simply a stockholder in said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any Court, for reason of the violation of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

24 The defendant denies that he signed or attested the reports set out and referred to in said amended petition, and denies that he made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

This defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a federal question is involved in determining the liability of this defendant by reason of the al-

leged mismanagement of said bank and the alleged neglect of duty on the part of this defendant.

This defendant further answering for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense.

This defendant further says for himself, that the plaintiff on or about the 27th day of October, 1893, brought an action
25 against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Jones National Bank to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action, and a judgment for costs was rendered in said Court against the plaintiff and in favor of the defendants and the other defendants herein in the sum of $125.73 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

This defendant therefore avers that the plaintiff under the law and the practice, is and ought to be barred and stopped from prosecuting this defendant on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, this defendant says for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February, 1895, by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defend-
26 ants. That on or about the 9th day of July, 1895, the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of its claim as made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County, in favor of the plaintiff Jones National Bank and against the said defendant Stuart has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging

to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff Jones National Bank. And this defendant alleges the fact to be that the plaintiff's claim against this defendant and the other defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said Jones National Bank against the said defendant Stuart and the payment thereof, is a complete bar against any further judgment or claim in favor of the said plaintiff against this defendant and the other defendants in said cause.

Fourth Defense.

This defendant for a further and separate defense to the plaintiff's cause of action, says that as hereinbefore alleged in the first defense in this answer, this defendant in all of his actions concerning and in connection with the said bank, acted in his capacity as director or stockholder of said national bank, and if he neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages, said cause of action existed, if any, in favor of the said bank or the re-
27 ceiver of said bank after his appointment, and not in favor of this plaintiff.

This defendant alleges the fact to be that if the plaintiff deposited its money in the said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank; and that the said money as well as any damage caused by the alleged neglect of duty on the part of this defendant, did not give rise to any cause of action in favor of this plaintiff; but alleges the fact to be that if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

This defendant for himself denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

This defendant therefore alleges that the plaintiff has no cause of action against this defendant.

Wherefore, the defendant prays judgment for costs.

J. W. DEWEESE &
F. E. BISHOP,
Att'ys for Def't.

* * * * * * *

28 Afterwards, on the 15th day of July, A. D. 1901, there was filed herein a certain Answer of Chas. E. Yates and Ellis P. Hamer, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK
vs.
CHARLES W. MOSHER et al.

Separate Answer of Charles E. Yates and Ellis P. Hamer to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now come the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the court, each make answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th of March 1899.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, these defendants have not knowledge or information and they therefore deny that such deposits were made.

First Defense.

29 These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1913, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the con-

dition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by these
30 defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense.

These defendants further say, each for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Jones National bank to remand said cause to the District Court from which
31 it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said court against the plaintiff and in favor of these defendants in the sum of $125.93 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and the practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895 by said plaintiff making Charles W. Mosher, Morman J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants and plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the Plaintiff Jones National Bank and against the said defendant Stuart has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said Judgment rendered in favor of the plaintiff.

And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said Jones National Bank against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense.

These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the said bank or receiver of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the fact to be that if the plaintiff deposited his money in the said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these

defendants, did not give rise to any cause of action in favor
33 of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. A. HALL, AND
FRANK BISHOP,
Att'ys for Def'ts.

* * * * * * *

34 Afterwards on the 23rd day of August, A. D. 1901, there was filed herein a certain reply, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER et al., Defendants.

Reply to Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, David E. Thompson and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, David E. Thompson and Richard C. Outcalt denys each and every allegation of new matter contained in each of their several answers.

JONES NATIONAL BANK,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS &
C. C. BURR.

35 *Stipulation.*

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward County, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time, and that the

evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, sub-
36 ject of course to the objection of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and produced and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in-so-far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be
37–38 necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases. And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, and Hamer Estate.
CHAS. O. WHEDON,
Att'y for Chas W. Mosher and R. C. Outcalt

* * * * * * *

39 Afterwards, on the 14th day of October, 1908, there was filed and entered of record herein a Mandate of the Supreme Court of Nebraska, in words and figures following to-wit:

Mandate.

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, September Term, 1908.

To the District Court of the Fifth Judicial District, sitting in and for the County of Seward, Greeting:

Whereas, in a late action before you, wherein The Jones National Bank, a corporation, duly organized and doing business at Seward, Nebraska, was plaintiff, and Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, revived in the name of Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, Ambrose P. S. Stuart, David E. Thompson, Richard C. Outcalt, and Rollo O. Phillips, were defendants, the said plaintiff recovered a judgment against said defendants Charles W. Mosher, Charles E. Yates, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, David E. Thompson, and Richard C. Outcalt upon a transcript of which record and proceedings in your said court the said defendants Charles W. Mosher, Charles E. Yates, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, David E. Thompson and Richard C. Outcalt, each prosecuted a petition in error to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court, during the

40 September term, 1905, upon an opinion by the Commissioners of said Supreme Court filed in said cause, it was considered by said Court that the judgment entered by you in favor of said plaintiff and against said defendants be affirmed at the costs of said defendants, taxed at $—.

That afterwards, upon a writ of error issued out by said Charles W. Mosher, Charles E. Yates, David E. Thompson, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, and Richard C. Outcalt, said cause was appealed to the Supreme Court of the United States, wherein, during the October Term, 1906, thereof the said cause coming on to be heard before the Supreme Court of the United States, in consideration whereof it was ordered and adjudged by the said Supreme Court of the United States that the said judgment of our Supreme Court in this cause be reversed with costs, and the said Charles E. Yates, David E. Thompson, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover against the said The Jones National Bank the sum of $625.75 for their costs therein expended and that execution issue therefor. And it was also by said Supreme Court of the United States ordered that the said cause in the said Supreme Court of the United States as to said Charles W. Mosher and Richard C. Outcalt, be dismissed for want of prosecution; and it was by the said Supreme Court of the United States further ordered that the said cause be, and the same duly was re-

manded to our Supreme Court for further proceedings not inconsistent with the opinion of said Supreme Court of United States.

That afterwards, and on the 4th day of May, 1908, said mandate from the Supreme Court of the United States was duly filed in this court; that afterwards, to-wit, on October 8, 1908, upon
41 a trial of said cause in the Supreme Court of the State of Nebraska, it was considered by said Court that the judgment entered by you in favor of said plaintiff and against said defendants Charles E. Yates David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, be reversed and remanded for further proceedings according to law, and that the said Charles E. Yates, David E. Thompson, and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover, of and from said plaintiff The Jones National Bank, three fifths of their costs expended in this court; taxed at $119.85 (The total costs in this court being $199.75) and that execution be awarded therefor.

Now, therefore, You are commanded, without delay, to proceed according to law.

Witness, The Honorable John B. Barnes, Chief Justice, and the seal of said Court at Lincoln, this 12th day of October, 1908.

[SEAL.] H. C. LINDSAY, *Clerk*,
By VICTOR SEYMOUR, *Deputy*.

Afterwards, on the 17th day of February, A. D. 1911, there was filed herein, a certain Request for Special Findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, et al., Defendants.

Request of Defendants for Special Findings.

42 The defendants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately and for each one alone, requests the court to make and find the following special findings of fact and of law:

I.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages

against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in his favor.

III.

That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the National Bank to violate any of the provisions of the national banking act under which said Bank operated.

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank.

V. That the defendant Charles E. Yates and the deceased, Ellis P. Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank
43 or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI. That the plaintiff was not induced or influenced by any parole or oral statement or representation of the defendant Yates or of the deceased, Hamer, either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII. That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date December 28, 1886, and of date December 9, 1892; exhibits "A" and "B" attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery.

VIII. That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained:

IX. That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886 and December 9, 1892, did not with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities;

X. That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets
44 of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case;

XI. (A) That neither the defendant Charles E. Yates nor the de-

ceased, Ellis P. Hamer, with actual personal knowledge or intentionally, made, published or declared or permitted to be made, published or declared any untrue statement, report or representation of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (B) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants acted in good faith, honestly believing that said statements, reports and publications were true and without any knowledge or intention that any of said statements, repoprts and representations were untrue.

FRANK E. BISHOP,
For Defendants Yates and Hamer as Adm'x.

Afterwards, on the 17th day of February, A. D. 1911, there was filed herein a certain Request of D. E. Thompson for Special Findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES E. YATES, LOUIS P. HAMER, Administrator of the Estate of Ellis P. Hamer, Deceased, and DAVID E. THOMPSON, Defendants.

Request for Special Findings.

45 Defendant, David E. Thompson, requests the court to find specially from the evidence touching the following facts in issue:

1. Whether the allegations contained in the petition to the effect that defendant, Thompson, failed to perform his duties to personally manage and superintend the business of the Capital National Bank, to examine the loans and securities, to see that the general condition of the bank corresponded with its books, to see that only good bills receivable were entered upon bank books and in its statements, and that assets which were worthless or of little value were charged off, and including all allegations of official misfeasance and mismanagement, are sustained by the evidence and whether plaintiff is entitled to recover from this defendant by reason thereof.

2. Whether this defendant at any time prior to the suspension or failure of the Capital National Bank made any oral statement or representation touching the pecuniary worth, standing, or responsibility of the said bank to the plaintiff or to the witness H. T. Jones, the Cashier of Plaintiff.

3. Whether the plaintiff was induced or influenced by any oral statement of this defendant to depopsit any funds in the Capital National Bank.

4. Whether this defendant at any time prior to its failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of

the Currency and referred to in the petition or the evidence were in any material respect false and untrue.

5. Whether this defendant in fact participating in any of the official reports made by the Capital National Bank to the Comptroller of the Currency other than the five several reports dated respectively, December 28, 1886, August 1, 1887, October 2, 1890, and December 19, 1890, and July 9, 1891.

6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith.

7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith, with actual personal knowledge that such reports or any one of them were in any material respect false and untrue.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

Afterwards, on the 1st day of April, A. D. 1911, there was filed herein a certain request for additional findings, in words and figures to-wit:—

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspaper and the names of the directors of the bank:

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, requests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the Comptroller and printed in the newspapers and the names of the directors of the bank.

16. That the evidence does not show said Hamer personally took part in the preparation nor distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the bank, showing its assets, liabilities and officers' names, were printed and carried in the newspapers.

FRANK E. BISHOP,
Attorney for Defendants Yates and Hamer.

Then again on April 1st, 1911, there was filed herein a certain Request of D. E. Thompson for Additional Special Findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and DAVID E. THOMPSON, Defendants.

Request for Additional Findings.

48 Comes now defendant David E. Thompson before the rendition or entry of any judgment herein, and suggests to the Court that the findings and conclusions of law, as found, made and announced, touching the issues between plaintiff and this defendant, leave uncertain the particular grounds or facts upon which the Court concludes as a matter of law that the plaintiff is entitled to recover against this defendant. To the end, therefore, that the findings shall be made to disclose the particular ground of liability against this defendant, this defendant respectfully requests that the Court specially find further upon the following interrogatories:

1. Did this defendant ever at any time personally make, compile, issue or circulate any financial statement of the resources and liabilities of the Capital National Bank of an unofficial or voluntary character, separate and apart from the official reports which the Court finds this defendant attested, of dates, respectively December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891?

2. Did this defendant, so far as shown by the evidence adduced, ever at any time personally direct or participate in making, compiling, issuing or circulating any financial statement of the resources and liabilities of the Capital National Bank, of an unofficial or voluntary character, separate and apart from the official reports which the Court finds this defendant attested, of Dates respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891?

3. Is the liability of this defendant for deceit or false representations under the principles of the common law, as determined by the Court, founded or based upon the defendant's attestation of the official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, of dates respectively,

December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891; or any one or more thereof?

4. What are the particular written false representations made by this defendant, which form the basis or foundation for the legal conclusion that this defendant is liable for deceit or false representations under the principles of the common law?

This request is only for such general reference in the findings to said written statements as will identify them, specifically, or by classification, in the proofs adduced at the trial.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

Afterwards, on the 1st day of April A. D. 1911, there was filed herein a certain Motion of Defendant David E. Thompson for Judgment in his favor on the Special Findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Motion of Defendant David E. Thompson for Judgment in His Favor on the Special Findings.

Comes now the defendant David E. Thompson and suggests to the Court that the facts specially found by the Court herein, to-wit: That plaintiff was not induced or influenced by any oral statements of this defendant to deposit any funds in the Capital National Bank; and that this defendant had no actual personal knowledge of the falsity of any of the reports made to the Comptroller of the Currency, attested by him, but in attesting such reports relied upon the statements made to him by the president and cashier of the bank, (there being no evidence that this defendant ever made or participated in making or publishing any written reports other than the official reports so mentioned) leaves the judgment against this defendant wholly without support, and entitles this defendant to a judgment in his favor as a matter of law.

Wherefore, defendant moves the court to vacate the judgment entered against him herein, and to render a final judgment upon the facts so specially found in favor of this defendant that he go hence without day, and for costs, in conformity to the law of the case as established and declared by the judgment of the Supreme Court of the United States, and the Supreme Court of Nebraska in the appellate proceedings heretofore had in said courts in this cause.

HALLECK F. ROSE,
Attorney for Defendant David F. Thompson.

* * * * * * *

51–54 On this day, this cause came on for trial and by agreement of parties in open Court, trial by jury is waived and this cause is set for further hearing, by agreement of parties in open Court on January 30, 1911, at 1:30 P. M.

* * * * * * *

55–59 And now on this 1st day of April, 1911, being a day of the February 1911 term of this Court, these causes came on further to be heard on the motion of each of the plaintiffs for leave to amend their interlined amended petitions by interlineation upon consideration whereof said motions and each of them are sustained and the plaintiffs and each of them permitted to amend their petitions as prayed; to which ruling of the Court the defendants and each of them except.

* * * * * * *

60 *Special Findings of Fact and Conclusions of Law.*

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates, and Louisa P. Hamer, administratrix, defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

61 Respecting the ninth request as to the reports of December 28, 1886 the Court answers the same in the negative and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line and the residue thereof contained in sub-division "B" and answers the first question contained in sub-division "A" in the affirmative and the second question contained in sub-division "B" in the negative.

Subject to the foregoing Special Findings of Fact made at the

request of the defendants the Court now finds generally in plaintiff's favor and against the defendants and each of them upon the evidence under the issues joined and that the allegations of plaintiff's amended petition are true, and that plaintiffs are entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of $23777.67.

To each of the findings of fact and conclusions of law made by the Court the defendants each severally except.

B. F. GOOD, *Judge.*

* * * * * * *

62 *Special Findings of Fact and Conclusions of Law.*

And now on this First day of April, 1911, the Court in pursuance of the request of the defendant, David E. Thompson, in this cause, makes the following findings of fact, and conclusions of law.

In response to the first request the Court finds that the defendant Thompson failed to perform his duties as a director in the Capital National Bank, in failing to personally assist his fellow directors in managing and superintending the business of such bank, and to examine the loans and securities thereof, and to see that the general condition of the bank corresponded with its books, and to see that only good Bills Receivable were entered upon the bank's books and its statements and to see that the assets which were worthless or of little value were charged off, and that the allegations of plaintiff's petition of official misfeasance and mismanagement are sustained by the evidence, and that such allegations are true.

In respect to the second and third requests of the defendant David E. Thompson, the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing or responsibility of said bank to the plaintiff, and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank.

63 In response to the fourth request the Court finds in the affirmative.

Respecting the fifth request the Court finds that the defendant Thompson attested only five reports mentioned in said request.

Respecting the sixth and seventh requests of the defendant the Court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, attested by him, but in attesting such reports the Court finds that the defendant relied upon the statements made to him by the president and cashier of the bank, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth of falsity of such reports and that the same were attested recklessly and without performing his duties as a Director to ascertain the truth or falsity of such reports before the same were attested by him, and in this respect the Court finds that the same were not made in good faith.

Subject to the foregoing Special Findings of Fact made at the request of the defendant David E. Thomp-son, the Court now finds generally in plaintiff's favor and against the defendant upon the evidence under the issues joined, and that the allegations of the Plaintiff's Amended Petition are true.

Responsive to the request for a conclusion of law embodied in the first request the Court finds that Plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that plaintiff has sustained damages in the sum of $23777.37.

64–67 To each of the findings of fact and conclusions of law made by the Court the defendant excepts.

B. F. GOOD.

* * * * * * *

68 "The Motion for leave to amend" petition, filed herein on the 18th day of February, 1911, is in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE JONES NATIONAL BANK, a Corporation Duly Organized and Doing Business at Seward, Nebraska, Plaintiff.

vs.

YATES et al., Defendants.

Motion to Amend Petition.

Comes now the plaintiff and moves the court for leave to amend its last petition herein in this to-wit:—that it be permitted to amend its petition as follows, to-wit:

On page 2, line 32, after the words "to be" add the words "printed and".

69 On page 2, line 49, after the word "plaintiff" add words "and sent by defendants and their agents to plaintiff through the United States mails and otherwise."

On page 2, line 55, after the word "advertisements" add the words and the statements sent by defendants to plaintiff as aforesaid."

On page 2, line 57, after the word "advertisements" add the words "and the statements by defendants to plaintiff as aforesaid."

On page 3, line 67, after the word "public" add the words "and send and deliver to plaintiff statements of its condition."

On page 3, line 59, after the word "published" add the words "and send and give to plaintiff."

On page 3, line 84, after the word "newspapers" add the words "and as aforesaid, caused and permitted to be made, and sent and delivered to plaintiff statements of the bank's condition."

On page 3, line 87, after the word "statements", add the words "and upon the statements of its financial condition sent to and received by the plaintiff as aforesaid."

On page 4, line 113, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be sent to, and received by plaintiff, said false and untrue statements aforesaid."

On page 4, line 124, after the word "Nebraska" add the words "and sent and caused to be sent to, and received by the plaintiff said false and untrue statements aforesaid."

On page 5, line 136, after the word "Nebraska", add the words "and sent and caused to be sent to and received by, the plaintiff said false statements aforesaid, through the United States mails and otherwise and which were received by plaintiff."

On page 5, line 143, after the word "published" where it appears the second time, add the words "and sent and delivered to plaintiff."

70 On page 5, line 147, after the word "publish" add the words "and as sent and delivered to and received by plaintiff."

On page 5, line 159, after the word, "advertisements" add the words "and said statements of its financial condition so sent and received by the plaintiff."

On page 6, line 153, after the word "advertisements" add the words "and other statements as aforesaid."

On page 6, line 164, before the word "this" insert the following words "and statements sent to plaintiff by defendants and by plaintiff received and examined."

On page 6, line 193, after the word "statements", add the words "so sent to and received by plaintiff as aforesaid" and after the word "advertisements" add the words "and statements".

On page 7, line 205, after the word "made," add the words "and said statements so sent to and received by plaintiff."

On page 7, line 210, after the word "statements" add the words "so sent to and received by plaintiff."

On page 7, line 219, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements."

On page 7, line 224, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff."

On page 7, line 226, after the word "published" add the words "and said statements so sent to and received by plaintiff."

On page 8, line 237, after the word "advertisements" add the words "and sending to, and causing to be received by the plaintiff said statements."

On page 8, at the end of line 240, omit the word "published."

THE JONES NATIONAL BANK,
By J. J. THOMAS AND
NORVAL BROS.,
Attorneys for Plaintiff.

* * * * * * *

Motion for New Trial.

71 The defendant Charles E. Yates moves the court to set aside his findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The Court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

72 7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepts to said finding.

9. The court erred in finding on the third request that Charles E. Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provisions of the banking act by any of the officers, agents or servants of the bank, and that the defendant is liable at the common law for deceit therefor.

12. The Court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The Court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the re-
73 ports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The Court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the
74 terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in each of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by this defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law

or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The Court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21c. The Court erred in finding against defendant on the tenth request.

75 22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National Banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking Act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

76 26. The Court erred in finding and adjudging the defendand liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and wilfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 203 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the

judgement of said United States Supreme Court on said writ of error and the mandate of said Court on said judgement persuant to which these further proceedings are had in the following particulars:

(*a*) The findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting— (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is that the violation must in effect be intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgement of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in ever- state shall be bound thereby any-thing in the Constitution or laws of any state to the contrary notwithstanding," contained in section 2 article 6 of the constitution of the United States.

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28. Upon the issues and the evidence, the defendant is entitled to judgement in his favor and moves the Court to render such judgement thereon.

29. Upon the facts specially found, this defendant is entitled to judgement in his favor as a matter of law and moves the Court to render such judgement thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

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32. The finding and judgment are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The Court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

79 39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendant.

* * * * * * *

Motion for New Trial.

The defendant Louisa P. Hamer Adm'x moves the court to set aside her findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

80 4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liabilty on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers,
81 agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his findings on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports, did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is not contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

82 17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

83 21. The Court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank showing its assets, liabilities and officers' names, and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16 and 17.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgement should be entered in his favor.

24. The conclusion and judgement that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official

neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgement and findings
84 permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and essented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars: (*a*) the findings and judgment violate the
85 holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting." (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be

intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding," contained in section 2 article 6 of the constitution of the United States.

86 28. Upon the issues and the evidence, the defendant is entitled to judgement in his favor and moves the Court to render such judgement thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgment thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgment are against the clear weight of the evidence.

33. The Court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statements of the financial condition of the bank in the reports made to the comptroller.

35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained

87 material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published, advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined

for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this state.

FRANK E. BISHOP,
For Defendants.

* * * * * * *

88 *Motion of Defendant David E. Thompson for New Trial.*

The defendant, David E. Thompson, moves the Court to vacate and set aside the findings and judgment rendered herein against him and to grant a new trial of this case for the following reasons:

1. The said cause had been duly and regularly and lawfully removed to the Circuit Court of the United States for the District of Nebraska, by proceedings taken in accordance with the acts of Congress of the United States on the ground that the liabilities sought by plaintiff to be enforced arose on an act of Congress of the United States. As shown on the face of plaintiff's petition, this Court had no jurisdiction or power to proceed further in the trial of said cause.

2. The petition of the plaintiff does not set forth facts sufficient to constitute a cause of action in favor of plaintiff against this defendant, and does not set forth sufficient facts to support and maintain the judgment rendered herein.

3. The Court erred in receiving any testimony and in overruling the objection of this defendant to the admission of any testimony at the trial, because the petition did not state facts sufficient to constitute a cause of action in favor of plaintiff against this defendant.

89 4. The judgment is not sustained by sufficient evidence.

5. The judgment is against the clear weight of the evidence.

6. The judgment is contrary to law.

7. The judgment is not sustained by the findings of the Court.

8. The facts specially found by the Court affirmatively show that defendant is not liable to plaintiff upon the cause of action set forth in the petition and entitle this defendant to judgment in his favor.

9. The Court erred in finding and holding as a conclusion of law that mere negligence or failure of this defendant to perform his duties as a director in the Capital National Bank in failing to personally assist his fellow directors in managing and superintending the business of such bank and to examine the loans and securities and see that the general condition of the bank corresponded with its books and that only good bills receivable were entered upon the bank's books and its statements and to see that the assets that were worthless or of little value were charged off, and acts of mere official

misfeasance and mismanagement, entitle plaintiff to recover in an action of deceit under the principles of the common law, exclusive of the requirements of the national banking act.

10. The conclusion of law found and held by the Court that plaintiff in its individual capacity and right is entitled to maintain or prosecute a cause of action for negligence or deceit under the principles of the common law on account of the mere negligence of this defendant in performing his duties as a director in the Capital National Bank and for mere acts of official misfeasance and
90 mismanagement, is contrary to and violative of the act of Congress of the United States known as the "National Banking Act," and the plan and theory of liquidation and distribution of the assets of insolvent national banks thereby established, in this, that whereas by the said act of Congress all liabilities of directors of national banks, for mere acts of official neglect, misfeasance and mismanagement are assets of the Banking Association and pass upon the bank's insolvency to the Receiver appointed by the Comptroller of the Currency, and are enforceable only by the Receiver so appointed, for the equal and ratable distribution and benefit of all creditors, the said conclusion of law and finding of the Court permits the plaintiff to recover in its personal and individual capacity to the exclusion of other creditors, and thereby operates to violate and nullify the act of Congress in that behalf, which is the Supreme and paramount law governing national banks.

11. The court erred in finding, holding and adjudging that a common law action of deceit could be maintained against this defendant as a director of the Capital National Bank, based upon his neglect of official duties imposed upon him by the provisions of the national banking act, or upon the manner in which this defendant conducted or failed to conduct the business of said bank, upon grounds exclusive and apart from the liabilities imposed in and by the terms of said act.

12. The Court erred in finding, holding and adjudging that the liability of this defendant upon the cause of action set forth in the petition is not governed and limited by the liabilities imposed upon directors of national banks by the national Banking act, being title
62 of the Revised Statutes of the United States.

91 13. The Court erred in finding, holding and adjudging as a matter of law, that this defendant is liable to plaintiff upon the cause of action set forth in its petition, notwithstanding that this defendant was without knowledge of the falsity of any report attested by him and that he attested such reports in reliance upon information communicated to him by the president and cashier of the bank, under the principles of the common law exclusive of the requirements of the national banking act. The findings and judgment in that behalf are in violation of the provisions of section 5239 of the revised Statutes of the United States, which makes liabilities of directors of national banks dependant upon the fact that they have knowingly violated or knowingly permitted the violation of the provisions of the national banking act and knowingly and willfully participated in, and knowingly and wilfully assented to such violation.

14. The findings and judgment are contrary to and violative of the opinion of the Supreme Court of the United States delivered upon a writ of error to the Supreme Court of the State of Nebraska in appellate proceedings prosecuted from this Court in this same identical cause, and reported in volume 205 U. S. Supreme Court Reports at pages 158 to 181, inclusive, and also of the judgment entered by said United States Supreme Court on said writ of error, and also of the mandate of said court issued upon said judgment, pursuant to which these further proceedings were had, in the following particulars: (*a*) The findings and judgment are violative of the holding of said United States Supreme Court that section 5239 United States Revised Statutes, furnished the exclusive test of liability in actions against bank directors for deceit based upon false official reports of the resources and liabilities of a national bank; (*b*) they are violative of the holding of said United States
92 Supreme Court that a director of a national bank is not charged with knowledge of whether a report attested by him is true or false, as a matter of law, by reason of his official relation, or upon the theory that "it was his duty to know or refrain from acting;" (*c*) they are violative of the holding of said Supreme Court of the United States that liability of a director of a national bank for deceit does not attach from the mere fact that a director "merely negligently participated in or assented to the making and publishing of an untrue official report." (*d*) they are violative of the holding of said Supreme Court of the United States "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required; that is, that the violation must in effect be intentional;"

And in each and every of the respects aforesaid, the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and by the acts of Congress passed pursuant thereto, and by the inherent necessity of according such faith and credit to all *ce*disions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto; and all treati*se* made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding," contained in section 2, article 6 of the United States Constitution.

93 15. The specific findings of the Court that this defendant failed to discharge his duties of administration and was guilty of official misfeasance and mismanagement is not sustained by sufficient evidence and is not material to any issue upon which the liability of this defendant depends.

16. The special finding made in response to the fourth request of this defendant is not sustained by sufficient evidence is not consistent with the findings made in response to the sixth and seventh requests of this defendant for special findings, and in view of the findings made in response to the sixth and seventh requests of this

defendant, is mere surplusage and irrelevant and immaterial to any issue upon which liability of this defendant depends.

17. The general finding in favor of plaintiff is not sustained by sufficient evidence.

18. The conclusion of law made in response to the first request for special findings made by this defendant, namely: to find whether this defendant is liable on account of allegations of official misfeasance and mismanagement is erroneous and contrary to law.

19. Upon the evidence this defendant is entitled to judgment in his favor, as a matter of law.

20. Upon the facts specially found this defendant is entitled to a judgment in his favor, as a matter of law.

21. The damages awarded are excessive, and greatly exceed the amount of damages sustained by plaintiff or established by any testimony.

22. The Court erred in including and allowing interest as
94 an element of damages, and in compounding the interest, as is shown by the excessive damages assessed.

23. The action being in tort no interest is allowable or recoverable, and the maximum recovery can not lawfully exceed the unpaid principal sum of plaintiff's deposit in the Capitol National Bank.

24. The facts and conclusions of law found by the Court show that the judgment is based wholly or in part upon statements of the financial condition of the Capital National Bank "published in the newspapers." By the National Banking Act such newspaper publications of official reports were specifically required to be made, and were not voluntary or unofficial acts, and the findings of fact and conclusions of law stated in said judgment in so far as they find or assume such newspaper publications to be voluntary and unofficial acts are in conflict with said act of Congress and with the law of the case established in and by the appellate proceedings heretofore had herein.

25. The additional special finding made in response to this defendant's request No. 1 for additional findings, except in so far as it finds in response to the interrogatory submitted that this defendant "did not personally make, compile, issue or circulate such statements other than those mentioned in said interrogatory" is not sustained by sufficient evidence nor by any evidence, and is contrary to the undisputed evidence.

26. The additional special finding made in response to this defendant's request No. 2 for additional findings, except in so far as it finds in response to the interrogatory submitted that this defendant "did not personally direct the making, compiling, issuing, or circulating, of any statements other than those referred
95 to in said interrogatory" is not sustained by sufficient evidence nor by any evidence, and is contrary to the undisputed evidence.

27. The Court erred in its conclusion of law stated in answer to this defendant's 3rd request for additional findings. The conclusion of law found therein is so indefinite, uncertain and equivocal, in itself and by the references therein made to the answers given to the

first and second interrogatories that the basis of the judgment cannot be ascertained therefrom.

28. The Court erred in each of its conclusions of law stated in answer to this defendant's 4th request for additional findings. In so far as it is therein found that defendant's common law liability rests" upon the statements * * * setting forth the financial condition of the bank which were published in the newspapers" it bases a common law liability upon official acts enjoined by the National Banking Act, contrary to and in violation of section 5239 of the Revised Statutes of the United States, and contrary to the law of the case established in and by the appellate proceedings heretofore had herein. The finding of facts contained therein is not sustained by sufficient evidence, nor by any evidence, and is contrary to the undisputed evidence.

29. The Court erred in finding generally in favor of plaintiff and against this defendant. The said general finding is also inconsistent with the facts specially found in favor of this defendant.

30. The facts specially found against this defendant on the Court's own motion are not sustained by sufficient evidence nor by any evidence and are contrary to the undisputed evidence.

31. The Court erred in overruling the motion of this defendant for judgment in his favor that he go hence without day, upon the facts specially found in his favor.

96 32. The Court erred in sustaining the motion of plaintiff to amend its petition and in granting leave to make such amendments after the conclusion of the trial.

33. The court committed errors of law during the trial which were duly excepted to by this defendant.

34. The Court erred in receiving incompetent evidence over the objections of defendant, and in giving consideration thereto in rendering judgment.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

* * * * * * *

"And now on this 8th day of May, 1911, it being the first day of the May, 1911, term of this Court this cause came on to be heard on the request of the defendants, for additional special findings filed herein, April 1st, 1911, and for final determination and the Court being fully advised in the premises in response to the request of the defendant, David E. Thompson, makes the following additional special findings of fact and conclusions of law.

97 Respecting interrogatory No. 1 the Court finds that the defendant, David E. Thompson did not personally make, compile, issue or circulate such statements, other than those mentioned in said interrogatory, but that he knew financial statements of the resources and liabilities of the Capital National Bank of an official, as well as of an unofficial and voluntary character were being made, compiled, issued, published and circulated by the bank, from time to time, containing his name as one of the directors of said bank, and purporting and assuming to be made, compiled, issued, published and circulated, under his authority and directions as one of

the directors of said bank, and that he knowingly permitted and assented to and allowed the same to be made, compiled, issued, circulated and published by the officers of the bank.

Respecting interrogatory No. 2, the Court finds that the defendant, David E. Thompson, did not personally direct the making, compiling, issuing or circulating of any financial statements other than those referred to in said interrogatory but that he knew statements of the resources and liabilities of the Capital National Bank of an official as well as of an unofficial and voluntary character were being made, compiled, issued, published, and circulated, by the bank, from time to time, and that he knowingly permitted, assented to and allowed the same to be made, issued, circulated, compiled and published by the officers of the Bank, and that he knew that said unofficial and voluntary statements and representations contained his name as one of the directors and purported and assumed to be made, compiled, issued, published, and circulated under his authority and direction as one of the directors of said bank.

98 Respecting the third interrogatory, the Court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit under the principles of the common law is not founded upon the attestation of the official reports referred to in the third interrogatory, but that such statements are correlative of the unofficial and voluntary statements made by the bank, as set forth in the answers to the first and second additional interrogatories, and such liability is founded upon the truth of the allegations of plaintiff's amended petition and embodied in the general findings of the Court.

In answer to the fourth interrogatory the Court bases or founds its legal conclusion as to the defendant, David E. Thompson's liability, upon the statements, representations and advertisements setting forth the financial condition of the bank which were published in the newspapers and such as were sent by the bank to the plaintiff, in the form of cards and slips, and purporting and assuming to have been made, compiled, issued, published, and circulated under the authority and direction of the directors of the Capital National Bank, and in the name of the defendant, David E. Thompson with the other directors, that such statements, representations and advertisements were false, and known to be so by the defendant, and were relied upon by the plaintiffs to their damage.

And in response to the request of the defendants, Charles E. Yates, and Louisa P. Hamer, Administratrix, makes the following additional special findings of fact and conclusions of law:—

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that

99 such printed slips and business cards were compiled, prepared, and distributed by the bank, from time to time and contained his name as one of the directors, thereof, and purported and assumed to be compiled, prepared, and distributed under the au-

thority and directions of said defendant Yates and in his name as one of the directors of the bank.

Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates did know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers' patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the Defendant Yates.

Respecting the 15th request, the Court finds that the said Ellis P. Hamer, did know that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank,

Respecting the 16th request the Court finds that the said Ellis P. Hamer, did not personally take part in the preparation or distribution of the printed slips or business cards, showing the assets and liabilities of the bank, as shown in the evidence but the Court finds that he did know that such printed slips and business cards were prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name, as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

100 The Court further and upon its own motion finds as to each and all of the defendants, in this action that: The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority, in their names and with their sanction and consent.

The Court further finds that the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, from and after September 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in

And afterwards, to-wit, on the 22nd day of October, 1912, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1912, Oct. 22.

121 Upon application, it is by the court ordered that appellees in the above entitled causes be, and hereby are, given leave to serve and file reply briefs herein instanter.

M. B. REESE,
Chief Justice.

And afterwards, on the 31st day of January, 1913, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913, Jan. 31.

* * * * * * *

This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted
122 to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein by them taxed at $—, and have and recover from appellee all their costs so expended, that appellee pay all costs incurred herein by it, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

123

Nos. 17276, 7, 8, 9.

JONES NATIONAL BANK
v.
YATES.

BANK OF STAPLEHURST
v.
YATES.

UTICA BANK
v.
YATES.

BAILEY
v.
YATES.

Opinion.

Filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability cannot be measured by a higher standard than that which is imposed by the act.

2. Where by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the
124 penalty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and prescribes a penalty for its non-performance "the rule prescribed in

the statute is the exclusive test of liability." Yates v. Jones Nat. Bank, 206 U. S. 158; Farmers & Merchants Nat. Bank v. Dearing, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of, or approved of, or participated in, the fraudulent acts of which complaint is made.

125 HAMER, *J.*:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed. Yates v. Jones Nat. Bank, 206 U. S. 158; Yates v. Utica Bank, Yates v. Bailey, and Yates v. Bank of Staplehurst, 206 U. S. 181, where it was held that plaintiff's petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiff's causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments contain
126 no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

To the petitions thus amended each of the defendants demurred. The demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity or untruth of any of them, or of the true condition of the Capital

National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured by
127 the terms of that act, and not otherwise.

Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiffs' amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the Supreme Court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without
128 dispute, that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statements, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that

they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants Yates and Hamer, within the rule of liability announced by the Supreme Court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in
129 question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. That thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the Supreme Court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an induce-
ment to him to act in that capacity the law assures him that
130 he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the Supreme Court of the United States in any cases. The opinion of Justice White in Yates v. Jones Nat. Bank, supra, is based on a single proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance

the rule prescribed in the statute is the exclusive test of liability." In the argument on behalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute." (Cochran v. United States,
131 157 U. S. 286.) The argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violation of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In Briggs v. Spaulding, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors, of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of action together and then say to the defendant—If you are
132 not liable upon that which I have charged you with then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the Supreme Court of the United States in the case of Briggs v. Spaulding, supra, where it was said: "Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other

persons that he has a right to expect that the directors, who are supposed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In Briggs v. Spaulding, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things,
133 said: (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 Morawetz, Private Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director) depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their
134 agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 Morawetz, Private Corporations, (2d ed.) sec. 551, et seq., and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. * * * (10) There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the
135 fendants. It also is apparent that plaintiffs cannot produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.

Sedgwick and Fawcett, JJ., dissenting.

136 LETTON, *J.*, concurring in part.

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the Supreme Court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the Supreme Court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The Supreme Court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." Yates v. Jones Nat. Bank, 206 U. S. 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the Supreme Court of the United States. I am also inclined to the
137 view that the evidence would support a judgment upon such a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

138 And afterwards, to-wit, on the 10th day of March, there was filed in the office of the clerk of said supreme court, a certain Motion, in the words and figures following, to-wit:

* * * * * * *

Appellee's Motion for Rehearing.

Appeal from Seward County.

B. F. Good, Judge.

The undersigned appellee respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in Yates vs. Jones Nat. Bank, 206 U. S. 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dismissal of this case and of the erroneous construction as to the sufficiency of the evidence to support the findings and judgments of the trial court.

1.

It is stated in the syllabus of this case, paragraph two, that "Where, by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not that as a con-
139 dition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." Thomas v. Taylor, 32 Sup. Ct. 403.

2.

The deciding opinion in this case concedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decision of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, in effect, denied a right and privilege conferred upon it by the constitution and statutes of the United States: of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas, by the decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with the
140 opinion of the said United States Supreme Court, when in fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially §5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws,—"the rule of responsibility declared by them" have "been satisfied" (Thomas v. Taylor) and the judgment should be affirmed.

6

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and
141 liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and the measure of duty and of liability established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of lia-

bility announced by the Supreme Court of the United States in this case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8

It is said in the opinion of Judge Letton that:

"A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, shows that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking acts. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings contained no federal question, and stated merely a common-law liability. The Supreme Court of the United States held that a federal
142 question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the nationa- bank act, is, in the nature of things exclusively governed by the specific provisions on the subject contained in that act. Yates v. Jones Nat. Bank, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S."

Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e. reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial state-
143 ments and reports and not upon the official reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiffs' petition was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide and plaintiff's petition was then and now is sufficient to charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion Judge Hamer says the plaintiff "still charge the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery," whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plai-tiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts,—the only
144 requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says: "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank",—thus assuming that the court held the plaintiff's petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not so decide and plaintiff's petition does state a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District Court should be reversed as to all the defendants." This statement assumes that our petitions failed to allege that the defendants per-
145 sonally knew of or personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and §5329 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally knew of or personally participated in the acts charged in the petition whereas the evidence is amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S.; that under the interpretation and construction of that statute made by the United States Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the frame of our petition precluded that view or theory; whereas, the holding of the United States Supreme Court is
146 that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied for recovery upon any act done pursuant to an express command of the national bank act; also that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the ex-

press commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act; and finally that that act does not require proof of actual knowledge but that it is sufficient if it be shown the defendants acted recklessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages * * *". And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank * * * *of* by the receivers * * *" they thereby admitted that they neglected their duties as such directors and committed the wrongs complained of in plaintiff's amended petition whereby the bank became insolvent and that such damages resulted from the con-
147 duct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and §5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

J. J. THOMAS,
Att'y for Appellee, Jones National Bank.

* * * * * * *

148 & 149 On application of attorneys for appellee, it is by the court ordered that time be, and hereby is, extended to April 12, 1913, within which to file printed briefs in support of motion for rehearing heretofore filed herein.

M. B. REESE,
Chief Justice.

* * * * * * *

150 SEDGWICK, *J.*, dissenting:

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the supreme court of the United States that the action is one for deceit at common law and for that reason cannot be maintained. The opinion says that it was held (by the supreme court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit", whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because

the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and concludes that "unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any members of this court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shows. "I concur in the view that
151 the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the supreme court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly liable to anyone deceived", etc. Yates v. Jones Nat. Bank, 27 Sup. Ct. Rep. 638 (206 U. S. 158). This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusals to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. Is proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action, and the right to
bring it in the state courts is plainly stated in the fourth para-
152 graph of the syllabus. "State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the Comptroller of the Currency, the civil liability prescribed by U. S. Rev. St., sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the supreme court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher

duty may be rightfully established and demanded," and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the supreme court of the United States and has been since emphatically decided by that court, and no such claim can be made in this case. The question is whether these directors are liable under the federal statute,
153 and this action is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of Gerner v. Mosher, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. Yates v. Jones Nat. Bank, 74 Neb. 734. The supreme court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court upon this point that doubt has emphatically been set at rest by a later decision where the language used by
154 that court in this case is quoted and its meaning fully stated and made plain. Thomas v. Taylor, 224 U. S. 73. That case originated in a nisi prius court of the state of New York. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the supreme court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase

stock in the bank will not be reversed when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y.) 53). The supreme court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment that "unless the supreme court of the United States shall recede from its
155 decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such common law liability; that is that no common law action could be sustained.

The case of Thomas v. Taylor, 224 U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On acount of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, Yates v. Jones Nat. Bank, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional violation of a statute
156 when one deliberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in Yates v. Jones Nat. Bank. The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books

and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports were
157 published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which this decision depends.

Fawcett, J., concurs.

* * * * * * *

158 And afterwards, to-wit, on the 17th day of May, 1913, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

* * * * * * *

It is by the court ordered that oral argument on the motions of appellees for rehearing herein, be had before the court at the session of court commencing June 2, 1913.

M. B. REESE,
Chief Justice.

* * * * * * *

159 Upon agreement of counsel, oral argument on motions for rehearing in these causes, is continued to the session of court commencing September 16, 1913.

M. B. REESE,
Chief Justice.

* * * * * * *

160 "This cause coming to be heard" upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing, and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore, ordered and adjudged that said motion of appellee for a rehearing be, and the same hereby is, allowed and a rehearing herein ordered.

J. FAWCETT,
Acting Chief Justice."

* * * * * * *

161 "Hamer, Rose and Barnes, JJ. dissent" from the order granting a rehearing and protest against the entry thereof on the journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the Chief Justice having been consulted by the plaintiff and having so announced when the cause was on for hearing. Shumway v. State, 82 Neb. 152, 165.

J. FAWCETT,
Acting Chief Justice."

162 * * * * * * *

Appellant, David E. Thompson, moves the Court to vacate, set aside and hold for naught the order entered herein on January 7th 1914, declaring carried the appellee's motion for a rehearing, and granting a rehearing of this cause for the following reasons:

1. It appears upon the face of said order, and by facts of which the Court and all of its members have judicial knowledge, that the said order was not concurred in by a constitutional quorum of four judges qualified to act in said cause, and the said order is for that reason null and void.

2. It appears upon the face of said order that of the six qualified judges of said court, who sat upon the motion for a rehearing and considered the record and arguments, only three judges, who are not sufficient to constitute a quorum or pronounce a decision, according to section 2 of article 6 of the Constitution of Nebraska, concurred in said order.

3. It is shown by said order that of the six judges who were qualified to hear and determine said motion, and sat at the hearing three voted against and three voted for a rehearing, and that the legal effect of said vote was an adherence by the court to its own previous final judgment reversing the judgment of the district court and dismissing this defendant without day, as is well settled by the recent judgment of this court in R. Mead Shumway vs. The State of Nebraska, wherein it was specifically adjudged that upon

163 three judges voting for and three against a motion for a rehearing, the other judge having been of counsel and disqualified the vote constituted an adherence by the court to its previous judgment affirming a capital sentence, and required the issuance by the clerk of a death warrant, under which plaintiff in error was hanged by the neck until he was dead.

4. Hon. M. B. Reese, Chief Justice, who, upon finding, as shown by said order, that the six qualified judges who heard said motion for a rehearing were equally divided in opinion thereon, and that said vote, in view of his own disqualification, operated as an adherence by the court to its previously entered final judgment, assumed the function of participating in said decision, concurring with the qualified judges who favored said motion, and directing the entry of said Order, had previously been counselled by *and* an attorney of one of the parties in said case, namely the Jones National Bank, and was and is by the statutes of this State, in that behalf, disqualified and prohibited from action as a judge or justice in said case, or in any judicial proceedings therein, and his pretended judicial

participation in said order is void and is of no force or effect whatever.

5. The disqualification of the Chief Justice to sit, or act or perform any judicial act or function in said case was within the judicial knowledge of the court and of all the members thereof, by reason of a public announcement made by the Chief Justice in open court in the presence of all of the members of the court, upon the calling up of a motion to advance, that he had been counselled in the suit by one of the parties and was for that reason disqualified, and by reason of like announcements made in open court when an application made by appellees for additional time to file brief was called for hearing, when the case was first called for argument on its merits, and when the case was called for oral argument on the motion for a rehearing. Upon each and all of said occasions, the Chief Justice orally certified, publicly and in open court, to his own
164 disqualification and upon each and all of said occasions, he arose from his seat and left the bench and did not sit. The report of the opinions delivered on the occasion of the rendition of the final judgment of reversal by this court shows that the Chief Justice did not sit or participate therein.

6. This defendant did not, in person nor by attorney orally or in writing, consent that the Chief Justice, act in this cause, and no mutual consent of the parties was ever made in writing and made part of the record in this case.

7. This defendant relied upon the nonparticipation of the Chief Justice on his own oral certificate, and on the fact that he left the bench when the motion was called, and had no notice or knowledge that he would, in any circumstances, participate in or control the decision of said motion, and had, therefore neither occasion nor opportunity until after the event to formally challenge his competency and qualification to act in said cause, and had at all times implicitly rened on his publicly expressed intention not to act therein.

II.

Motion of Appellant, David E. Thompson, to Vacate and set Aside and Hold for Naught, the Order Entered Herein of Date, May 17, 1913, Ordering an Oral Argument on the Motion for a Rehearing.

And this appellant further and separtely moves the court to vacate and set aside the order for an oral argument on the motion of appellees for a rehearing entered herein on the 17th day of May, 1913, for the following reasons:

1. The said order was not concurred in by four judges of this court, qualified to act herein as required by section 2 of Article 6 of the Constitution of Nebraska.

2. The said order was made only by the participation and deciding vote of Hon. M. B. Reese, Chief Justice, who had previously been counsel*led* and attorney of one of the parties therein, namely the appellee Jones National Bank, and was, for that reason disqualified

to act in any judicial capacity therein, all of which is within
165 the judicial knowledge of the court, and of each one of the judges of said court. In the said proceedings, as is within the judicial knowledge of the court because it was a judicial proceeding of the court, there were but six judges qualified to act, and they were equally divided in opinion, three voting to deny an oral argument and to overrule the motion for a rehearing, and three voting for an oral argument. The said vote was in law, and by the settled practice of this court an adherence to the previous final judgment of reversal, and operated to overrule said motion for a rehearing.

3. The participation of the Chief Justice in said proceeding and order was an unauthorized and void act in direct violation of the statutes of this State in that behalf, and there was no consent of this appellant that the Chief Justice might act herein, was made in writing and entered of record in said case.

4. Upon at least three prior occasions when this case was called for hearing in open court, the Chief Justice orally certified, publicly, and in open court, to his disqualification to act herein, and upon each one of said occasions, he arose from his seat and left the bench, and did not return so long as the said case was under consideration, of all of which the court has judicial knowledge because the same were a part of the public proceedings of the court. This appellant relied on the nonparticipation of the Chief Justice in the proceedings in said case upon his own public certification of his disqualification, and upon his said public announcement that he would not so participate, and upon his said retirement on every occasion when the case was called for public hearing, and had no knowledge that the Chief Justice had participated, or would, under any circumstances, participate in the private deliberation or orders of the court therein, contrary to his public announcement, until long after the event, and had therefore, neither occasion nor opportunity to
166 file any formal recusation against the Chief Justice, or to present said issue for formal decision and determination.

III.

Motion of Appellant, David E. Thompson, to Correct the Record and Make the Journal Entries of the Proceedings Correctly recite the Proceedings had by the Court Herein, and to Order a Mandate to Carry into Effect Its Previous Judgment of Reversal and Dismissal of This Appellant Without Day.

And this appellant further and separately moves the court to correct the journal entry of the proceedings had herein on May 17, 1913, and on January 7th, 1914, severally, so as to conform to and show the actual proceedings had and done by the Court, that is to say, that upon consideration of the motion for a rehearing, the Chief Justice was disqualified to act, and of the six qualified judges who participated therein, three judges voted to overrule said motion, and three judges voted to grant an oral argument on said motion, and that there not being a constitutional quorum of four qualified

judges in favor either of granting said motion or of granting an oral argument thereon the court does hereby overrule the said motion, and adheres to its former judgment of reversal and dismissal, and directs the clerk to issue a mandate to carry into effect the said previous judgment.

The facts averred in the foregoing motions are proved by affidavits filed herewith.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Attorneys for Appellant,
David E. Thompson.

* * * * * * *

167 Halleck F. Rose, being first duly sworn, on his oath says:

I am now and for more than twenty-six years last past have been an attorney and counsellor at the bar of this court, in good standing. I have been a duly authorized attorney for appellant David E. Thompson in all the proceedings had in this court upon the appeal in cases numbered 17276 and 17277 in which the foregoing and annexed motions are made and filed. I have personally attended all of the public proceedings in this case upon said appeals as the attorney of appellant David E. Thompson. When the motion of appellants to advance said case was called for submission, and when a motion by appellees for an extension of time to file briefs was called for presentation and when the said appeal was called for argument upon the merits, and when the said appeal was called for oral argument upon the motion of appellees for rehearing, Honorable Manoah B. Reese, Chief Justice was upon the bench. Upon each of said four several occasions when public hearings were had before the Court in said cases, all of the judges of the said court were sitting upon the bench. Upon each of said several occasions, as soon as the said causes, numbered 17276 and 17277 were called, the Chief Justice announced publicly in open court from the bench that he had been counseled by one of the parties to said appeals in a previous stage of the proceedings and was disqualified to act in said cases, and he thereupon in each instance, following said announcement, arose from his seat upon the bench and retired through the door back of the bench into an adjoining room or chamber, and did not resume his seat upon the bench until a hearing in said several cases was concluded. I, therefore, say upon such creditable information, and belief, that the Chief Justice, Honorable Manoah B. Reese, was

168 at a former stage of the proceedings in said cases counseled and employed as an attorney therein by one of the parties thereto, namely the Jones National Bank, appellee.

Appellant, David E. Thompson, never at any time, either in person, or by attorney, in writing, or otherwise, consented that the said Chief Justice might act in said cases notwithstanding his former employment as an attorney therein, and no mutual consent of the parties to said suits or to either one of them was ever made in writing and made part of the record in said cases, or in either one of the said cases.

After I was notified by the clerk of the entry on May 17th, 1913 of an order of this court for an oral argument upon the motions of appellees for a rehearing, I discussed with my partner, John F. Stout, the possibility that the Chief Justice, notwithstanding his former relation as counsel for one of the parties, might be impelled to act in the hearing and decision of the said motion for a rehearing, and we had fully determined upon such conference that if he would not withdraw when the cases were called for oral argument as he had done on previous occasions, we would file a formal challenge against his qualification to act upon said appeals. The Chief Justice's public withdrawal when the cases were subsequently called, as above stated, left neither occasion, nor opportunity for making any formal challenge of his qualification to act in said cases, or for calling said issue to the notice of the court for decision. I relied confidingly and implicitly upon the said public certification of the Chief Justice of his own disqualification and had no knowledge, nor means of knowledge that he was acting, or would under any circumstances, or conditions, participate or act in the decision or determination of the said motion from the public hearing of which he had withdrawn, until after the announcement upon January 7th, 1914, of the order sustaining said motion, a memorandum of which was delivered to the clerk upon said day by Judge Barnes, reciting that:

169 "on consideration of said motion, Judges Barnes, Hamer and Rose voted against a rehearing and Judges Sedgewick, Letton and Fawcett voted for a rehearing, and thereupon Reese, Chief Justice, voted for a rehearing and declared the motion carried." Upon application this day to the clerk for a certified copy of the said order, he declined to make and certify the same upon the ground that while he had notified the parties of the order, the form in which it should be entered, had not yet been agreed upon, and that he was unable to certify the form of the order or to enter an order upon the journal until the court had prepared and agreed upon its specific terms.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 8th day of January, 1914.

[SEAL.] K. M. ANDERSEN,
Notary Public.

STATE OF NEBRASKA,
County of Douglas, ss:

John F. Stout, being first duly sworn, on his oath says: I am attorney and counsellor at the bar of this court, and have been for many years last past, in good standing. I am associated as a partner with Halleck F. Rose, and was so associated when the appeals in cases numbered 17276 and 17277, in which the foregoing motions are made, were filed and docketed in this court. Our said firm has represented appellant, David E. Thompson, in all of the proceedings had in said cases on said appeals in this court. On the occasion of the original argument of said cases on the merits before this

court, I was in attendance upon the court and participated in the presentation of a motion in another case heard at the morning hour. When the above mentioned causes were called upon that occasion for final argument, all of the judges of this court, including
170 the Chief Justice were upon the bench. When said causes were so called for argument, the Chief Justice, Honorable Manoah B. Reese, announced publicly and in open court that he had been counselled by one of the parties in said cases at a former stage of the proceedings and was disqualified; and the Chief Justice thereupon arose from his seat upon the bench and left the bench, retiring through a door back of the bench into an adjoining room or chamber, and thereupon the argument of the said causes proceeded in the absence of the said Chief Justice. After the making of a previous order for an oral argument in said causes in this court, my partner, Halleck F. Rose, and myself conferred as to what course we should pursue in the event the Chief Justice should not retire on his own motion when the said cases were called for oral argument upon the motions of appellees for a rehearing. We then determined that if the Chief Justice should not so retire, as he had previously done, we would present a formal challenge to his qualification to act in said cases. I was personally in the office of the clerk of the Supreme Court on the afternoon of January 7th, 1914, when Judge Barnes delivered to the clerk a memorandum of the order that day made by the court granting a rehearing in the aforesaid two cases, and I asked and was given permission to read and copy the same. The said order recited that: "on consideration of said motion, Judges Barnes, Hamer and Rose voted against a rehearing, and Judges Sedgwick, Letton and Fawcett voted for a rehearing, and thereupon Reese, Chief Justice, voted for a rehearing and declared the motion carried." I also read a memorandum by Judges Barnes, Hamer and Rose, which was at the same time delivered by Judge Barnes to the clerk. I did not take a copy of the said memorandum, but it stated in substance that the said three judges dissented from, or protested against, the entry of the order for a rehearing, because the said order was not concurred in by a qualified constitutional quorum of the court. The said memorandum disclosed that
171 Mr. Chief Justice Reese had participated in the said order and declared the motion for rehearing to be carried.

I had no knowledge until the said 7th day of January, 1914, that the Chief Justice was participating or acting in said case, or would do so under any circumstances, contrary to his public announcement in open court; and the attorneys for appellant, David E. Thompson, had neither previous knowledge, nor occasion, nor opportunity to raise the issue of the qualification of Chief Justice, or to have the same determined previously by a constitutional quorum of the court. The said attorneys relied upon the public announcement made by the Chief Justice, and for that reason presented no challenge against his qualification.

JOHN F. STOUT.

Subscribed in my presence and sworn to before me this 8th day of January, 1914.

[SEAL.] K. M. ANDERSEN,
Notary Public.

STATE OF NEBRASKA,
Lancaster County, ss:

David E. Thompson, being first duly sworn, on his oath deposes and says: I am one of the appellants in cases numbered 17276 and 17277, and am the party who makes the foregoing annexed motions. I was personally before the Supreme Court in September, 1913, on the occasion of the oral argument of the motions of appellees for a rehearing in said two cases. When the cases were reached and called, all of the judges, including the Chief Justice, were upon the bench. Upon the cases being so called for oral argument, the Chief Justice, Honorable Manoah B. Reese, stated publicly and in open court that he had at one time been counselled by one
172 of the parties in said cases and was disqualified to act therein, and he thereupon arose from his seat and left the bench, retiring through a door at the back of the bench into an adjoining room or chamber, and he did not again return to the bench until the oral arguments in said causes had been concluded. A considerable number of persons were in the audience in the court room when said public announcement was so made.

I did not at any time, in any manner, in person or by attorney, consent that the Chief Justice should act in said causes, or in either one of them, and no mutual consent of the parties to said causes, or either one of them was ever made in writing and made part of the record in said cases, or either one of them, I had no knowledge, or means of information, until announcement of the order granting the rehearing of said cases, on January 7th, 1914, which I was informed, showed that the Chief Justice participated therein and cast the deciding vote for a rehearing, that he had in any respect acted or participated in the said motion for a rehearing, or that he intended to, or would, under any circumstances, so act or participate in the decision of the said motion, contrary to his own public announcement made in my presence on the occasion of the oral argument on said motion. I would have insisted on my attorneys presenting a challenge against the qualification of the Chief Justice to act in said cases if I had previously known, or been informed, that it was his purpose to do so. As a suitor before this court, I feel and say that, because of the participation of the Chief Justice in the circumstances stated, I have not had a fair hearing and decision of the motion of appellees for a rehearing in said cases, and that the said Chief Justice was, and is, biased in favor of the appellees with one of whom he had been in previous consultation as an attorney in respect to the said identical cases, and in whose favor he voted when acting upon the said motions for rehearings.

173 DAVID E. THOMPSON.

* * * * * * *

174 1. The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for
175 naught so much of the record and proceedings of January 7, 1914, as shows the motion for rehearing was declared carried and orders a rehearing to be had for the reasons which follow this and the other two motions.

2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to vacate, set aside and hold for naught the order of May 17, 1913, ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to correct the proceedings and order of the court of January 7, 1914, so as to eliminate therefrom the deciding vote of the Chief Justice, the Honorable Manoah B. Reese from said order and proceedings; and from the tie vote of the remaining six judges who heard and considered this case to overrule the motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court of January 31, 1913, reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as such
176 in any case where he has been attorney for either party in the action or proceeding," without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides, "The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision," and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914, and by the showing filed herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practice of this court and courts in general, had the legal effect of overruling the motion for rehearing and of ad-
177 hereing to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action, and of dismissing these appellants without day, which rule was illustrated and applied in Shumway vs. State, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

7. The order of May 17, 1913, directing reargument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

8. The order of May 17, 1913, was as the appellants believe, carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914, and there was no opportunity or occasion so far as the appellants personally or by counsel knew, to challenge or object to such action of the Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914, allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerk of the court with the exception that it should not recite "Was argued by counsel," and after reciting the vote of the six judges, should
178 & 179 read—"And thereupon, upon due consideration whereof, the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of

appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to execute and carry into effect the prior judgment of this court as directed in the majority opinion therein."

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

* * * * * * *

180 And afterwards, to-wit, on the 14th day of January, 1914, there was filed in the office of the clerk of said supreme court, a certain Statement made by Chief Justice Reese concerning his action in voting to allow a rehearing in said case, which said statement was entered upon the Journal of said court and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Jan. 14.

No. 17276.

JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

REESE, *C. J.:*

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called, I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form, if in court, I withdrew, if in the consultation room I kept silent. I was acting in en-
181 tire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing Judges Barnes, Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemanly and personally friendly way. I stated that the vote

would not be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer at a meeting of the State Bar Association at Omaha, a long time member of the Iowa supreme court and former Chief Justice thereof, and in whose integrity and ability, I, with all others so far as I know, have the fullest confidence, and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three
182 who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are equally divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is in effect, rendered by the three, while the constitution and statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into which I did fall. It is true that I stated from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure, perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones
183 mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said some-

thing about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years after the bank failure, by other attorneys I was never at any time consulted by Mr. Jones nor his counsel as to the bringing or maintaining of this suit,—never employed as attorney or counselor and have known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know I never knew any of the plaintiffs nor officers of the other banks nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, as above stated."

* * * * * * *

184 & 185 Lionel C. Burr, being first duly sworn on his oath deposes and says as follows: Several months after the failure of the Capital National Bank in January 1893, the firm of Pound & Burr was employed as attorneys in these several cases and especially by Thomas Bailey Appellee, in No. 17279, who is now absent from this state at Corpus Christi, Texas, where an affidavit has been sent by mail to him and where he has been for a period of about two years. I was at all times familiar and knew about all the pleadings filed, briefs prepared and of the several trials in both State and Federal courts; I knew all the counsel employed in the case; I never heard it claimed that the honorable Monoah B. Reese now the Chief Justice of this court as being either attorney, counsellor or adviser in any of these cases until within the past few months, and I am sure he never was. I occupied such a position in these cases that if he had ever been consulted, retained or counseled in any of the proceedings in these several cases I am sure I would have heard it and would have had knowledge of that fact. I know he was never employed, counseled or retained by Thomas Bailey.

Further affiant saith not.

L. C. BURR.

186 Fritz Beckford, being first duly sworn, upon his oath says he is a resident of Utica, Seward County, Nebr., and that ever since the 1st day of January, 1893, he has been the president and managing officer of the Utica Bank, of Utica, Nebr., the plaintiff in the above cause entitled Utica Bank, Appellee, vs. Charles E. Yates et al., Appellants, which cause is now pending in the Supreme Court of the State of Nebraska.

Affiant further says that he is not personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the

State of Nebraska; that he never at any time talked with, consulted or in any way or manner, made any statement of any kind or nature whatsoever, to him, the said Manoah B. Reese, about said cause, or in relation to the issues therein, nor has he at any time, in any way or manner, either directly or indirectly, talked to, conversed with, or consulted him, regarding said cause, nor has he, or any officer, member or stockholder in said bank directly or indirectly authorized any time authorized, requested, selected or permitted, in any way or garding said cause, or in regard to any cause now pending or heretofore pending in said court.

Affiant further says that one Harry T. Jones, of Seward, Nebr., who was an officer of the Jones National Bank of Seward, Nebr., and with whom affiant is well and personally acquainted, was never at any time authorized, requested, selected or permitted, in any way or manner, to represent the Utica Bank aforesaid, in the conduct or management of the said Utica Bank's cause of action, and that the cause of action of the said Utica Bank has at all times been, since the commencement of the same, in the charge and under the management and control of this affiant, and the attorneys of record in said cause for the said Utica Bank.

Affiant further says that the said Manoah B. Reese, Chief Justice of said Supreme Court, was never at any time, either directly
187 or indirectly, employed by the Utica Bank as its attorney in said cause, or otherwise, and that the said Chief Justice, Manoah B. Reese, never at any time acted, or attempted to act, for the Utica Bank, in said cause, as its attorney, or otherwise, nor has he, the said Manoah B. Reese, at any time ever acted for the said Utica Bank, as its attorney, in any cause or matter whatsoever; and affiant further says that the said Chief Justice, Manoah B. Reese, has no acquaintance, either personal, professional, or otherwise, with the Utica Bank, the plaintiff and appellee aforesaid, and that he has never spoken to this affiant, or to any officer or agent of the said Utica Bank, upon any subject or matter whatever, with relation to said action or otherwise; and further affiant saveth not.

FRITZ BECKORD.

* * * * * * *

188 H. T. Jones being first duly sworn deposes and says as follows:

At the time of the failure of the Capital National Bank in January, 1893, my father, Claudius Jones was President of the Jones National Bank, Appellee in the above entitled cause, and I was its Cashier but in fact had the entire management of the bank as I had had for some years prior thereto. I became its President on or about January 1894.

The Capital National Bank of Lincoln, Nebraska, closed on January 21, 1893 at 1 o'clock P. M. and thereafter did not open again. During the afternoon of that day, the Jones National Bank had mailed certain remittances to the Capital National Bank.

I do not think I learned of the failure until Monday morning, January 23, 1893—just a short time before the train de-
189 parted for Lincoln. I took the first train and came to Lincoln for the purpose of preventing the remittance above re-

ferred to from entering into the assets of the Capital National Bank. On arriving at Lincoln, I called on the Honorable Manoah B. Reese, now Chief Justice, whom I had previously known for some time and asked him to assist me in procuring the return of the remittances.

It is my recollection that I accompanied the Chief Justice to the bank and it was there arranged with the Bank Examiner in charge, that all remittances received by the bank after it closed its doors on the Saturday preceding, should be returned, as was done with all similar remittances sent by other banks.

I do not recall all the conversation between the Chief Justice and myself at that time but I am certain that he was not then or at any other time consulted with reference to any suit against the directors or officers of the Capital National Bank. The Chief Justice made no charge for his services and neither I nor the Jones National Bank paid him any fee or gave him any reward either at that time or at any other time.

I had no thought of instituting suit against the directors or officers of the Capital National Bank for I did not then consider the bank's failure to be serious or that the Jones National Bank would suffer any loss thereby. In fact I did not know that such an action would lie against the officers and directors and did not learn that such an action was possible until several months thereafter.

Edward C. Biggs and J. J. Thomas, attorneys at Seward, were the attorneys for the Jones National Bank at the time of the failure of the Capital National Bank but I did not have time to consult them before departing for Lincoln.

190 At the time of my conversation with the Chief Justice it was not known that there had been any irregularities in the management of the Capital National Bank. These were not discovered until some time thereafter and it was several months after my visit to Lincoln before the matter of instituting suit against the officers and directirs personally was discussed with my said attorneys at Seward.

The transaction above related is the only one in which the Chief Justice had anything to do with any matter growing out of the failure of the Capital National Bank so far as it, in any way directly or indirectly, affected the Jones National Bank.

I did not then nor at any other time, nor did any one else on behalf of the Jones National Bank ever counsel with the Chief Justice with reference to the commencement of this or any other suit against the officers or directors of the Capital National Bank nor was he ever retained or counselled either in this suit or any other suit by myself or the Jones National Bank or any one in its behalf. In fact he was never counselled by me or by any one on behalf of the Jones National Bank at any time after January 23, 1893 either in this matter or in any matter concerning either myself or the Jones National Bank, nor was he ever counselled by me on behalf of any of the other appellees herein.

I think I have been present at every public hearing in this Court in these cases. I think at the first hearing when the Chief Justice retired he made some remark but I can not now recall his words.

At all the subsequent public hearings, while he retired from the bench, I am quite sure he made no remarks as to why he did so and it is my memory that upon one occasion the Court had taken an intermission immediately preceding the time these cases were reached for argument and that when the members of the Court reassembled to hear these cases the Chief Justice did not return.

191 I am quite sure that the Chief Justice never stated at any time that he had acted as attorney for at least one of the parties in these cases or that in more than one consultation with affiant the Chief Justice had been fully advised of the facts and circumstances from the plaintiff's standpoint in these cases or that he had expressed his opinion of the law and the facts herein or that he might not be a fair and impartial Judge to try the cases or that he used any words of like import.

I have read the affidavit of Frank E. Bishop filed herein wherein he refers to a statement made by me during the month of February, 1911, and said statement is untrue and incorrect. The fact is that I never represented any of the appellees except the Jones National Bank and never counselled with the Chief Justice concerning them.

Some time after the commencement of these actions these appellees each obtained judgments against A. P. S. Stuart who was then a defendant therein. Thereafter executions issued in each of said cases and were levied on the property of the defendant Stuart. The executions were all levied at the same time so that they became coordinate liens. Upon sale under said executions there were no outside bidders for a portion of the property sold and it was bid in by me on behalf of the several plaintiffs for convenience in subsequently disposing of the same. When the property was thereafter sold the proceeds were prorated among the various plaintiffs in accordance with the amount of their several judgments. I merely held the property as trustee for the plaintiffs. I never stated nor is it true that there was any agreement or understanding that these four cases were to be or being prosecuted by the plaintiffs in common nor that the net proceeds were to be applied on plaintiffs' claims in common. The appellant David E. Thompson is a defendant only in the cases of the Bank of Staplehurst and the Jones National Bank and any recovery against him could not be applied on

192 the judgments in the other cases and there is no agreement or understanding that the same shall be so applied and never has been.

These cases were tried together pursuant to a stipulation of all the parties in order to save expense and time in litigation and because the greater portion of the evidence in each case is relevant and material to each of the other cases.

Dated this 17th day of January, 1914.

H. T. JONES.

* * * * * * *

193 I, Erich Jacobs, being first duly sworn depose and say that I am the President of the Bank of Staplehurst, Appellee in the above entitled cause of the Bank of Staplehurst, Appellee, vs. Charles E. Yates et al., Appellants, No. 17277, and that I have been

President thereof since February 1st, 1894; that prior thereto and from February 10, 1886 to said February 1, 1894, I was Cashier of said bank.

At the time of the failure of the Capital National Bank of Lincoln, Nebraska, I was in charge of the affairs of the Bank of Staplehurst and from that time on until this date, I have had the sole charge and management of its claim against the Capital National Bank and against the appellants herein and have attended to all matters concerning said Bank of Staplehurst in all its litigation growing out of the failure of the Capital National Bank.

I am not personally acquainted with Honorable Manoah B. Reese, Chief Justice of the Supreme Court of Nebraska, I have never met him or counselled with him or employed him as attorney in any matter either for myself or for the Bank of Staplehurst and I know that he has never at any time been counselled or employed as counsel or attorney on behalf of the Appellee, Bank of Staplehurst either in this case or in any other matter whatsoever.

So far as I know, I have never seen the Chief Justice and do not think I would know him if I were to meet him.

I further say that no other person whomsoever has ever directly or indirectly counselled, talked to or conferred with the said Chief Justice on behalf of the Bank of Staplehurst in the above entitled cause or in any other matter whatsoever.

As above stated, I have had full and complete charge of this case on behalf of the Bank of Staplehurst and am positive that H. T. Jones of Seward, Nebraska was never authorized by said Bank or by any one on its behalf to represent said Bank in the conduct or management of this cause and that he never did so represent this Appellee in any matters concerning this case or any other
194 matter and so far as affiant is aware, he never did counsel or consult with the Chief Justice on Appellee's behalf.

There never was any agreement or understanding between the Bank of Staplehurst and the other appellees that these four cases should be prosecuted by the plaintiffs in common nor that the proceeds were to be applied on plaintiffs' claims in common. The appellant David E. Thompson is a defendant only in the cases of the Jones National Bank and the Bank of Staplehurst and any recovery against him could only be applied on the judgments in those cases and there is no agreement and understanding that the same shall be applied otherwise and there never has been. These cases were tried together pursuant to a stipulation of all the parties in order to save expense and time in litigation and because the greater portion of the evidence in each case is relevant and material to each of the other cases.

Dated this 16 day of January, 1914.

"ERICH JACOBS."

* * * * * * *

195 HALLECK F. ROSE, being first duly sworn, on his oath deposes and says:

I am attorney for appellant David E. Thompson, in the above entitled causes, whose testimony by affidavit was filed herein with

the motions referred to in the caption hereof. I have read the statement of the Chief Justice, filed herein on the 14th day of January, 1914 subsequent to the filing of the said motions and of my said affidavit in support thereof. The above-entitled cases, in one of which the Jones National Bank is plaintiff, and in one of which the Bank of Staplehurst is plaintiff, and cases No. 17278 in which the Utica Bank is plaintiff, and No. 17279, in which Thomas
196 Bailey is plaintiff, and in the latter two of which David E. Thompson was not a party, were by written stipulation of all of the parties to all of said cases tried together and heard upon the same identical evidence in the District Court of Seward County. The questions involved in all of the cases have always been regarded by all counsel concerned and by all courts in which the causes have been considered, as identical, and the same were in this court and on former writs of error in the Supreme Court of the United States, and upon the present appeals in this court, disposed of in the main by opinions applicable to all the cases. H. T. Jones was for a long time during the pendency of said cases the president of the Jones National Bank. While said Jones was so president of said Bank and as such actively participating and in effect directing the litigation in all of the cases above mentioned, he told me that there was an arrangement between the plaintiffs whereby all sums that had been or would be realized in and by the prosecution of said suits was and would be a common fund for distribution among the plaintiffs in proportion to the amounts which they severally had on deposit in the Capitol National Bank on the date of its failure, and, as he expressed it, whatever was gotten out of the suits was to go into a "pot" and that said Jones was, in a way, appointed and looked to to conduct and manage the suit and the funds and that one division had been made from funds derived from judgments previously recovered against Ambrose P. S. Stuart in the identical suits here and now pending on appeal. I therefore say on oath, upon such information and belief, that the Jones National Bank has a pecuniary interest in the result and avails of each one of the judgments in every one of the said mentioned four suits.

I am informed and am personally familiar with the history of all the litigation that has been prosecuted by the four several
197 plaintiffs hereinabove named against the appellants therein and others, since the failure of the said Capitol National Bank, on January 21, 1893.

On or about the 27th day of October, 1893, as is set forth in the answer of defendant Thompson in case No. 17276, the Jones National Bank sued the defendants herein in the District Court of Lancaster County, Nebraska on substantially the same cause of action that is set forth in its present amended petition herein, and the object and prayer of said suit was to enforce personal liability against the said defendants for the loss of the previous deposits of the said Jones National Bank in the Capitol National Bank of Lincoln, Nebr.

Subsequently, and without any final judgment having been entered therein, the said suit was dismissed on the motion of the said Jones National Bank and thereupon, on February 25, 1895, the

present suit was brought for the same identical purpose and end. The petition of said Jones National Bank, embraced in the transcript in case No. 17276, sets forth the plaintiff's previous deposit in the Capitol National Bank, for the loss of which it seeks to recover, in the words following:

"That on the 2nd day of January, 1893, plaintiff had a balance to its credit amounting to Ten Thousand Four Hundred Twenty-nine and 90-100 ($10,429.90) Dollars, money it loaned to and deposited with said Bank, and from January 2nd, 1893, to and including Jan'y 21st, 1893, (the day said Bank closed its doors and ceased to do business) the plaintiff loaned and deposited with said Bank the following sums of money, to-wit:

"January	4, 1893	$5,660.60
"	6, "	233.35
"	7, "	250.84
198		
"	10, "	254.40
"	13, "	301.57
"	16, "	162.15
"	19, "	5,000.00
"	20, "	400.79
Balance due plaintiff on January 1st, 1893		10,429.90
"Making total amount due plaintiff from Capital National Bank		$22,793.11

"That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $5,263.88, leaving still due and owing from said Capital National Bank to the plaintiff the sum of Seventeen Thousand Five Hundred Twenty-nine and 23-100 ($17,529.23) Dollars, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated."

In the previous performance of service as attorney for appellant D. E. Thompson, in the conduct of two trials of the present suits, I ascertained and state the fact to be that Mr. H. T. Jones was not a personal depositor in the Capitol National Bank, and I therefore suggest and say that the reference in the statement filed herein by the Chief Justice, to Mr. Jones having consulted the Chief Justice after the failure of the Bank "about bringing a suit for his previous deposits in the bank" is an error and that the said conversations must have related to the deposits of the "Jones National Bank of Seward", whose remittances, delivered at or just subsequent to the failure of the bank, the Chief Justice assisted in procuring the return of; and in which bank the said Jones was at the time the managing officer.

Upon my information and definite knowledge of the transactions of the Jones National Bank with the Capitol National Bank, prior to January 21, 1893, and my knowledge that H. T. Jones was not a personal depositor in said bank, obtained while serving
199 & 200 and conducting the defense of said cases, as aforesaid, and as shown by the pleadings and evidence in the rec-

ord herein, I say, on oath, that the Chief Justice was not mistaken and could not have been mistaken upon the several occasions when from the bench, in open court, he announced his disqualification to act in the said several cases, and he was not then mistaken "in supposing that this suit was based upon the matter spoken of by Mr. Jones" to him after the failure of the Capitol National Bank. The suit of said Jones National Bank is in fact based upon the loss of the previous deposits of that bank in the Capitol National Bank, about the bringing of a suit for which the Chief Justice in said statement affirms Mr. Jones consulted him and about which Mr. Jones drew the advice and opinion of the Chief Justice.

My recollection of the substance of the oral statement of the Chief Justice, made from the bench at the time he first announced his disqualification in said cases, concurs with the recital thereof contained in the affidavit of Frank E. Bishop, now on file herein. I recollect definitely that the Chief Justice did say, in substance, that in connection with the service he rendered for one of the parties, he was consulted about the subject matter of the present suits and expressed his opinion, at least, upon some phases thereof, and that in personal conference he had been advised of the facts and circumstances from the standpoint of one of the parties, and for that reason he was disqualified to act in the cases. As attorney for one of the parties herein, I then believed and now believe that upon his own public statement the Chief Justice was disqualified to act in said cases. I never intermeddled with the scruples of the Chief Justice about sitting under such circumstances, but have always acquiesced in his retirement from the case for the reason stated by him.

HALLECK F. ROSE.

* * * * * * *

201 THOMAS BAILEY, being first duly sworn, on his oath says he is the plaintiff and appellee in the above cause, entitled Thomas Bailey, Appellee, v. Charles E. Yates, et el., appellants, No. 17279, now pending in the Supreme Court of the State of Nebraska.

Affiant further says that he is not personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska; that he has never at any time talked with, consulted, or made any statement of any kind or nature whatsoever, to the said Manoath B. Reese, about said cause, or regarding the issues therein, nor has he at any time, in any way or manner, either directly or indirectly, talked to, conversed with, or consulted him, regarding said cause, nor has affiant, either directly or indirectly, authorized any other person or persons to talk to, consult or converse with him regarding said cause, or any other cause pending in said court.

Affiant further says that one Harry T. Jones, of Seward, Nebraska, who was an officer of the Jones National Bank of Seward, Nebr., and with whom affiant is acquainted, was never at any time authorized, requested, selected or permitted, in any way or manner, to represent this affiant in the conduct or management of affiant's said cause of action, and that affiant's said cause of action has been at all

times since the commencement of same, in the charge and under the management of affiant's attorneys of record in said cause.

Affiant further says that the said Manoath B. Reese, Chief Justice of said Supreme Court, was never at any time employed by affiant as his attorney in said cause, or otherwise, and that said Chief Justice Manoah B. Reese never at any time acted for affiant in said cause, as his attorney, nor has he at any time ever acted for affiant as his attorney, in any cause or matter whatever; and
202–204 affiant further says that the said Chief Justice, as your affiant verily believes, has no acquaintance, personal or otherwise, with affiant, and has never spoken to affiant upon any subject or matter whatever; and further affiant sayeth not.

THOMAS BAILEY.

* * * * * * *

205 J. J. Thomas, being duly sworn, deposes and says that he is one of the attorneys for the appellees in the above entitled causes, and that he has had sole charge of these cases in this court and particularly of the preparation of all briefs filed herein, and has been entrusted with the duty of preparing the briefs in opposition to appellants' briefs in support of their motions filed herein on January 9, 1914.

Affiant avers that ever since appellants' briefs have been served upon him he has devoted every possible moment of available time in the preparation of the appellee's reply briefs. That he has worked nights and Sundays and has refused to be consulted by clients in order that his time might be devoted to the preparation of briefs herein.

That prior to the filing of appellants' motion affiant had engagements in important litigated matters that could not be delayed and had to be disposed of after the filing of appellants' briefs. That among others was a case of great importance pending in the district court of Hamilton county, Nebraska wherein the Aurora Elevator Company is plaintiff and the C., B. & Q. R. Co. is defendant. This cause involves issues of great importance and had been delayed from time to time and finally set for hearing on Monday of last week when it was expected the trial would be completed, argued and the cause submitted. That it took fully twice as long to complete the taking of testimony alone as counsel on both sides had expected it would take to complete the submission of the case, and the same is not yet finally submitted but is set for argument at Wahoo, Nebraska, on Friday of this week which will necessitate affiant's leaving his home on Thursday, the 5th instant.

Affiant further avers that in order to expedite the preparation of briefs herein he made arrangements with Judge E. A. Coufal of David City whereby the latter had promised to come to Seward and assist affiant, but on account of some unexpected cause Judge
206 Coufal was unable to and did not come, and affiant was deprived of his assistance.

The issues involved in these cases are of very great importance and it has been necessary to examine a great number of adjudicated cases bearing upon the points in controversy. Not having access at

Seward to many of the authorities on the points involved, affiant has been compelled to come to the state library on three different accasions to pursue his investigation in these cases, all of which has delayed him in the completition of his briefs.

Affiant states and solemnly assures the court that he has devoted every possible moment in making investigations of authorities and preparing briefs herein, and that to avoid delay he has refused to permit clients to see or consult with him on matters of great importance in order that his time might be devoted to these cases, and the briefs herein completed within the time directed by the court, but that it has been utterly impossible to so complete them and affiant will be unable to have them completed or filed by the 5th instant.

That owing to matters aforesaid it will be impossible to have the manuscript in readiness for the printer until Monday, February 9, and that it will require several days to have it printed and ready for filing, and that it will be impossible to have them on file in this court until Thursday, February 12, 1914.

J. J. THOMAS.

* * * * * * *

207 These causes coming on to be heard upon motion of appellees for an extension of time within which to file briefs herein, *was* submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of
208 time be, and the same hereby is, sustained, and appellees given until February 12, 1914, to serve and file briefs.

M. B. REESE,
Chief Justice.

* * * * * * *

R. S. Norval, being first duly sworn, on his oath deposes and says that he is a regularly admitted and practicing attorney
209 at the bar of this court, and has been such for the past forty years or more, and that ever since the year 1872 he has been engaged in the practice of law at the City of Seward, Nebr.

Affiant further says that he has been for the last twenty-five years and more, attorney for each of the plaintiffs in the above and foregoing entitled causes, and that some time after the failure of the Capital National Bank of Lincoln, Nebr., he was retained by said plaintiffs, and each of them, to represent their interests in the matters growing out of the failure of the said Capital National Bank.

Affiant further says that he is well and personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of this state, and has known him for over forty years; and he verily believes that he would have known the fact, if the Hon. Manoah B. Reese had ever been employed or consulted by the plaintiffs in either of said causes, and affiant states that the said Manoah B. Reese has never been so consulted or employed by either of said plaintiffs; at least if he was, it was never brought to affiant's knowledge.

Affiant further says that — the time of the failure of the Capital National Bank, and for some time thereafter, it was not thought that

the failure of said bank was of a serious nature, or that the depositors would suffer serious loss thereby; and there was no thought by either of the plaintiffs, of instituting suits against the officers or directors of said bank, until several months after its failure.

Affiant further says that he has participated in the prosecution of these suits, and has been present at all public hearings in this court, save one; that he was present when these cases were argued and submitted in this court in February, 1912; that the Chief Justice retired at that time; that while he cannot state the
210–211 exact words the Chief Justice used at the time he retired, and which words were directed to his associates on the bench, rather than the public, he is quite positive that the said Manoah B. Reese did not then or at any other time, state he had acted as attorney for at least one of the plaintiffs in these cases; or that he had more than one consultation with Mr. Harry T. Jones, one of the chief officers of the Jones National Bank; or that he had been fully advised of the facts and circumstances from the plaintiffs' standpoint, in these cases; or had expressed an opinion of the law and the facts therein and that he might not be a fair and impartial judge to try the cases; or was disqualified under the law to sit or participate in them; or that he stated or used any other word or words of similar or like import or nature.

Affiant further says that he knows the relation that H. T. Jones has sustained towards each of the appellees in these causes, and he knows that he has never acted as their representative in any manner in these cases, except that he held certain property in trust for all of the plaintiffs, which was acquired by reason of certain executions levied upon the property of one A. P. S. Stewart, who was a former defendant in said causes.

Affiant further says that from his connection with said causes, as one of the attorneys for each of the appellees, and from his intimate knowledge of the litigation connected therewith, he is quite certain that the Honorable Manoah B. Reese was never at any time employed by either of said appellees, as attorney for them or either of them, in said causes, nor was he ever consulted as an attorney therein, by either of said appellees, or any one for them, and that he was never at any time, by said appellees or any one for them advised of the facts and circumstances connected with said causes, from the plaintiffs' standpoint; and further affiant sayeth not.

R. S. NORVAL.

* * * * * * *

212 George Dod-on being first duly sworn depose- and say- as follows:

That from some time in 1892 until January 1914, I was Cashier of the First Bank of Ulysses and since said last date have been its President.

I was Cashier and manager of said Bank at the time of the failure of the Capital National Bank of Lincoln, Nebraska in January 1893.

I was informed of the failure of the Capital National Bank by

telegram received from the First National Bank at Lincoln. This telegram reached me on Monday morning January 23, 1893 shortly before the train departed for Lincoln.

I took the train going by way of Seward and arrived at Lincoln shortly after 10 A. M. At Seward H. T. Jones who was then Cashier of the Jones National Bank joined me and we sat together and discussed the failure of the Capital National Bank until we reached Lincoln. Upon our arrival, we immediately went to the place occupied by the Capital National Bank at Lincoln and found it in charge of Bank Examiner Griffith. While there some conversation took place with Mr. Griffith concerning some remittances that had been sent to the Capital National Bank on the Saturday preceding but I can not recall just what was said.

Mr. Jones and I were both acquainted with the Honorable Manoah B. Reese who was then practicing law at Lincoln and I think it was at my suggestion that we called to see him concerning the remittances above referred to. Mr. Reese accompanied
213 us to the Capital National Bank building and it is my recollection that the remittances above referred to were returned. This ended all our transactions with Mr. Reese and we did not return to his office. I was with Mr. Jones during all of the time Mr. Reese was with him and I was with Mr. Jones the remainer of that day, returning with him on the same train that evening.

I am quite certain there was no conversation had with Mr. Reese concerning any proposed suits against the officers or Directors of the Capital National Bank and know that he was neither counselled nor retained in any such proposed litigation.

Mr. Jones and I conversed that day with a large number of persons residing at Lincoln and it was their universal opinion that the failure was not serious and that the depositors would suffer no loss and we came home that evening feeling that the banks we represented would sustain no loss on account of any deposits they had in the Capital National Bank.

At that time no examination had been made of the affairs of the Capital National Bank and it was not known that there had been any irregularities or mismanagement in its affairs or that the reports and statements issued by the bank were in any particular false or incorrect.

Dated this 21st day of January, 1914.

GEORGE DOBSON.

* * * * * * *

214 I, H. T. Jones being first duly sworn depose and say as follows:

At the time I went to Lincoln on January 23, 1893 I did not know that the appellees, the Bank of Staplehurst, the Utica Bank
215 or Thomas Bailey had any deposits in the Capital National Bank. I do not know just when I learned they had deposits but it was several weeks after my visit to Lincoln on the above date.

I did not know that there had been any frauds or irregularities in the management of the Capital National Bank nor that any state-

ments of its financial condition, were in any respect incorrect, false or untrue until some time after Kent H. Hayden entered upon his duties as Receiver of said Bank.

Shortly after said bank failed, to-wit, on or about Feb. 6, 1893, Mr. McFarland was appointed Receiver of said Bank but resigned on May 4, 1893. Mr. Hayden was appointed Receiver to succeed Mr. McFarland and entered upon his duties as such Receiver on or about May 31, 1893 and it was perhaps during the month of June or July succeeding that I first learned of any of the irregularities, frauds and mismanagement in the bank's affairs.

On or about October 27, 1893, the Appellee Thomas Bailey commenced an action in the district court of Lancaster County Nebraska, against certain of the officers and directors of the Capital National Bank. This case was removed to the Federal Court where a demurrer to the plaintiffs petition was sustained and the case dismissed.

The Appellee Jones National Bank commenced a similar action against certain of the officers and directors of the Capital National Bank in the District Court of Lancaster County, Nebraska on or about December 19, 1893, but it was dismissed on December 29, 1894. In neither of said actions in Lancaster County, Nebraska was the Appellant David E. Thompson a party. Neither I nor the Jones National Bank had anything whatever to do with the
216 suit instituted by Thomas Bailey as aforesaid, and I have no knowledge that the Appellees, Bank of Staplehurst, or Utica Bank, instituted similar suits in Lancaster County. If they did I had nothing whatever to do with them.

The above entitled suits now before this Court for consideration were commenced in Seward County, Nebraska, on Feb-uary 25, 1895.

H. T. JONES.

* * * * * * *

217 I, J. J. Thomas, being first duly sworn depose and say that I am a regularly admitted and practicing attorney at the bar of this Court and have been for the past twenty years or more, and since 1891 have been engaged in the practice of law at Seward, Nebraska.

At the time of the failure of the Capital National Bank, Edward C. Biggs and I (under the firm name of Biggs & Thomas) were the attorneys for the Jones National Bank and had been for several years preceding. And some time after the failure of the Capital National Bank our firm was retained by the Bank of Staplehurst, appellee, to represent its interests in matters growing out of the failure of said Capital National Bank.

Mr. Biggs departed this life in March 1899 but I have been attorney for said parties in all their matters growing out of the failure of the Capital National Bank and am and have been familiar with all matters pertaining thereto.

I believe I would have known had the Honorable Manoah B. Reese, Chief Justice, ever been attorney or counselled as an attorney

in these cases on behalf of the above parties or either of them, and I state that he never has been so counselled or employed; at least if he was, it was never brought to my knowledge.

218 I know that at the time of the failure of the Capital National Bank and for some time thereafter it was not thought that the failure was of a serious nature or that the depositors would suffer thereby and there was no thought of instituting suits against the officers or directors until several months after the failure of the Bank.

I have actively participated in the prosecution of these suits and think I have been present at every public hearing in this Court. I was present when these cases were argued and submitted to this Court in February 1912 and presented the argument on behalf of the appellees. I recall that the Chief Justice retired at that time. I could not state his words but it is my recollection that what he did say was directed to his associates rather than to the public.

I am quite certain that the Chief Justice did not then or at any other time state that he had been consulted and had acted as attorney for at least one of the plaintiffs in these cases, or that in more than one consultation with Mr. Harry T. Jones, a Chief officer of the Jones National Bank, an appellee herein, he had been fully advised of the facts and circumstances from the plaintiffs' standpoint in these cases or had expressed his opinion of the law and the facts therein, or that he might not be a fair and impartial Judge to try the cases or was disqualified under the law to sit or participate in them, or that he uttered any words of similar or like import.

I recall that when these cases were argued upon appellees' motion for rehearing, the Court had taken an intermission immediately preceding the time these cases were reached for argument and that when the members of the Court reassembled to hear them, the Chief Justice did not return; but no remark was made by him or any other member of this Court as to why the Chief Justice did not sit at that time.

219 I know the relation that H. T. Jones has sustained toward each of the appellees herein, and I know that he has never acted as their representative in these cases except that he held certain property in trust for all the plaintiffs that was acquired as the result of executions levied upon the property of A. P. S. Stuart, a former defendant herein.

J. J. THOMAS.

* * * * * * *

220 The appellees the Jones National Bank and the Bank of Staplehurst respectfully represent to the Court that they have reason to believe and do believe that the Honorable William B. Rose, a member of this Court is biased and prejudiced against the Appellees herein and in favor of the appellant, David E. Thompson, to such an extent that he can not give to the issues involved therein a fair, impartial and disinterested consideration and therefore protest and remonstrate against the right of the said William B. Rose

to sit or participate in the decision or determination of these cases and respectfully request that he do not so sit or participate.

That the Court may be advised whether appellees' accusation is justified and based upon sufficient grounds, they present herewith the reason that has impelled them to challenge the right and propriety of the said Judge to sit and participate in the decision of these cases.

1. It is well known to this Court that Halleck F. Rose, an attorney at this bar, has throughout the entire proceedings in these cases been the chief, if not the sole, counsel for the appellant, David E. Thompson, and has upon all occasions when hearings have been had in this Court appeared on behalf of said appellant.

2. The said Halleck F. Rose is a brother of the Honorable William B. Rose, a member of this Court, between whom exists the closest ties of kinship.

3. For may years past, the appellant, David E. Thompson and his counsel, Halleck F. Rose, have been the very closest and
221 most intimate friends and there has existed between them and now exists the closest ties of friendship, gratitude and personal interest, so that the said counsel, for reasons well known to himself, has as great an interest in the success of his client in these cases as though he himself were a party to said suit, and has throughout this litigation, for personal reasons manifested most unusual and intense zeal for the success of his client.

4. That the relationship existing between the appellant and his counsel is in a great measure shared by the said Judge Rose whose relations with the said appellant have likewise been of a very close and intimate nature for many years past; that by reason of said relationship the interest of said Judge Rose in the success of appellant and in the success, both professional and financial, of his brother is such that it is as potent and effective as though he had a direct personal and pecuniary interest in the outcome of this litigation.

5. In addition to the foregoing, appellees say that since the order of January 7, 1914 granting a rehearing herein they have been informed and upon information and belief allege the fact to be that Judge Rose at prior stages of this litigation prepared or assisted as said appellant's attorney in the preparation of briefs, both upon the law and facts on behalf of appellant, David E. Thompson, in these cases, as well as in other cases in which Halleck F. Rose appeared as counsel and attorney, of which facts appellees had no knowledge prior to said January 7, 1914.

6. That by reason of the foregoing, Judge Rose, prior to the submission of this cause, had unconsciously entertained a fixed and determined opinion upon the merits of these cases and is biased and prejudiced therein in favor of said appellant and is therefore
222 disqualified from giving the same impartial consideration.

7. That the conduct of Judge Rose in the consideration of these cases, has been that of a zealous advocate and intense partisan rather than an impartial Judge, is apparent from the records of the proceedings in this cause, of which the court will take judicial no-

tice—all of which clearly demonstrates the injustice and impropriety of his participation in these cases.

Dated this 11 day of February, 1914.

JONES NATIONAL BANK,
Appellee, and
BANK OF STAPLEHURST, *Appellee,*
By J. J. THOMAS, *Their Attorney.*

* * * * * * *

223 On oral application of attorney, it is by the court ordered that appellants in above entitled causes be, and hereby are, given leave to file reply briefs by March 1, 1914.

M. B. REESE,
Chief Justice.

224 Supreme Court of Nebraska, January Term, A. D. 1914.
Ap'l 3.

*JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County, No. 17276.

The motion of appellant to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion is declared lost, and a rehearing denied.

*Reese, C. J., not sitting.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

225 Supreme Court of Nebraska, January Term, A. D. 1914,
Ap'l 3.

No. 17276.

JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

SEDGWICK, *J.*:

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I supposed as a matter of course there would at once be an unanimous court to set aside the former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order or judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done so far as I know and it did not occur to me that
226 any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to make use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refuse to concur in setting aside the former order of this court, I think that such suggestions are improper; that each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know. In the case of Shumway v. State, 82 Neb. 152, after full investigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be

reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event and the judgment was affirmed. The constitution provides that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgment of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality, and
227 thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. John B. Barnes, one of the Judges of said court and which statement was entered of record on the journal of said court and is in the words and figures as follows, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, April 3.

No. 17276.

JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

BARNES, *J.:*

When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands un-
228 changed for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a Statement of Honorable William B. Rose,

one of the Judges of said court, which said Statement is in the words and figures following, to-wit:

No. 17276. Jones National Bank v. Yates.
No. 17277. Bank of Staplehurst v. Yates.
No. 17278. Utica Bank v. Yates.
No. 17279. Bailey v. Yates.

ROSE, *J.*:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and voted against plaintiff's motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a solemn sense of duty to make and place on record the following statement:

I have never had any interest, direct, remote or contingent,
229 in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from participating in a case wherein his brother appears as an attorney. Longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all of my judicial acts and conduct. As a judge I can
230 not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * * * *

1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th, 1913, and January 7th, 1914, granting a rehearing in these actions, for the following reasons, to-wit:

2. After appellee had filed their briefs herein in opposition to appellants' motions to set aside the orders of May 17th, 1913, and January 7th, 1914, the several appellants filed additional
231 briefs herein on the 28th day of February, 1914, and appellee herein had neither the time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' brief heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law that after a judge had once withdrawn from a case that he had no right to reenter upon his duties, or that the parties had a right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein, a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court has set aside the order granting a rehearing herein and a constitutional majority of the court has concurred in denying the motion of appellee for a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying the motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a judge of the court granting such order, and appellee had and now has a constitutional right to have him give due consideration to this whole case.

8. Because said order of court deprives appellee of his property without due process of law.

9. Because said order is prohibited by and in conflict with the Fourteenth Amendment to the Constitution of the United States and denies to appellee equal protection of law and de-
232 & 233 prives appellee of this property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely on the ground that the Chief Justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition. Whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the cause had proceeded to final judgment operated as a judicial determina-

tion of his disqualification, and effectually excluded him from further participation although no facts existed constituting a disqualification, and although the Chief Justice's withdrawal was based upon a mistake of facts.

That said reply brief tendered issues not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein discloses that when the Chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact that upon his discovery of the true facts it was his duty to participate in the decision of said cases. And appellee had a constitutional right to all the judges in this court sitting in his case.

JONES NATIONAL BANK,
By J. J. THOMAS,
R. S. NORVAL,
L. C. BURR,
Its Attorneys.

* * * * * * *

234 & 235 And afterwards, to-wit, on the 17th day of April, 1914, there was rendered by said Supreme Court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914.

Apl. 17.

No. 17276.

JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon motion of appellee for a rehearing and leave to file additional briefs on motion of appellants to set aside the order of the court of date January 7, 1914, granting a rehearing, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, overruled.

Sedgwick, J., dissenting.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

236 & 237 EXHIBIT "A."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

JONES NATIONAL BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, acting Chief Justice of the Supreme Court of Nebraska:

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme Court of the State of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioners.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction: that a citation be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
Acting Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 17276. Jones National Bank v. Yates. Petition for writ of error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

238 EXHIBIT "B."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

No. 17276.

JONES NATIONAL BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Assignments of Error.

Comes now the Jones National Bank, Appellee in the above named court and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit:

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of some thing more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States—in conflict with and opposition to the decision

of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

239 7. The Court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

8. The Court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provisions of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily and wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous interpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record, it

was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States; and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under Section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statements to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239 Revised Statutes of the United States.

14. The Court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

240 15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agent and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239 Revised Statutes of the United States in his personal

and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The Court erred in not deciding that by their attestation of the official published report shown by the record, the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation, in effect, knowingly made and are liable under Section 5239 Revised Statutes of the United States.

21. The court erred in deciding that the allegations of appellee's petition are insufficient to sustain the judgment against appellants under Section 5239 Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because the opinion of Hamer J. as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court,—Letton J. having only concurred on the law—and therefore the findings of fact of the trial court have not been reversed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI, Section 2, of the Con-
241 stitution of the State of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing and when the final order was made herein, there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether tested by the require-

ments of the national banking act or the common law action for fraud and deceit, and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud and deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was necessarily drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said Statutes.

Wherefore appellee prays that the judgment of this court may be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

[Endorsed:] 17276. Jones National Bank vs. Yates. Assignments of error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

242–253 And on the same day there was rendered by said supreme court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914. April 27.

No. 17276.

JONES NATIONAL BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon assignments of error and petition for writ of error to the Supreme Court of the United States, by Jones National Bank, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein, for their appearance in the said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice.

254 In the Supreme Court of the United States, October Term, 1914.

File No. 24,240.

No. 501.

JONES NATIONAL BANK, Plaintiff in Error,
vs.
CHARLES E. YATES, DAVID E. THOMPSON, and LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased.

Designation for Printing.

The plaintiff in error in the above-entitled case intends to rely on the assignments of error contained in the record, and requests the Clerk of the Supreme Court of the United States to print the following portion of the transcript of the record, which it thinks necessary for the consideration of such errors:

1. Transcript page 1: all of page.

2. Transcript page 6: amended petition, commencing with the words "afterwards, on the 16th day of March, A. D. 1895", and ending with the signature of attorneys on page 17.

3. Transcript page 18: Exhibits A and B, commencing at top of page, and ending with signature of directors near bottom of page 20.

4. Transcript page 22: answer of David E. Thompson, beginning with the words "afterwards, on the 15th day of July, A. D. 1901", and ending with the signature of attorneys on page 27.

255 5. Transcript page 28: answer of Yates and Hamer, commencing with the words "afterwards, on the 15th day of July, A. D. 1901", and ending with signature of attorneys on page 33.

6. Transcript page 34: reply of plaintiff, commencing at top of page, and ending with signature of attorneys on same page.

7. Transcript page 35: Stipulation, commencing with the word "stipulation" (omitting title), and ending with signature on page 37.

8. Transcript page 41: request for special findings, commencing with the words "afterwards, on the 17th day of February, A. D. 1911", and ending with signature of attorneys on page 49.

9. Transcript page 51: first five lines at top of page.

10. Transcript page 55: Commencing with the words "and now on this first day of April, 1911", and ending with the words "defendants and each of them except", on the same page.

11. Transcript page 60: special findings, commencing at top of page (omitting title), and ending near bottom of page 61 with the words "B. F. Good, Judge."

12. Transcript page 62: special findings, commencing at top of page (omitting title), and ending with third line at top of page 64, with the signature "B. F. Good."

13. Transcript page 68: motion to amend petition, commencing with the words "the motion for leave to amend" (omitting title), and ending with signature of attorneys at bottom of page 70.

256 14. Transcript page 71: Yates' motion for new trial, commencing with the words "the defendant, Charles E. Yates moves the court", and ending with signature of attorney on page 79.

15. Transcript page 79: Hamer's motion for new trial, beginning with the words "the defendant, Louisa P. Hamer", and ending with signature of attorney on page 87.

16. Transcript page 88: motion of Thompson for new trial, commencing with the words "the defendant, David E. Thompson", and ending with the signature of attorneys on page 95.

17. Transcript page 96: findings and judgment, commencing with the words "and now on this 8th day of May, 1911", and ending with the words "to prepare and serve bills of exceptions", near bottom of page 101.

18. Transcript page 112, commencing with the words "Supreme Court of Nebraska", and ending with signature of the chief justice, on same page.

19. Transcript page 119: commencing at top of page and ending at bottom of page 137, omitting in all cases the title of the case.

20. Transcript page 138: motion for rehearing (omitting title), commencing with the words "and afterwards, towit, on the 10th day of March", and ending with the signature of attorneys, near top of page 147.

21. Transcript page 148: commencing with the words "on application of attorneys for appellee", and ending with the signature "M. B. Reese, Chief Justice."

22. Transcript page 150: opinion of Sedgwick, J., com-
257 mencing at top of page and ending at bottom of page 157.

23. Transcript page 158: commencing with the words "it is by the court ordered", and ending with the words "M. B. Reese, Chief Justice."

24. Transcript page 159: commencing with the words "upon agreement of counsel", and ending with the signature "M. B. Reese, Chief Justice."

25. Transcript page 160, commencing with the words "this cause coming on to be heard", and ending with the signature "J. Fawcett, Acting Chief Justice."

26. Transcript page 161: commencing with the words "Hamer, Rose and Barnes, JJ. dissent", and ending with the signature "J. Fawcett, Acting Chief Justice," on same page.

27. Transcript page 162: motion of Thompson, commencing with the words "appellant, David E. Thompson, moves", and ending with signatures of attorneys at bottom of page 166.

28. Transcript page 167: affidavits, commencing with the words "Halleck F. Rose", and ending with the signature "David E. Thompson", at top of page 173 (including affidavits of Rose, Stout and Thompson).

29. Transcript page 174: Motion of Yates and Hamer, commencing with the third line from the bottom of page, and ending with the signature of attorneys, near center of page 178.

30. Transcript page 180: statement of Reese, C. J., commencing with the words "and afterwards, towit, on the 14th day of January,

1914", and ending with the words "as above stated", near bottom of page 183.

258 31. Transcript page 184: affidavit of Lionel C. Burr, commencing with the words "Lionel C. Burr", and ending with the signature "L. C. Burr", at bottom of page.

32. Transcript page 186: affidavit of Fritz Beckord, commencing at top of page and ending with the signature "Fritz Beckord", near center of page.

33. Transcript page 188: Affidavit of H. T. Jones, commencing with the words "H. T. Jones", near center of page, and ending with signature "H. T. Jones", near top of page 192.

34. Transcript page 193, affidavit of Erich Jacobs, at top of page, and ending with the signature "Erich Jacobs", near center of page 194.

35. Transcript page 195: affidavit of Halleck F. Rose, commencing with the words "Halleck F. Rose being first duly sworn", and ending with signature at bottom of page 199.

36. Transcript page 201: affidavit of Thomas Bailey, beginning at top of page, and ending with the signature "Thomas Bailey", near top of page 202.

37. Transcript page 205: affidavit of J. J. Thomas, commencing at top of page, and ending with signature "J. J. Thomas", near bottom of page 206.

38. Transcript page 207: commencing with third line from bottom and ending with signature "M. B. Reese, Chief Justice", at top of page 208.

39. Transcript page 208: affidavit of R. S. Norval, commencing with second line from bottom of page and ending with signature bottom of page 210.

40. Transcript page 212: affidavit of George Dobson, commencing at top of page and ending with signature "George Dob-

259 son", near bottom of page 213.

41. Transcript page 214: affidavit of H. T. Jones, commencing with the words "I. H. T. Jones", and ending with the signature "H. T. Jones", near top of page 216.

42. Transcript page 217: affidavit of J. J. Thomas, commencing with the words "I, J. J. Thomas", and ending with the signature "J. J. Thomas", near top of page 219.

43. Transcript page 220: recusation of Judge Rose, commencing with the words "appellees, the Jones National Bank", and ending with signature of attorneys at page 222.

44. Transcript page 223: commencing with the words "on oral application of attorney", and ending with the signature "M. B. Reese, Chief Justice."

45. Transcript page 224: order of court, commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice."

46. Transcript page 225: statements of Sedgwick, Barnes and Rose, JJ., commencing at top of page and ending with first line at top of page 230.

47. Transcript page 230: motion for rehearing, commencing with the words "1. Comes now the appellee herein", and ending with signature of attorneys near bottom of page 232.

48. Transcript page 236: petition for writ of error. All of page.
49. Transcript page 238: assignments of error, commencing at top of page and ending with signature of attorneys, on page 241.
50. Transcript page 242: allowance of writ of error. All of page.
260 51. Transcript page 234: order overruling request for rehearing, commencing with the words "and afterwards, towit", and ending at bottom of page.

JONES NATIONAL BANK,
Pl'ff in Error.
By J. J. THOMAS, *Att'y.*

Rec'd copy of above designations this 21st day of August 1914.

DAVID E. THOMPSON,
Def't in Error.
By STOUT, ROSE & WELLS,
His Attorneys.

261 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamer, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion or Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska.]

S. C. STONER,
Notary Public.

Commission expires Oct. 8, 1918.

262 [Endorsed:] 501/24240. In the Supreme Court of the United States. Jones National Bank, Pl'ff in Error v. Charles E. Yates et al, Def'ts in Error. File No. 24,240. Oct. Term 1914, No. 501. Designation for printing. J. J Thomas, Att'y for Pl'ff in Error

263 [Endorsed:] File No. 24,240. Supreme Court U. S., October term, 1914. Term No. 501. Jones Nat'l Bank, Plaintiff in Error vs. Charles E. Yates, et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same Filed August 25th, 1914.

264 In the Supreme Court of the United States.

Term No. 501. General No. 24,240.

JONES NATIONAL BANK, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

Designations of Defendants Yates and Hamer for Printing Their Transcript.

Defendants Yates and Hamer, designate the following portions of the transcript to be printed in addition to the parts designated by the plaintiff in error.

1. Immediately following designation 29 of the plaintiff in error, print the affidavit of Frank E. Bishop on the motion to set aside the order for re-hearing. This affidavit may by mistake have been left out of the transcript of the Jones National Bank case, but will be found in the transcript of the Staplehurst Bank case at the plaintiff's designation for printing No. 28. The affidavit bears the title of all four of the cases and was filed in all four of them so that it should be printed in the transcript of the Jones case.

FRANK M. HALL,
FRANK E. BISHOP,
As Attorneys for Defendants in Error, Charles E. Yates and Louisa Hamer, Admx.

[Endorsed:] 501–24,240.

265 [Endorsed:] File No. 24,240. Supreme Court U. S. October term, 1914. Term No. 501. Jones National Bank, pl'ff in error, vs. Charles E. Yates et al. Designation of additional parts of record to be printed by defendants in error Yates and Hamer. Filed November 13, 1914.

266 File No. 24,240. No. 501.

In the Supreme Court of the United States. October Term, 1914.

JONES NATIONAL BANK, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

Designation by Defendant in Error David E. Thompson of Additional Parts of the Record to be Printed.

David E. Thompson, one of the defendants in error in the above entitled case, states that he thinks it material that the following additional parts of the transcript of the record should be printed, and hereby designates and requests that the Clerk print and include in

the printed record the parts of the transcript of the record in addition to the parts thereof designated by the plaintiff in error, namely:

1. The mandate of the Supreme Court of Nebraska, found on pages 39 and 40.

2. The motion of David E. Thompson for judgment in his favor on the special findings, found on pages 49 and 50.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson, Defendant in Error.

267 [Endorsed:] 501 &c. 24,240. File No. 24,240. October Term 1914. No. 501. In the Supreme Court of the United States. Jones National Bank, Plaintiff in Error, vs. Charles E. Yates, et al., Defendants in Error. Designation by defendant in error, David E. Thompson, of additional parts of the record to be printed. Stout, Rose & Wells, 524 Omaha National Bank Bldg. Omaha, Nebraska, Counsel for Defendant in Error, David E. Thompson.

268 [Endorsed:] File No. 24,240. Supreme Court U. S., October term, 1914. Term No. 501. Jones National Bank, pl'ff in error, vs. Charles E. Yates et al. Designation by David E. Thompson, defendant in error, of additional parts of record to be printed. Filed November 14, 1914.

Endorsed on cover: File No. 24,240. Nebraska Supreme Court. Term No. 501. Jones National Bank, plaintiff in error, vs. Charles E. Yates, D. E. Thompson, and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased. Filed May 26th, 1914. File No. 24,240.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. [redacted] 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(24,241)

(24,241)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1-4 BANK OF STAPLEHURST
v.
YATES.

No. 17277.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol in the City of Lincoln, in said State, on the 6th Day of Jan., 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk*.

Be it remembered. That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court a certain Praecipe, in the words and figures following, to-wit:

* * * * * * *

5 Afterwards, on the 16th day of March A. D. 1899, there was filed herein a certain amended petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, a Corporation Duly Organized and Doing Business at Staplehurst, Nebraska, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, DAVID E. THOMPSON, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

6 The plaintiff for its amended petition complains of the defendants and alleges that the plaintiff is a corporation duly organized and doing a general banking business, with its principal place of business at Staplehurst, Nebraska.

That on, Prior, and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they acted as such officers and directors and as such had the control and

management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska.

That acting as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its books; to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said Bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements; to see that the valuable effects, assets, and other matters including the cash on hand and in other Banks or depositories agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said bank, and by reason of such fail-
7 ure, large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers, and to those who were relatives and favorit*ics* of the defendants as officers or acting officers of the Bank.

That the books of said Bank were out of balance, that they allowed and permitted forced balances to be made and carried on the Bank books, the deposit account was falsified, being greatly under stated, the real estate, bills receivable, and deposit account each being largely inflated that they permitted to be carried on the books of the bank and permitted and caused to be (printed and) published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or overdue without taking steps to collect or secure the same, whereby the same were lost to the Bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless, and of no value, and from time to time they published, permitted, allowed and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff

and sent by defendants and their agents to plaintiff through
8 the U. S. mails and otherwise that such notes, bills receivable, and other worthless assets were good and collectible and part of the valuable resources and effects of said Bank when in truth and in fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken; and the published statements and advertisements and the statements sent by defendants to plaintiff as aforesaid and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisement and the statements sent by defendants to plaintiff as aforesaid showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and its said business, and all of which said facts and circumstances the defendants, and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid, the defendants made, caused, allowed and permitted to be made and sent & delivered to plaintiff statements of its condition, statements to the plaintiff and the public showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause, allow, and permit to be published and sent and gave to plaintiff said statement showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent
9 until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after the said Bank became insolvent as aforesaid the said defendants permitted said Bank to continue in business and receive deposits from Plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting as directors but of the insolvency of said Bank this plaintiff was at all times entirely ignorant.

That while said bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers as aforesaid, caused & permitted to be made & sent & delivered to plaintiff statements of the bank's condition setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to deposit and keep money in said bank and the plaintiff relying upon said published statements and upon the statements of its financial condition sent to and received by plaintiff as aforesaid as it had the right to

do, deposited and loaned its money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein but on account of the false statements referred to aforesaid it allowed the same to remain on deposit when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said Bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in
10 a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid; the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made, caused, allowed, and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement is hereto attached and marked "Exhibit A" which said statement was made, caused, allowed, and permitted to be made by the said defendants acting as such directors and officers of said Bank, for the purpose of deceiving the plaintiff and others and induce the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date caused, allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers aforesaid were of general circulation in the State of Nebraska, and said defendants on or about said date sent & caused to be sent & received by plaintiff said false & untrue statements aforesaid.

Plaintiff further avers that on the 28th day of December 1886, the said defendants and each of them acting as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid, and solvent, and to induce the plaintiff and others to do business with said Bank as aforesaid made, caused, allowed and permitted to be made, a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked "Exhibit B" and caused allowed and per-
11 mitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska, and sent & caused to be sent to, & received by plaintiff said false & untrue statements aforesaid for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank, when in truth and in fact said Bank was not in a sound, solid, safe and solvent condition but was wholly insolvent.

This plaintiff avers that on and between July 23rd, 1884 and

January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time allowed caused and permitted to be made at divers intervals false statements of the condition of said Bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused acqu-esced in, allowed and permitted said false statements and each of them severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, and sent & caused to be sent to, and received by plaintiff said false statements aforesaid through the U. S. mails & otherwise & which were received by plaintiff.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements, represented that said Bank was in a thoroughly sound, safe, and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe Bank in which to make deposits and loans of money and said statements were prepared and published and were
12 caused, permitted and allowed to be prepared and published and sent and delivered to plaintiff by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published and as sent and delivered to and received by plaintiff stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the officers of the plaintiff corporation, which officers were in the full control and management of plaintiff's business and plaintiff avers that it believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time, the exact times of which plaintiff cannot at this time state—the said defendants had conversations with the officers of plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1881 and January 21st, 1893, in which said conversations said defendants represented said Bank, of which they were directors and acting directors and officers was thoroughly safe and sound, and believing said published statements and advertisements and said statements of its financial condition so sent and received by plaintiff as aforesaid and said verbal representations so made by said defendants to be true and believing them to be true and relying upon the same, that said Bank was sound, solid and solvent and doing a flourishing and prosperous business as said published statements and advertisements and other statements as aforesaid showed and as represented in said verbal statements, and statements sent to plaintiff by defendants and by plaintiff received & examined this plaintiff on the 11th day of February 1885, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money and continued to loan
13 and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of

January, 1893, which said sums of money so loaned and deposited with said Bank varied as Plaintiff during all of said period withdrew and reloaned to said Bank said divers sums of money, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to its credit amounting to Eight Thousand One Hundred Fifteen and 34/100 ($8,115.34) Dollars, money it had loaned to and deposited with said Bank, and from January 1st, 1893, to and including Jan'y 21st, 1893 (the day said Bank closed its doors and ceased to do business), the plaintiff loaned and deposited with said Bank the following sums of money, to-wit:

January	2nd,	1893	$547.90
"	3,	"	503.00
"	5,	"	527.62
"	6,	"	800.00
"	7,	"	1,324.57
"	7,	"	306.00
"	9,	"	2,693.16
"	10,	"	39.25
"	11,	"	1,357.42
"	12,	"	3,103.42
"	14,	"	632.01
"	16,	"	2,046.00
"	16,	"	168.59
"	16,	"	139.23
"	18,	"	1,507.38
"	18,	"	1,293.04
"	19,	"	215.00
"	20,	"	890.00
Balance due plaintiff on January 1st, 1893			8,115.34
Making total amount due plaintiff from Capital National Bank			$26,210.93

That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $11,264.11, leaving still due and owing from said Capital National Bank to the plaintiff the sum of $14,946.82, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated.

14 Plaintiff avers that said statements so sent to and received by plaintiff aforesaid and advertisements and statements so published as aforesaid, and said statements as verbally announced to the officers of said plaintiff, were as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements and each of them, as well as said verbal statements made and caused, allowed and permitted to be made to the officers of plaintiff as aforesaid, showed

that said Bank was sound, solid and solvent and doing a flourishing business, when in truth and in fact said Bank was not doing a flourishing and prosperous business, and was in fact at the time said statements and advertisements were published and verbally made, and said statements so sent to and received by plaintiff in an unsafe, precarious and insolvent condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made said statements so sent to & received by plaintiff and advertisements as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting as directors and they and each of them willfully, negligently and recklessly for the purpose and with the intent aforesaid made, and caused, allowed and permitted to be published said false statements and advertisements and sent to and caused to be received by plaintiff such false & untrue statements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

Plaintiff further avers that its knowledge of the condition of said Bank was wholly derived from said published statements and advertisements by said statements so sent to and received by plaintiff and by said verbal statements so made to its officers by said defendants and that had said statements and advertisements so published and said statements so sent to and received by plaintiff and as verbally made as aforesaid set out and given the true condition of said Bank, it would have appeared and would have been shown that said Bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and sending to & causing to be received by plaintiff said statements and making said verbal statements by said defendants to the officers of plaintiff as aforesaid, insolvent and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had in said statements and advertisements and verbal statements made as aforesaid, and that by reason thereof said Bank could not pay and did not pay this plain-

tiff any part of said sum of money loaned and deposited with said Bank, except the sum of $2,241.22, and that the remainder of said money so loaned and deposited with said Bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars.

Wherefore plaintiff prays judgment against the defendants and each of them for the sum of Twenty Thousand ($20,000) Dollars, its damages, with interest thereon from January 21st, 1893, at 7 per cent and costs of suit.

BANK OF STAPLEHURST, NEBRASKA,
Plaintiff.

By BURR & BURR,
GEO. W. LOWLEY, &
BIGGS & THOMAS,
Its Attorneys.

* * * * * * *

17 "EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and Discounts	768,601.44
Overdrafts secured and unsecured	6,217.74
United States bonds to secure circulation	50,000.00
Stocks, securities, etc	325.00
Due from approved reserve agents	107,090.01
Due from other National Banks	17,800.33
Due from State Banks and Bankers	5,394.72
Banking house, furniture and fixtures	5,770.00
Other real estate and mortgages owned	38,716.92
Current expenses and taxes paid	14,286.28
Checks and other cash items	3,698.56
Exchange for clearing house	8,841.16
Bills of other Banks	2,355.00
Fractional paper currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes	17,431.00
Redemption fund with United States Treasurer (5 per cent circulation)	1,350.00
Total	$1,074,867.37

Liabilities.

Capital Stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$355,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	
		643,632.24
Notes and bills rediscounted		59,054.38
		$1,074,867.37

18 STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL. C. YOUNG,
Notary Public.

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

Loans and discounts	737,462.12
Over drafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stock, bonds, and mortgages	22,739.34
Due from approved and reserve agents	74,068 63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other cash items	13,742.02
Bills of other Banks	3,712.00

Fractional paper currency, nickels and cents		216.42
Specie		27,358.00
Legal tender notes		10,400.00
Redemption with U. S. Treasurer (5% circulation		1,900.00
Total		$1,035,448.92

19 & 20 Liabilities.

Capital stock paid in		300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,932.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.94
Notes and bills re-discounted		52,090.60
Total		$1,035,448.92

THE STATE OF NEBRASKA,
Lancaster County, ss:

I, C. W. Mosher, President of the above bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct. Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

* * * * * * *

21 Afterwards, on the 15th day of July, 1901, there was filed herein a certain answer of David E. Thompson, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER et al., Defendants.

Separate Answer of David E. Thompson to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendant David E. Thompson, and in obedience to the order of the court, makes answer for himself to the plaintiff's petition as amended by interlineation on the 16th of March 1899.

This defendant says that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, this defendant has not knowledge or information and therefore denies that such deposits were made.

First Defense.

This defendant for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and
22 Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank, and the defendant David E. Thompson was a director for a short time in said bank, but was not such director at the time any of the deposits were alleged to have been made by the plaintiff in the Capital National Bank, and during such time he was simply stockholder in said bank.

That said bank was closed by the national bank examiner on or about the 23rd day of January 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any Court, for reason of the violation of the national banking act by the directors and officers of said Bank, or for any other reason.

That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

This defendant denies that he signed or attested the reports set out and referred to in the said amended petition, and denies that

he made, signed or attested any report purporting to show
23 the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

This defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by this defendant as a director or stockholder of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said national banking act relating to the duties of directors and stockholders of national banks. That a federal question is involved in determining the liability of this defendant by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of this defendant.

This defendant further answering for himself, denies each and every allegation in the plaintiff's petition except as hereinbefore stated or admitted.

Second Defense.

This defendant further says for himself, that the plaintiff on or about the 27th day of October, 1893, brought an action against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska, was duly made and after
24 the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Bank of Staplehurst to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action, and a judgment for costs was rendered in said court against the plaintiff and in favor of the defendants and the other defendants herein in the sum of $125.73 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

This defendant therefore avers that the plaintiff, under the law and the practice, is and ought to be barred and estopped from prosecuting this defendant on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiffs pretended cause of action as set forth in its petition as now amended, this defendant says for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895, by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant, Ambrose P. S. Stuart, for the full amount of its claim made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bank of Staplehurst and against the said defendant Stuart has not been reversed or set aside, but in due course of time, executions were issued on said judgment for the collection of the
25 same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff Bank of Staplehurst. And this defendant alleges the fact to be that the plaintiff's claim against this defendant and the other defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged and that said judgment so taken by the said Bank of Staplehurst against the said defendant Stuart and the payment thereof, is a complete bar against any further judgment or claim in favor of the said plaintiff against this defendant and the other defendants in said cause.

Fourth Defense.

This defendant for a further and separate defense to the plaintiff's cause of action, says that as hereinbefore alleged in the first defense in this answer, this defendant in all of his actions concerning and in connection with the said bank, acted in his capacity as director or stockholder of said national bank, and if he neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages, said cause of action existed, if any, in favor of the said Bank or the receiver of said bank after his appointment, and not in favor of this plaintiff.

This defendant alleges the fact to be that if the plaintiff deposited its money in the said bank as alleged and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank; and that the said money as
26 as well as any damage caused by the alleged neglect of duty on the part of this defendant, did not give rise to any cause

of action in favor of this plaintiff; but alleges the fact to be that if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

This defendant for himself denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

This defendant therefore alleges that the plaintiff has no cause of action against this defendant.

Wherefore, the defendant prays judgment for costs.

J. W. DEWEESE &
F. E. BISHOP,
Attys. for Defts.

* * * * * * *

27 Afterwards on the 15th day of July, A. D. 1901, there was filed herein a certain Answer of Chas. E. Yates and Ellis P. Hamer to amended petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER et al.

Separate Answer of Charles E. Yates and Ellis P. Hamer, to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now come the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the court, each makes answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th of March, 1890.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said amended petition, these defendants have not knowledge or information and they therefore deny that such deposits were made.

First Defense.

These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank

and Richard C. Outcalt was the ca-hier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge
28 of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks.

That a federal question is involved in determining the lia-
29 bility of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense.

These defendants further say, each for himself that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the district court of Lancaster, County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from

the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Bank of Staplehurst to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said court against the plaintiff and in favor of the defendants in the sum of $125.93 and the plaintiff has failed and neglected to pay the said judgment for costs. That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and the practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895 by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of its claim as made against all of the defendants, the plaintiff's cause of action being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bank of Staplehurst and against the said defendant Stuart has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff. Bank of Staplehurst. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged and that said judgment so taken by the said Bank of Staplehurst, against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense.

These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first

defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained
31 of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the fact to be that if the plaintiff deposited its money in the said bank as alleged and the bank then failed and became insolvent the plaintiffs could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants, therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL, AND
FRANK E. BISHOP,
Attys. for Defts.

* * * * * * *

32 & 33 Afterwards, on the 24" day of August A. D. 1901 there was filed herein a certain Reply, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER et al., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, David E. Thomson, and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher,

David E. Thompson and Richard C. Outcalt, and denies each and every allegation of new matter contained in their several answers.

BANK OF STAPLEHURST,
By E. JACOBS, *President.*

* * * * * * *

34 *Stipulation.*

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward County, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and produced and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in so far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of
35 & 36 the court may warrant;

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and direction of the Court, subject *of* the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases. And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorneys for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

37 Afterwards, on the 14th day of October, A. D. 1908, there was filed and entered of record herein a certain Mandate from the Supreme Court of Nebraska, in words and figures following to-wit:

Mandate.

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, September Term, 1908.

To the District Court of the Fifth Judicial District, Sitting in and for the County of Seward, Greeting:

Whereas, in a late action before you, wherein the Bank of Staplehurst, a corporation organized and doing business at Seward, Nebraska, was plaintiff, and Charles W. Mosher, Homan J. Walsh, Ellis P. Hamer, revived in the name of Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, Charles E. Yates, Ambrose P. S. Stuart, David E. Thompson, Richard C. Outcalt, and Rollo O. Phillips, were defendan-s, the said plaintiff recovered a judgment against the said defendants Charles W. Mosher, Charles E. Yates, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, David E. Thompson, and Richard C. Outcalt, upon
38 a transcript of which record and proceedings in your said court the said defendant Charles W. Mosher, Charles E. Yates, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, David E. Thompson, and Richard C. Outcalt each prosecuted a petition in error to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court, during the September term, 1905, upon an opinion by the Commissioners of said Supreme Court filed in said cause, it was considered by said Court that the judgment entered by you in favor of said plaintiff and against said defendants be affirmed at the costs of said defendants, taxed at $—.

That afterwards, upon a writ of error issued out by said Charles W. Mosher, Charles E. Yates, David E. Thompson, Louisa Hamer,

administratrix of the estate of Ellis P. Hamer, deceased, and Richard C. Outcalt, said cause was appealed to the Supreme Court of the United States, wherein, during the October term, 1905 thereof, the said cause coming on to be heard before the Supreme Court of the United States, in consideration whereof it was ordered and adjudged by the said Supreme Court of the United States that the said judgment of our Supreme Court in this cause be reversed with costs, and the said Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover against the said The Bank of Staplehurst the sum of $584.75 for their costs therein expended and that execution issue therefor. And it was also by said Supreme Court of the United States ordered that the said cause in the said Supreme Court of the United States as to said Charles W. Mosher and Richard C. Outcalt, be dismissed for want of prosecution; and it was by the said Supreme Court of the United States further ordered that said cause be, and the same duly was remanded to *our* Supreme Court for further proceedings not inconsistent with the opinion of said Supreme Court of the United States.

That afterwards, and on the 4th day of May, 1908, said mandate from the Supreme Court of the United States was duly filed in this court: that afterwards, to-wit, on October 8, 1908, upon a
39 trial of said cause in the Supreme Court of the State of Nebraska, it was considered by said court that the judgment entered by you in favor of said plaintiff and against said defendants Charles E. Yates, David E. Thompson, and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover of and from the said plaintiff, The Bank of Staplehurst, three-fifths of their costs expended in this court, taxed at $90.93, (total costs in this court being $151.55) and that execution be awarded therefor.

Now, Therefore, You are commanded, without delay, to proceed according to law.

Witness, The Honorable John B. Barnes, Chief Justice, and the seal of said Court, at Lincoln, this 12th day of October, 1908.

[SEAL.] H. C. LINDSAY, *Clerk*.
VICTOR SEYMOUR, *Deputy*.

Afterwards, on the 17th day of February, A. D. 1911, there was filed herein a certain Request for findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer et al., Defendants.

Request of Defendants for Special Findings.

40 The defendants, Charles E. Yates and Louisa P. Hamer as administratrix of the Estate of Ellis P. Hamer, deceased,

each separately and for each one alone, requests the court to make and find the following special findings of fact and of law.

I.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in her favor.

III.

That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank;

V.

That the defendant Cha*l*res E. Yates and the deceased, Ellis P Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank
41 or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI.

That the plaintiff was not induced or influenced by any parol or oral statement or representation of the defendant Yates or of the deceased Hamer either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII.

That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date

December 28, 1886, and of date December 9, 1892, exhibits "A" and "B", attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery:

VIII.

That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained;

IX.

That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital Na-
42 tional Bank, nor of any of the items of either its assets or liabilities;

X.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case;

XI.

(A) That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual personal knowledge or intentionally made, published or declared, or permitted to be made, published or declared, any untrue statement, report or representation of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (B) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants acted in good faith, honestly believing that said statements, reports and publications were true and without and knowledge or intention that any of said statements, reports and representations were untrue.

FRANK E. BISHOP,
For Defendants Yates and Hamer, as Adm'x.

And again on February 17th, A. D. 1911, there was filed herein a Request of D. E. Thompson, for Special Findings, in words and figures following, to-wit:—

43 In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, Administrat-*or* of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Request for Special Findings.

Defendant, David E. Thompson, requests the court to find specially from the evidence touching the following facts in issue:

1. Whether the allegations contained in the petition to the effect that defendant Thompson failed to perform his duties to personally manage and superintend the business of the Capital National Bank, to examine the loans and securities, to see that the general condition of the bank corresponded with its books, to see that only good bills receivable were entered upon the bank books and in its statements, and that assets which were worthless or of little value were charged off and including all allegations of official misfeasance and mismanagement are sustained by the evidence and whether plaintiff is entitled to recover from this defendant by reason thereof.

2. Whether this defendant at any time prior to the suspension or failure of the Capital National Bank made any oral statement or representation touching the pecuniary worth, standing or responsibility of the said bank, to the plaintiff or to the witness E. Jacobs, the cashier of plaintiff.

3. Whether the plaintiff was induced or influenced by any oral statement of this defendant to deposit any funds in the Capital National Bank.

44 4. Whether this defendant, at any time prior to its failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency and referred to in the petition or the evidence were in any material respect false and untrue.

5. Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency, other than the five several reports dated respectively, December 28, 1886, August 1, 1887, October 2, 1890, and December 19, 1890, and July 9, 1891.

6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith.

7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently and with actual personal knowledge that such reports or any one of them were in any material respect false and untrue.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

Afterwards, on the 1st day of April, 1911, there was filed herein certain requests for additional findings, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

45 BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the Court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the Comptroller and printed in the newspaper and the names of the directors of the bank.

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, requests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the Comptroller and printed in the newspapers and the names of the directors of the bank.

16. That the evidence does show said Hamer personally took part in the preparation nor distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the bank, showing its assets, liabilities and officers' names, were printed and carried in the newspapers.

FRANK E. BISHOP,
Attorney for Defendants Yates and Hamer.

46 And on the same day, April 1st, 1911, there was filed herein a certain Request of D. E. Thompson for Additional findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Request for Additional Findings.

Comes now defendant David E. Thompson before the rendition or entry of any judgment herein, and suggests to the Court that the findings and conclusions of law, as found, made and announced, touching the issues between plaintiff and this defendant, leave uncertain the particular grounds or facts upon which the Court concludes as a matter of law that the plaintiff is entitled to recover against this defendant. To the end, therefore, that the findings shall be made to disclose the particular ground of liability against this defendant, this defendant respectfully requests that the Court specially find further upon the following interrogatories:

1. Did this defendant ever at any time personally make, compile, issue or circulate any financial statement of the resources and liabilities of the Capital National Bank of an unofficial or voluntary character, separate and apart from the official reports which the Court finds this defendant attested of dates, respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891?

2. Did this defendant, so far as shown by the evidence
47 adduced, ever at any time personally direct or participate in making, compiling, issuing or circulating any financial statement of the resources and liabilities of the Capital National Bank, of an unofficial or voluntary character, separate and apart from the official reports which the Court finds this defendant attested of dates, respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891?

3. Is the liability of this defendant for deceit or false representations under the principles of the common law, as determined by the Court, founded or based upon the defendant's attestation of the official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, of dates respectively, December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890; and July 9, 1891, or any one or more thereof?

4. What are the particular written false representations made by this defendant, which form the basis or foundation for the legal conclusion that this defendant is liable for deceit or false representations under the principles of the common law? This request is only for such general reference in the findings to said written statements as will identify them, specifically, or by classification in the proofs adduced at the trial.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

* * * * * * *

48 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson, Defendants.

Motion of Defendant David E. Thompson for Judgment in His Favor on the Special Findings.

Comes now the defendant David E. Thompson and suggests to the Court that the facts specially found by the Court herein, to-wit: that plaintiff was not induced or influenced by any oral statements of this defendant to deposit any funds in the Capital National Bank; and that this defendant had no actual personal knowledge of the falsity of any of the reports made to the comptroller of the Currency, attested by him, but in attesting such reports relied upon the statement made to him by the president and cashier of the bank (there being no evidence that this defendant ever made or participated in making or publishing any written reports other than the official reports so mentioned) leaves the judgment against this defendant wholly without support, and entitled this defendant to a judgment in his favor as a matter of law.

Wherefore, defendant moves the Court to vacate the judgment entered against him herein, and to render a final judgment upon the facts so specially found in favor of this defendant that he go hence without day, and for costs, in conformity to the law of the case as established and declared by the judgment of the Supreme Court of the United States, and the Supreme Court of Nebraska in the appellate proceedings heretofore had in said courts in this cause.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

49–51 On November 28th, 1910, the following order was had and entered of record herein, to-wit:

#1792.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHAS. E. YATES et al., Defendants.

On this day, this cause came on for trial and by agreement of parties in open Court, trial by jury is waived and this cause is set for further hearing, by agreement of parties in open court on January 30, 1911.

* * * * * * *

52 And now on this 1st day of April, 1911, being a day of the February 1911 term of this Court, these causes came on further to be heard on the motion of each of the plaintiffs for leave to amend their interlined amended petitions by interlineation upon consideration whereof said motions and each of them are sustained and the plaintiffs and each of them permitted to amend their petitions as prayed; to which ruling of the 53–60 Court the defendants and each of them except.

* * * * * * *

61 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, et al., Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates and Louisa P. Hamer administratrix defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

62 Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

Respecting the ninth request, as to the report of December 28, 1886 the Court answers the same in the negative and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line, and the residue thereof contained in sub-division "B" and answers the first question contained in sub-division "A" in the affirmative and the second question contained in sub-division "B" in the negative.

Subject to the foregoing Special Findings of Fact made at the

request of the defendants, the Court finds generally in plaintiff's favor and against the defendants and each of them upon the evidence under the issues joined, and that the allegations of plaintiff's amended petition are true, and that plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of $19,022.11.

To each of the findings of fact and conclusions of law made by the Court the defendants each severally except.

B. F. GOOD, *Judge.*

63 In the District Court of Seward County, Nebraska.

BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, Administrator of the Estate of Ellis P. Hamer, Deceased, and DAVID THOMPSON, Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this First day of April, 1911, the Court in pursuance of the request of the defendant, David E. Thompson, in this cause, makes the following findings of fact, and conclusions of law:

In response to the first request the Court finds that the defendant Thompson failed to perform his duties as a director in the Capital National Bank, in failing to personally assist his fellow directors in managing and superintending the business of such bank and to examine the loans and securities thereof, and to see that the general condition of the bank corresponded with its Books and to see that only good Bills of Receivable were entered upon the bank's books and its statements, and to see that the assets which were worthless or of little value were charged off, and that the allegations of plaintiff's petition of official misfeasance and mismanagement are sustained by the evidence and that such allegations are true.

In respect to the second and third requests of the defendant David E. Thompson the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing, or responsibility of said bank to the plaintiff and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank.

64 In response to the fourth request the Court finds that the defendant Thompson attested only t-e five reports mentioned in said request.

Respecting the sixth and seventh requests of the defendant the Court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, at-

tested by him, but in attesting such reports the Court finds that the defendant relied upon the statements made to him by the president and cashier of the bank and without any investigation and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports and that the same were attested recklessly and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him, and in this respect the Court finds that the same were not made in good faith.

Subject to the foregoing Special Findings of Fact made at the request of the defendant David E. Thompson, the Court now finds generally in plaintiff's favor and against the defendant upon the evidence under the issues joined and that the allegations of the Plaintiff's Amended Petition are true.

Responsive to the request for a conclusion of law embodied in the first request the Court finds that Plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that plaintiff has sustained damages in the sum of $19,022.11.

To each of the findings of fact and conclusions of law made by the Court the defendant excepts.

B. F. GOOD, *Judge.*

* * * * * * *

65 Comes now the plaintiff and moves the court for leave to amend its last petition herein in this to-wit:—that it be permitted to amend its petition as follows, to-wit:

On page 2, line 37, after the words "to be" add the following words: "printed and."

On page 2, line 54, after the word "plaintiff" add the words "and sent by defendants and their agents to plaintiff through the U. S. mails and otherwise."

On page 2, line 60, after the word "advertisement" add the words "and the statements sent by defendants to plaintiff as aforesaid."

On page 2, line 62, after the word "advertisements" add the words "and the statements sent by defendants to plaintiff as aforesaid."

On page 3, line 72, after the word "made" add the words "and sent and delivered to plaintiff statements of its condition."

On page 3, line 74 after the word "published," add the words "and sent and gave to plaintiff."

66 On page 3, line 89, after the word "newspapers" add the words "and as aforesaid caused and permitted to be made and sent and delivered to plaintiff statements of the bank's condition."

On page 3, line 92, after the word "statements" add the words "and upon the statements of its financial condition, sent to and received by plaintiff as aforesaid."

On page 4, line 118, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be

sent and received by plaintiff said false and untrue statements aforesaid."

On page 4, line 129, after the word "Nebraska" add the words "and sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid."

On page 5, line 141, after the word "Nebraska" add the words "and sent and caused to be sent to, and received by, plaintiff said false statements aforesaid, through the U. S. mails and otherwise and which were received by plaintiff."

On page 5, line 148, after the word "published" where it appears the second time add the words "and sent and delivered to plaintiff."

On page 5, line 152, after the word "published" add the words "and as sent and delivered to, and received by, plaintiff."

On page 5, line 164, after the word "advertisements" add the words "and said statements of its financial condition so sent and received by plaintiff."

On page 6, line 168, after the word "advertisements" add the words "and other statemen-s as aforesaid."

On page 6, line 169, before the word "this," insert the words "and statements sent to plaintiff by defendants, and by plaintiff received and examined."

On page 6, line 207, after the word "statements" add the words "so sent to and received by plaintiff aforesaid," and after the word "advertisements" add the words "and statements."

67 On page 7, line 219, after the word "made" add the words "and said statements so sent to and received by plaintiff."

On page 7, line 224, after the word "statements" add the words "so sent to and received by plaintiff."

On page 7, line 233, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements."

On page 7, line 238, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff."

On page 7, line 240, after the word "published" add the words "and said statements so sent to and received by plaintiff."

On page 8, line 251, after the word "advertisements" add the words " and sending to and causing to be received by plaintiff said statements."

On page 8, line 254, omit the word "published."

BANK OF STAPLEHURST, NEBRASKA,
Plaintiff.

By J. J. THOMAS &
NORVAL BROS.,
It's Attorneys.

* * * * * * *

68 1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occuring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepts to said finding.

9. The court erred in finding on the third request that Charles E. Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

69 10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provisions of the banking act by any of the officers, agents or servants of the bank, and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be true, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were

untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B. of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the findings and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in each of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by this defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21*c*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National Banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such
72 Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowlecge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute- which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and wilfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgement of said United States Supreme Court on said writ of
73 error and the mandate of said Court on said judgement persuant to which these further proceedings are had in the following particulars:

(a) The findings and judgement violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources

and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting— (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report". (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgement of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in ever- state shall be bound thereby any-thing in the Constitution or laws of any state to the contrary notwithstanding." contained in section 2 article 6
74 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgement in his favor and moves the Court to render such judgement thereon.

29. Upon the facts specially found, this defendant is entitled to judgement in his favor and moves the Court to render such judgement thereon, notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The Court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements

or representations, either official or voluntary, were prepared,
75 distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

* * * * * * *

76 The defendant Louisa P. Hamer, Adm'x moves the court to set aside her findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

77 7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28/1886 and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

78 15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the

National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

79 20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16, and 17.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgement should be entered in his favor.

80 24. The conclusion and judgement that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking Law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgement and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action

of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute- which makes liability depend upon the fact that directors knowingly vio-
81 lated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars: (*a*) the findings and judgement violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting" (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional". And in each and every of these respects the Court has denied that due faith and credit to the judgement of the Su-
82 preme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding", contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to

judgement in his favor and moves the Court to render such judgement thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgement thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

83 35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published, advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant—on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this state.

FRANK E. BISHOP.
For Defendants.

* * * * * * *

84 The defendant, David E. Thompson, moves the Court to vacate and set aside the findings and judgment rendered herein against him and to grant a new trial of this case for the following reasons:

1. The said cause had been duly and regularly and lawfully removed to the Circuit Court of the United States for the District of Nebraska, by proceedings taken in accordance with the acts of Congress of the United States on the ground that the liabilities sought by plaintiff to be enforced arose on an act of Congress of the United States. As shown on the face of plaintiff's petition, this Court had no jurisdiction or power to proceed further in the trial of said cause.

2. The petition of the plaintiff does not set forth facts sufficient to constitute a cause of action in favor of plaintiff against this defendant, and does not set forth sufficient facts to support and maintain the judgment rendered herein.

3. The Court erred in receiving any testimony and in overruling the objection of this defendant to the admission of any testimony at the trial, because the petition did not state facts sufficient
85 to constitute a cause of action in favor of plaintiff against this defendant.

4. The judgment is not sustained by sufficient evidence.

5. The judgment is against the clear weight of the evidence.

6. The judgment is contrary to law.

7. The judgment is not sustained by the findings of the Court.

8. The facts specially found by the Court affirmatively show that defendant is not liable to plaintiff upon the cause of action set forth in the petition and entitle this defendant to judgment in his favor.

9. The Court erred in finding and holding as a conclusion of law that a mere negligence or failure of this defendant to perform his duties as a director in the Capital National Bank in failing to personally assist his fellow directors in managing and superintending the business of such bank and to examine the loans and securities and see that the general condition of the bank corresponded with its books and that only good bills receivable were entered upon the bank's books and its statements and to see that the assets that were worthless or of little value were charged off, and acts of mere official misfeasance and mismanagement, entitle plaintiff to recover in an action of deceit under the principles of the common law, exclusive of the requirements of the national banking act.

10. The conclusion of law found and held by the Court that plaintiff in its individual capacity and right is entitled to maintain or prosecute a cause of action for negligence or deceit under the principles of the common law on account of the mere negligence of this defendant in performing his duties as a director in the Capitol National Bank and for mere acts of official misfeasance and mismanagement, is contrary to and violative of the act of the Congress
86 of the United States known as the "National Banking Act," and the plan and theory of liquidation and distribution of the assets of insolvent national banks thereby established, in this that whereas by the said act of Congress all liabilities of directors of

national banks, for mere acts of official neglect, misfeasance and mismanagement are assets of the Banking Association and pass upon the bank's insolvency to the Receiver appointed by the Comptroller of the Currency, and are enforceable only by the Receiver so appointed, for the equal and ratable distribution and benefit of all creditors, the said conclusion of law and finding of the Court permits the plaintiff to recover in its personal and individual capacity to the exclusion of other creditors, and thereby operates to violate and nullify the act of Congress in that behalf, which is the Supreme and paramount law governing national Banks.

11. The court erred in finding, holding and adjudging that a common law action of deceit could be maintained against this defendant as a director of the Capitol National Bank, based upon his neglect of official duties imposed upon him by the provisions of the national banking act, or upon the manner in which this defendant conducted or failed to conduct the business of said bank, upon grounds exclusive and apart from the liabilities imposed in and by the terms of said act.

12. The Court erred in finding, holding and adjudging that the liability of this defendant upon the cause of action set forth in the petition is not governed and limited by the liabilities imposed upon directors of national banks by the national Banking act, being title 62 of the Revised Statutes of the United States.

13. The Court erred in finding, holding and adjudging as a matter of law, that this defendant is liable to plaintiff upon the cause of action set forth in its petition, notwithstanding that this defendant was without knowledge of the falsity of any report attested
87 by him and that he attested such reports in reliance upon information communicated to him by the president and cashier of the bank, under the principles of the common law exclusive of the requirements of the national banking act. The findings and judgment in that behalf are in violation of the provisions of section 5239 of the Revised Statutes of the United States, which makes liabilities of directors of national banks dependent upon the fact that they have knowingly violated or knowingly permitted the violation of the provisions of the national banking act and knowingly and wilfully participated in, and knowingly and wilfully assented to such violation.

14. The findings and judgment are contrary to and violative of the opinion of the Supreme Court of the United States delivered upon a writ of error to the Supreme Court of the State of Nebraska in appellate proceedings prosecuted from this Court in this same identical cause, and reported in volume 203 U. S. Supreme Court Reports at pages 158 to 181, inclusive, and also of the judgment entered by said United States Supreme Court on said writ of error, and also of the mandate of said court issued upon said judgment, pursuant to which these further proceedings were had, in the following particulars: (*a*) The findings and judgment are violative of the holding of said United States Supreme Court that section 5239 United States Revised Statutes, furnished the exclusive test of liability in actions against bank directors for deceit based upon false

official reports of the resources and liabilities of a national bank; (*b*) they are violative of the holding of said United States Supreme Court that a director of a national bank is not charged with knowledge of whether a report attested by him is true or false, as a matter of law, by reason of his official relation, or upon the theory that "it was his duty to know or refrain from acting"; (*c*) they are violative of the holding of said Supreme Court of the United States that liability of a director of a national bank for deceit does
88 not attach from the mere fact that a director "merely negligently participated in or assented to the making and publishing of an untrue official report"; (*d*) they are violative of the holding of said Supreme Court of the United States "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required: that is, that the violation must in effect be intentional."

And in each and every of the respects aforesaid, the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and by the acts of Congress passed pursuant thereto, and by the inherent necessity of according such faith and credit to all *ced*isions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding," contained in section 2, article 6 of the United States Constitution.

15. The specific findings of the Court that this defendant failed to discharge his duties of administration and was guilty of official misfeasance and mismanagement is not sustained by sufficient evidence and is not material to any issue upon which the liability of this defendant depends.

16. The special finding made in response to the fourth request of this defendant is not sustained by sufficient evidence, is not consistent with the findings made in response to the sixth and seventh requests of this defendant for special findings, and in view of the findings made in re-ponse to the sixth and seventh requests of this defendant, is mere surplussage and irrelevant and imma-
89 terial to any issue upon which liability of this defendant depends.

17. The general finding in favor of plaintiff is not sustained by sufficient evidence.

18. The conclusion of law made in response to the first request for special findings made by this defendant, namely: to find whether this defendant is liable on account of allegations of official misfeasance and mismanagement is erroneous and contrary to law.

19. Upon the evidence this defendant is entitled to judgment in his favor, as a matter of law.

20. Upon the facts specially found this defendant is entitled to a judgment in his favor, as a matter of law.

21. The damages awarded are excessive and greatly exceed the amount of damages sustained by plaintiff or established by any testimony.

22. The Court erred in including and allowing interest as an element of damages, and in compounding the interest, as is shown by the excessive damages assessed.

23. The action being in tort no interest is allowable or recoverable, and the maximum recovery can not lawfully exceed the unpaid principal sum of plaintiff's deposit in the Capitol National Bank.

24. The facts and conclusions of law found by the Court show that the judgment is based wholly or in part upon statements of the financial condition of the Capital National Bank "published in the newspapers." By the National Banking Act such newspaper publications of official reports were specifically required to be made, and were not voluntary or unofficial acts, and the findings of fact and conclusions of law stated in said judgment in so far as they find or assume such newspaper publications to be voluntary
90 and unofficial acts are in conflict with said act of Congress and with the law of the case established in and by the appellate proceedings heretofore had herein.

25. The additional special finding made in response to this defendant's request No. 1 for additional findings, except in so far as it finds in response to the interrogatory submitted that this defendant "did not personally make, compile, issue or circulate such statements other than those mentioned in said interrogatory" is not sustained by sufficient evidence nor by any evidence, and is contrary to the undisputed evidence.

26. The additional special finding made in response to this defendant's request No. 2 for additional findings, except in so far as it finds in response to the interrogatory submitted that this defendant "did not personally direct the making, compiling, issuing, or circulating, of any statements other than those referred to in said interrogatory" is not sustained by sufficient evidence, nor by any evidence and is contrary to the undisputed evidence.

27. The Court erred in its conclusion of law stated in answer to this defendant's 3rd request for additional findings. The conclusion of law found therein is so indefinite, uncertain and equivocal, in itself and by the references therein made to the answers given to the first and second interrogatories that the basis of the judgment cannot be ascertained therefrom.

28. The Court erred in each of its conclusions of law stated in answer to this defendant's 4th request for additional findings. In so far as it is therein found that defendant's common law liability rests "upon the statements * * * setting forth the financial condition of the bank which were published in the newspapers" it bases a common law liability upon official acts enjoined by the National Banking Act, contrary to and in violation of section 5239 of the Revised Statutes of the United States, and contrary to the law of the case established in and by the appellate proceedings here-
91 tofore had herein. The finding of facts contained therein is not sustained by sufficient evidence, nor by any evidence, and is contrary to the undisputed evidence.

29. The Court erred in finding generally in favor of plaintiff and against this defendant. The said general finding is also inconsistent with the facts specially found in favor of this defendant.

30. The facts specially found against this defendant on the Court's own motion are not sustained by sufficient evidence nor by any evidence and are contrary to the undisputed evidence.

31. The Court erred in overruling the motion of this defendant for judgment in his favor that he go hence without day, upon the facts specially found in his favor.

32. The Court erred in sustaining the motion of plaintiff to amend its petition and in granting leave to make such amendments after the conclusion of the trial.

33. The court committed errors of law during the trial which were duly excepted to by this defendant.

34. The Court erred in receiving incompetent evidence over the objections of defendant, and in giving consideration thereto in rendering judgment.

HALLECK F. ROSE,
Attorney for Defendant David E. Thompson.

* * * * * * *

92 BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

And now on this 8th day of May, 1911, it being the first day of the May, 1911, term of this Court this cause came on to be heard on the request of the defendants, for additional special findings filed herein, April 1st, 1911, and for final determination and the Court being fully advised in the premises in response to the request of the defendant, David E. Thompson, makes the following additional special findings of fact and conclusions of law.

Respecting interrogatory No. 1, the Court finds that the defendant, David E. Thompson, did not personally make, compile, issue or circulate such statements, other than those mentioned in said interrogatory, but that he knew financial statements of the resources and liabilities of the Capital National Bank of an official, as well as of an unofficial and voluntary character were being made, compiled, issued, published and circulated by the bank, from time to time, containing his name as one of the directors of said bank, and purporting and assuming to be made, compiled, issued, published and circulated, under his authority and directions as one of the directors of said bank, and that he knowingly permitted and assented to and allowed the same to be made, compiled, issued, circulated and published by the officers of the bank.

Respecting interrogatory No. 2, the Court finds that the defendant, David E. Thompson, did not personally direct the making, compiling, issuing or circulating of any financial statements other
93 than those referred to in said interrogatory but that he knew statements of the resources and liabilities of the Capital National Bank of an official as well as of an unofficial and voluntary

character were being made, compiled, issued, published, and circulated, by the bank, from time to time, and that he knowingly permitted, assented to and allowed the same to be made, issued, circulated, compiled and published by the officers of the Bank, and that he knew that said unofficial and voluntary statements and representations contained his name as one of the directors and purported and assumed to be made, compiled, issued, published, and circulated under his authority and direction as one of the directors of said bank.

Respecting the third interrogatory, the Court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit under the principles of the common law is not founded upon the attestation of the official reports referred to in the third interrogatory, but that such statements are corroborative of the unofficial and voluntary statements made by the bank, as set forth in the answers to the first and second additional interrogatories, and that such liability is founded upon the truth of the allegations of plaintiff's amended petition and embodied in the general findings of the Court.

In answer to the fourth interrogatory the Court bases or founds its legal conclusion as to the defendant, David E. Thompson's liability, upon the statements, representations and advertisements setting forth the financial condition of the bank which were published in the newspapers and such as were sent by the bank to the plaintiff, in the form of cards and slips, and purporting and assuming to have been made, compiled, issued, published, and circulated under the authority and direction of the directors of the Capital National Bank, and in the name of the defendant, David E. Thompson with the other directors, that such statements, representations and advertisements were false, and known to be so by the de-
94 fendant, and were relied upon by the plaintiffs to their damage.

And in response to the request of the defendants, Charles E. Yates, and Louisa P. Hamer, Administratrix, makes the following additional special findings of fact and conclusions of law:

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that such printed slips and business cards were compiled, prepared, and distributed by the bank, from time to time and contained his name as one of the directors, thereof, and purported and assumed to be compiled, prepared and distributed under the authority and directions of said defendant Yates and in his name as one of the directors of the bank.

Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates, did know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the Defendant Yates.

Respecting the 15th request, the Court finds that the said Ellis P. Hamer did know that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 16th request the Court finds that the said Ellis P. Hamer did not personally take part in the preparation or distribution of the printed slips or business cards, showing the assets and liabilities of the bank, as shown in the evidence but the Court
95 finds that he did know that such printed slips and business cards were prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name, as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

The Court further and upon its own motion finds as to each and all of the defendants, in this action that:—The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority, in their names and with their sanction and consent.

96–115 The Court further finds that the said Ellis P. Hamer and the defendants, Yates and Thompson, and each of them, from and after September 1891, had knowledge and knew said statements representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in fact false and untrue, as in Plaintiff's amended petition alleged, and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the Bank to be

in a sound solvent and prosperous financial condition when in fact it was at all times wholly insolvent and unable to pay its liabilities.

The Court further finds on all the issues, joined for the plaintiff and against the defendants and each of them and that the allegations of plaintiff's amended petition are true.

To all of which findings the defendants and each of them severally except.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover from the defendants and each of them the sum of $19022.11 Dollars, with seven (7) per cent interest thereon from April 1st, 1911 and costs of action taxed at — Dollars.

And thereupon and on the same day this cause came on further to be heard on the motions of the defendants for new trial and the Court being fully advised in the premises doth overrule the same to which the defendants and each of — except and are allowed Forty (40) days from the rising of the Court within which to prepare and serve bill of exceptions.

* * * * * * *

116 Supreme Court of Nebraska, September Term, A. D. 1911.
Nov. 10.

* * * * * * *

This cause coming on to be heard upon motion of appellee for an extension of time within which to serve and file answer briefs and for a continuance herein, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time to file briefs and for continuance be, and the same hereby is, sustained and appellee given until December 18, 1911, to serve and file answer briefs and supplemental abstracts, and cause is continued to the session of court commencing January 2, 1912.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 4th day of January, 1912, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

117 Supreme Court of Nebraska, January Term, A. D. 1912.
Jan. 4.

* * * * * * *

Upon agreement of counsel, it is by the court ordered that cause be and hereby is, continued to February 5, 1912.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 5th day of February, 1912, the following among other proceedings were had and done in said supreme court, to-wit:

The following causes were argued by counsel and submitted to the court:

* * * * * * *

17277.

BANK OF STAPLEHURST
vs.
YATES.

Appeal from Seward County.

* * * * * * *

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 22nd day of October, 1912, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

118 Supreme Court of Nebraska, September Term, A. D. 1912.
Oct. 22.

* * * * * * *

Upon application, it is by the court ordered that appellees in the above entitled causes be, and hereby are, given leave to serve and file reply briefs herein, instanter.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 31st day of January, 1913, there was rendered by said court and entered of record upon the journal thereof a certain Judgment in the words and figures following, to-wit:

119 Supreme Court of Nebraska, January Term, A. D. 1913.
Jan. 31.

* * * * * * *

This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein by them, taxed at $—, and have and recover from appellee all their costs so expended, that appellee pay all costs incurred herein by it, taxes at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

120 JONES NATIONAL BANK
v.
YATES.

BANK OF STATTLEHURST
v.
YATES.

UTICA BANK
v.
YATES.

BAILEY
v.
YATES.

Nos. 17276-7-8-9.

Opinion. Filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability cannot be measured by a higher standard than that which is imposed by the act.

2. Whereby the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the pen-
121 alty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and pre-

scribes a penalty for its non-performance "the rule prescribed in the statute is the exclusive test of liability." Yates v. Jones Nat Bank, 206 U. S. 158; Farmers & Merchants Nat. Bank v. Dearing, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of, or approved of, or participated in, the fraudulent acts of which complaint is made.

122 HAMER, *J.*:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed, Yates v. Jones Nat. Bank, 206 U. S. 158; Yates v. Utica Bank, Yates v. Bailey, and Yates v. Bank of Staplehurst, 206 U. S. 181, where it was held that plaintiff's petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiffs' causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments contain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

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To the petitions thus amended each of the defendants demurred, the demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity

or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured
124 by the terms of that act, and not otherwise.

Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiffs' amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the supreme court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when defendants Yates and Hamer signed the
125 reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statement, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that they

knowingly participated in any of them. There being nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that
126 before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. That thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in Yates, v. Jones Nat. Bank, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an in-
127 ducement to him to act in that capacity the law assures him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in Yates v. Jones Nat. Bank, supra, is based on a simple proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is

the exclusive test of liability." In the argument on benalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute."
128 (Cochran v. United States, 157 U. S. 286.) The argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violations of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In Briggs v. Spaulding, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors, of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of
129 action together and then say to the defendant—If you are not liable upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of Briggs v. Spaulding, supra, where it was said: "Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other persons that he has a right to expect that the directors, who are sup-

posed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In Briggs v. Spaulding, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things,
130 said: (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of this course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 Marowetz, Private Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director) depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the
131 agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 Morawetz, Private Corporations, (2d ed.) sec. 551, et seq., and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. * * * (10) There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defend-

ants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defendants. It also is apparent that plaintiffs cannot
132 produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.
Sedgewick and Fawcett, J. J., dissenting.

133 LETTON, *J.*, concurring in part:

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the supreme court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the Supreme Court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The supreme court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." Yates v. Jones, Nat. Bank, 206 U. S., 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the supreme court of the United States. I am also inclined to the view that the evidence would support a judgment upon such
134 a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

135 And afterwards, to-wit, on the 10th day of March, 1913, there was filed in the office of the clerk of said supreme court, a certain Motion for Rehearing, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

* * * * * * *

The undersigned appellee, respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in Yates v. Jones Nat. Bank, 206 U. S., 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dismissal of this case and of erroneous construction as to the sufficiency of the evidence to support the findings and judgments of the trial court:

1.

It is said in the syllabus of this case, paragraph two, that "Where, by the federal statute concerning national banks, a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not * * * that
136 as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." Thomas v. Taylor, 32 Sup. Ct. 403.

2.

The deciding opinion in this case concedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decisions of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, in effect, denied a right and privilege conferred upon it by the constitution and statutes of the United States; of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas,
137 by decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with the opinion of the said United States Supreme Court, when in fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4.

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially §5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5.

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws,—"the rule of responsibility declared by them" have "been satisfied" (Thomas v. Taylor) and the judgment should be affirmed.

138

6.

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and the measure of duty and of liability established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7.

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of liability announced by the Supreme Court of the United States in this

case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8.

It is said in the opinion of Judge Letton that:

"A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, shows that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking acts. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings
139 contained no federal question, and stated merely a common law liability. The Supreme Court of the United States held that a federal question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things exclusively governed by the specific provisions on the subject contained in that act. Yates v. Jones Nat. Bank, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S."

Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, nor that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirement of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e.
reports published pursuant to the call of the Comptroller
140 The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiff's petition

was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide and plaintiff's petition was then and now is sufficient to charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion, Judge Hamer says the plaintiff "still charge- the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery", whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts,—the only
141 requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says: "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank",—thus assuming that that court held the plaintiff's petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not so decide and plaintiff's petition does state a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew

of or personally participated in the acts of the officers of the bank of which they now complain it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District
142 Court should be reversed as to all the defendants". This statement assumes that our petitions failed to allege that the defendants personally knew of our personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and §5239 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally knew of or personally participated in the acts charged in the petition whereas the evidence is amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S.; that under the interpretation and construction of that statute made by the United States Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the
143 United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the frame of our petition precluded that view or theory; whereas, the holding of the United States Supreme Court is that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied for recovery upon any act done pursuant to an express command of the national bank act: also, that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the express commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act: and finally that that act does not require proof of actual knowledge but that it is sufficient if it be shown the defendants acted reck-

lessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages * * *." And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said
144 bank * * * or by the receiver * * *"—they thereby admitted they neglected their duties as such directors and committed the wrongs complained of in plaintiff's amended petition whereby the bank became insolvent and that such damages resulted from the conduct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and §5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

J. J. THOMAS,
Att'y for Appellee Bank of Staplehurst.

* * * * * * *

145–146 On application of attorneys for appellee, it is by the court ordered that time be, and hereby is extended to April 12, 1913, within which to file printed briefs in support of motion for rehearing heretofore filed herein.

M. B. REESE,
Chief Justice.

* * * * * * *

147 SEDGWICK, *J.* (dissenting):

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the Supreme Court of the United States that the action is one for deceit at common law and for that reason connot be maintained. The opinion says that it was held (by the Supreme Court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit," whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and

concludes that "unless the Supreme Court of the United States shall recede from its decision of these cases, the petition will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any member of the court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shown. "I concur in the view that the amendments made after the remand do not
148 change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the Supreme Court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly to anyone deceived," etc. Yates v. Jones Nat. Bank, 27 Sup. Ct. Rep. 638 (206 U. S. 158. This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusal to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. If proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action, and the right to bring it in the state courts is plainly stated in the fourth paragraph of the syllabus. "State courts
149 may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., Sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the Supreme Court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and de-

manded," and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the Supreme Court of the United States and has been since emphatically decided by that court, and no such claim can be made in this case. The question is whether these directors are liable under the federal statute, and this action
150 is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of Gerner v. Mosher, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. Yates v. Jones Nat. Bank, 74 Neb. 734. The Supreme Court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court upon this point that doubt has been emphatically been set at rest by a later decision where the language used by that court in this case is quoted and
151 its meaning fully stated and made plain. Thomas v. Taylor, 224 U. S. 73. That case originated in a nisi prius court of the state of New York. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the Supreme Court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank will not be reversed

when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y.) 53). The Supreme Court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment that "unless the Supreme Court of
152 the United States shall recede from its decision of these cases, the petitions will be held, insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such common law liability; that is, that no common law action could be sustained.

The case of Thomas v. Taylor, 224, U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, Yates v. Jones Nat. Bank, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional viola-
153 tion of a statute when one deliberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in Yates v. Jones Nat. Bank. The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of

the books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports were published as before, and the plaintiffs were deceived and
154 damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which this decision depends.

FAWCETT, J., concurs.

* * * * * * *

155 It is by the court ordered that oral argument on the motions of appellees for rehearing herein, be had before the court at the sesion of court commencing June 2, 1913.

M. B. REESE,
Chief Justice.

* * * * * * *

156 & 157 Upon agreement of counsel, oral argument on motions for rehearing in these causes, is continued to the session of court commencing September 16, 1913.

M. B. REESE,
Chief Justice."

* * * * * * *

158 This cause coming on to be heard upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore, ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed and a rehearing herein ordered.

J. FAWCETT,
Actin Chief Justice.

* * * * * * *

Hamer, Rose and Barnes, JJ. dissent from the order granting a rehearing herein and protest against the entry thereof on
159 the journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a

rehearing, the Chief Justice having been consulted by the plaintiff and having so announced when the cause was on for hearing. Shumway v. State, 82 Neb., 152, 165.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

Appellant, David E. Thompson, moves the Court to vacate, set aside and hold for naught, the order entered herein on January 7th, 1914, declaring carried the appellee's motion for a rehearing and granting a rehearing of this cause for the following reasons:

1. It appears upon the face of said order, and by facts of which the Court and all of its members have judicial knowledge, that the said order was not concurred in by a constitutional quorum of four judges qualified to act in said cause, and the said order is
160 for that reason null and void.

2. It appears upon the face of said order that of the six qualified judges of said Court, who sat upon the motion for a rehearing, and considered the record and arguments, only three judges, who are not sufficient to constitute a quorum or pronounce a decision according to section 2 of article 6 of the Constitution of Nebraska, concurred in said order.

3. It is shown by said order that of the six judges who were qualified to hear and determine said motion, and sat at the hearing, three voted against and three voted for a rehearing, and that the legal effect of said vote was an adherence by the Court to its own previous final judgment reversing the judgment of the district court and dismissing this defendant without day, as is well settled by the recent judgment of this Court in R. Mead Shumway vs. The State of Nebraska, wherein it was specifically adjudged that upon three judges voting for and three against a motion for a rehearing, the other judge having been of counsel and disqualified, the vote constituted an adherence by the court to its previous judgment affirming a capital sentence, and required the issuance by the clerk of a death warrant, under which plaintiff in error was hanged by the neck until he was dead.

4. Hon. M. B. Reese, Chief Justice, who, upon finding, as shown by said order, that the six qualified judges who heard said motion for a rehearing were equally divided in opinion thereon, and that said vote, in view of his own disqualification, operated as an adherence by the court to its previously entered final judgment, assumed the function of participating in said decision, concurring with the qualified judges who favored said motion, and directing the entry of said order, had previously been counselled by and an attorney of the parties in said case, namely the Jones National Bank, and was and is by the statutes of this State, in that behalf, disqualified and prohibited from acting as a judge or justice
161 in said case, or in any judicial proceedings therein, and his pretended judicial participation in said order is void and is of no force or effect whatever.

5. The disqualification of the Chief Justice to sit, or act or perform any judicial act or function in said case was within the judicial knowledge of the court and of all the members thereof, by reason of a public announcement made by the Chief Justice in open court in the presence of all of the members of the Court, upon the calling up of a motion to advance, that he had been counselled in the suit by one of the parties and was for that reason disqualified, and by reason of like announcements made in open court when an application made by appellees for additional time to file brief was called for hearing, when the case was first called for argument on its merits, and when the case was called for oral argument on the motion for a rehearing. Upon each and all of said occasions, the Chief Justice orally certified, publicly and in open court, to his own disqualification, and upon each and all of said occasions, he arose from his seat and left the bench and did not sit. The report of the opinions delivered on the occasion of the rendition of the final judgment of reversal by this court shows that the Chief Justice did not sit or participate therein.

6. This defendant did not, in person nor by attorney, orally or in writing, consent that the Chief Justice, act in this cause, and no mutual consent of the parties was ever made in writing and made part of the record in this case.

7. This defendant relied upon the nonparticipation of the Chief Justice on his own oral certificate, and on the fact that he left the bench when the motion was called, and had no notice or knowledge that he would, in any circumstances, participate in or
162 control the decision of said motion, and had, therefore, neither occasion or opportunity until after the event to formally challenge his competency and qualification to act in said cause, and had at all times implicity relied on his publicly expressed intention not to act therein.

II.

Motion of appellant, David E. Thompson, to vacate and set aside and hold for naught, the order entered herein of date May 17, 1913, ordering an oral argument on the motion for a rehearing.

And this appellant further and separately moves the court to vacate and set aside the order for an oral argument on the motion of appellees for a rehearing entered herein on the 17th day of May, 1913, for the following reasons:

1. The said order was not concurred in by four judges of this court, qualified to act herein as is required by section 2 of Article 6 of the Constitution of Nebraska.

2. The said order was made only by the participation and deciding vote of Hon. M. B. Ree-e, Chief Justice, who had previously been counselled — and an attorney of one of the parties therein, namely the appellee Jones National Bank, and was, for that reason disqualified to act in any judicial capacity therein, all of which is within the judicial knowledge of the court, and of each

one of the judges of said court. In the said proceeding, as is within the judicial knowledge of the court because it was a judicial proceeding of the court, there were but six judges qualified to act, and they were equally divided in opinon, three voting to deny an oral argument and to overrule the motion for a rehearing, and three voting for an oral orgument. The said vote was in law, and by the settled practice of this court an adherence to the previous final judgment of reversal, and operated to overrule said motion for a rehearing.

163 3. The participation of the Chief Justice in said proceeding and order was an unauthorized and void act, in direct violation of the statutes of this State in that behalf, and there was no consent of this appellant that the Chief Justice might act herein, *was* made in writing and entered of record in said case.

4. Upon at least three prior occasions when this case was called for hearing in open court, the Chief Justice orally certified, publicly, and in open court, to his disqualification to act herein, and upon each one of said occasions, he arose from his seat and left the bench, and did not return so long as the said case was under consideration of all of which the court has judicial knowledge because the same were a part of the public proceedings of the court. This appellant relied on the nonparticipation of the Chief Justice in the proceedings in said case upon his own public certification of his disqualification, and upon his said public announcement that he would not so participate, and upon his said retirement on every occasion when the case was called for public hearing, and had no knowledge that the Chief Justice had participated, or would, under any circumstances, participate in the private deliberation or orders of the court therein, contrary to his public announcement, until long after the event, and had therefore, neither occasion nor opportunity to file any formel recusation against the Chief Justice, or to prevent said issue for formal decision and determination.

III.

Motion of appellant, David E. Thompson, to correct the record and make the journal entries of the proceedings correctly recite the proceedings had by the Court herein, and to order a mandate to carry into effect its previous judgment of reversal and dismissed of this appellant without day.

And this appellant further and separately moves the court to correct the journal entry of the proceedings had herein on May 17,

1913, and on January 7th, 1914, severally, so as to conform

164 to and show the actual proceedings had and done by the Court, that is to say, that upon consideration of the motion for a rehearing, the Chief Justice was disqualified to act, and of the six qualified judges who participated therein, three judges voted to overrule said motion, and three judges voted to grant an oral argument on said motion, and that there not being a constitutional quorum of four qualified judges in favor either of granting said motion or of granting an oral argument thereon, the court does hereby

over rule the said motion, and adheres to its former judgment of reversal and dismissal, and directs the clerk to issue a mandate to carry into effect the said previous judgment.

The facts averred in the foregoing motions are proved by affidavits filed herewith.

JOHN F. STOUT.
HALLECK F. ROSE,
ARTHUR R. WELLS,
Attorneys for Appellant David E. Thompson.

* * * * * * *

Halleck F. Rose, being first duly sworn, on his oath says: I am now and for more than twenty-six years last past have been an attorney and counsellor at the bar of this court, in good standing. I have been a duly authorized attorney for appellant, David E. Thompson, in all the proceedings had in this court upon the appeal in cases numbered 17276 and 17277 in which the foregoing and annexed motions are made and filed. I have personally attended all of the public proceedings in this case upon said appeals as the attorney of appellan*d* David E. Thompson.

165 When the motion of appellants to advance said case was called for submission, and when a motion by appellees for an extension of time to file briefs was called for presentation, and when the said appeal was called for argument upon the merits, and when the said appeal was called for oral argument upon the motion of appellees for rehearing, Honorable Manoah B. Reese, Chief Justice was upon the bench. Upon each of said four several occasions, when public hearings were had before the Court in said cases, all of the judges of the said court were sitting upon the bench. Upon each of said several occasions, as soon as the said causes, numbered 17276 and 17277 were called, the Chief Justice announced publicly in open court from the bench that he had been counselled by one of the parties to said appeals in a previous stage of the proceedings and was disqualified to act in said cases, and he thereupon in each instance, following said announcement, arose from his seat upon the bench and retired through the door back of the bench into an adjoining room or chamber, and did not resume his seat upon the bench until a hearing in said several cases was concluded. I, therefore, say upon such creditable information, and belief, that the Chief Justice Honorable Manoah B. Reese, was at a former state of the proceedings in said cases counselled and employed as an attorney therein by one of the parties thereto, namely the Jones National Bank, appellee.

Appellant, David E. Thompson, never at any time, either in person, or by attorney, in writing, or otherwise, consented that the said Chief Justice might act in said cases notwithstanding his former employment as an attorney therein, and no mutual consent of the parties to said suits or to either one of them was ever made in writing and made part of the record in said cases, or in either one of the said cases.

After I was notified by the clerk of the entry of May 17th, 1913,

of an order of this court for an oral argument upon the mo-
166 tions of appellees for a rehearing, I discussed with my partner John F. Stout, the possibility that the Chief Justice, notwithstanding his former relation as counsel for one of the parties, might be impelled to act in the hearing and decision of the said motion for a rehearing and we had fully determined upon such conference that if he would not withdraw when the cases were called for oral argument as he had done on previous occasions, we would file a formal challenge against his qualification to act upon said appeals. The Chief Justice's public withdrawal when the cases were subsequently called, as above stated, left neither occasion, nor opportunity for making any formal challenge of his qualification to act in said cases, or for calling said issue to the notice of the court for decision. I relied confidingly and implicitly upon the said public certification of the Chief Justice of his own disqualification and had no knowledge, nor means of knowledge that he was acting, or would under any circumstances or conditions, participate or act in the decision or determination of the said motion from the public hearing of which he had withdrawn, until after the announcement upon January 7th, 1914, of the order sustaining said motion, a memorandum of which was delivered to the clerk upon said day by Judge Barnes, reciting that: "on consideration of said motion, Judges Barnes, Hamer and Rose voted against a rehearing and Judges Sedgewick, Letton and Fawcett voted for a rehearing, and thereupon Reese, Chief Justice, voted for a rehearing and declared the motion carried." Upon application this day to the clerk for a certified copy of the said order, he declined to make and certify the same upon the ground that while he had notified the parties of the order, the form in which it should be entered, had not yet been agreed upon, and that he was unable to certify the form of the order or to enter an order upon the journal until the court had prepared and agreed upon its specific terms.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 8th day of January, 1914.

[SEAL.]

K. M. ANDERSEN,
Notary Public.

167 STATE OF NEBRASKA,
County of Douglas, ss:

John F. Stout, being first duly sworn, on his oath says: I am attorney and counsellor at the bar of this court, and have been for many years last past, in good standing. I am associated as a partner with Halleck F. Rose, and was so associated when the appeals in cases numbered 17276 and 17277, in which the foregoing motions are made, were filed and docketed in this court. Our said firm has represented appellant, David E. Thompson, in all of the proceedings had in said cases on said appeals in this court. On the occasion of the original argument of said cases on the merits before this court, I was in attendance upon the court and participated in the presentation of a motion in another case heard at the morning

hour. When the above mentioned causes were called upon that occasion for final argument, all of the judges of this court, including the Chief Justice, were upon the bench. When said causes were so called for argument, the Chief Justice, Honorable Manoah B. Reese, announced publicly and in open court that he had been counselled by one of the parties in said cases at a former stage of the proceedings and was disqualified; and the Chief Justice thereupon arose from his seat upon the bench and left the bench, retiring through a door back of the bench into an adjoining room or chamber, and thereupon the argument of the said causes proceeded in the absence of the said Chief Justice.

After the making of a previous order for an oral argument in said causes in this court, my partner, Halleck F. Rose, and myself conferred as to what course we should pursue in the event the Chief Justice should not retire on his own motion when the said cases were called for oral argument upon the motions of appellees for a rehearing. We then determined that if the Chief Justice
168 should not so retire, as he had previously done, we would present a formal challenge to his qualification to act in said cases. I was personally in the office of the clerk of the Supreme Court on the afternoon of January 7th, 1914, when Judge Barnes delivered to the clerk a memorandum of the order that day made by the court granting a rehearing in the aforesaid two cases, and I asked and was given permission to read and copy the same. The said order recited that: "on consideration of said motion, Judges Barnes, Hamer and Rose voted against a rehearing, and Judges Sedgewick, Letton and Fawcett voted for a rehearing, and thereupon Reese, Chief Justice, voted for a rehearing and declared the motion carried." I also read a memorandum by Judges Barnes, Hamer and Rose, which was at the same time delievered by Judge Barnes to the clerk. I did not take a copy of the said memorandum, but it stated in substance that the said three judges dissented from or protested against the entry of the order for a rehearing, because the said order was not concurred in by a qualified constitutional quorum of the court. The said memorandum disclosed that Mr. Chief Justice Reese had participated in the said order and declared the motion for rehearing to be carried.

I had no knowledge until the said 7th day of January, 1914 that the Chief Justice was participating or acting in said case, or would do so under any circumstances, contrary to his public announcement in open court; and the attorneys for appellant, David E. Thompson, had neither previous knowledge, nor occasion, nor opportunity to raise the issue of the qualification of Chief Justice, or to have the same determined previously by a constitutional quorum of the court. The said attorneys relied upon the public announcement made by the Chief Justice, and for that reason presented no challenge against his qualification.

JOHN F. STOUT.

169 Subscribed in my presence and sworn to before me this 8th day of January, 1914.

[SEAL.] K. M. ANDERSEN,
Notary Public.

STATE OF NEBRASKA,
Lancaster County, ss:

David E. Thompson, being first duly sworn, on his oath deposes and says: I am one of the appellants in cases numbered 17276 and 17277, and am the party who makes the foregoing annexed motions. I was personally before the Supreme Court in September, 1913, on the occasion of the oral argument of the motions of appellees for a rehearing in said two cases. When the cases were reached and called, all of the judges, including the Chief Justice, were upon the bench. Upon the cases being so called for oral argument, the Chief Justice, Honorable Manoah B. Reese, stated publicly and in open court that he had at one time been counselled by one of the parties in said cases and was disqualified to act therein, and he thereupon arose from his seat and left the bench, retiring through a door at the back of the bench into an adjoining room or chamber, and he did not again return to the bench until the oral arguments in said causes had been concluded. A considerable number of persons were in the audience in the court room when said public announcement was so made.

I did not at any time, in any manner, in person or by attorney, consent that the Chief Justice should act in said causes, or in either one of them, and no mutual consent of the parties to said causes or either one of them was ever made in writing and made part of the record in said cases, or either one of them. I had no knowledge, or means of information, until announcement of the order granting the rehearing of said cases, on January 7th, 1914, which I
170–172 was informed, showed that the Chief Justice participated therein and cast the deciding vote for a rehearing, that he had in any respect acted or participated in the said motion for a rehearing, or that he intended to, or would under any circumstances, so act or participate in the decision of the said motion, contrary to his own public announcement made in my presence on the occasion of the oral argument on said motion. I would have insisted on my attorneys presenting a challenge against the qualification of the Chief Justice to act in said cases if I had previously known, or been informed, that it was his purpose to do so. As a suitor before this court I feel and say, that because of the participation of the Chief Justice in the circumstances stated, I have not had a fair hearing and decision of the motion of appellees for a rehearing in said cases, and that the said Chief Justice was, and is, biased in favor of the appellees with one of whom he had been in previous consultation as an attorney in respect to the said identical cases, and in whose favor he voted when acting upon the said motions for rehearing.

DAVID E. THOMPSON.

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173 The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for naught so much of the record and proceedings of January 7, 1914 as shows the motion for rehearing was declared carried and orders

a rehearing to be had for the reasons which follow this and the other two motions.

2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to correct the proceedings and order of the court of May 17, 1913 ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased each separately moves the court to correct the proceedings and order of the court of January 7, 1914 so as to eliminate therefrom the deciding
174 vote of the Chief Justice, the Honorable Manoah B. Reese from said order and proceedings and from the tie vote of the remaining six judges who heard and considered this case to overrule the motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court *to execute and carry into effect the former judgment of this court* of January 31, 1913 reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of the Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as such—in any case—where he has been attorney for either party in the action or proceeding", without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides,—"The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision,"
175 and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914 and by the showing filed herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges

who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practice of this court and courts in general, had the legal effect of overruling the motion for rehearing and of adhering to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action and of dismissing these appellants without day, which rule was illustrated and applied in Shumway vs. State, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated, in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

176 7. The order of May 17, 1913 directing re-argument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

8. The order of May 17, 1913 was as the appellants believe carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants, either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914 and there was no opportunity or occasion so far as the appellants personally or by counsel know, to challenge or object to such action of the Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914 allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerk of the court with the exception that it should not recite "Was argued by counsel", and after reciting the vote of the six judges, should read,—"And thereupon, upon due consideration whereof the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to

execute and carry into effect the prior judgment of t-is court as
177 directed in the majority opinion therein."

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

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178 Frank E. Bishop being first sworn on his oath, says: I am a regularly admitted attorney at the bar of this court in good standing for the last twenty years and as such I have personally appeared and participated in all of the public and open proceedings of this court in the above entitled cases as the sole attorney for the appellants Charles E. Yates and Louisa P. Hamer, as Administratrix of the estate of Ellis P. Hamer, deceased, from the time the cases were filed in this court on appeal, to the present time.

On the first occasion when these cases appeared before this court upon the present appeal on motions of said appellants to advance the cases for an early hearing on the ground that they had once before been appealed to and passed upon by this court, the Honorable Chief Justice, Manoah B. Reese was presiding, and all of the judges now constituting the Supreme Court were then present and acting and the court was in open session with the chief justice calling the list of motions to be presented to the court. When these cases were reached and their names announced, the chief justice from his seat on the bench announced openly, in the presence of the court that he was not competent and was disqualified to sit and participate in the proceedings and determination of the records and judgment in these cases, because before he was elected to this court he had been consulted and had acted as attorney for at least one of the plaintiffs in these cases and that in more than one consultation with Mr.
Harry Jones a chief officer of the Jones National Bank, an
179 appellee herein, he had been fully advised of the facts and circumstances from the plaintiff's standpoint in these cases and had expressed his opinion of the law and the facts therein, and that he might not be a fair and impartial judge to try the cases, and was disqualified under -he law to sit or participate in them. Immediately thereupon the chief justice retired from his seat at the bench and withdrew from the court into an adjoining room and did not appear or take part in the public presentation of the motions to advance, but left the proceeding — charge of the presiding Judge Hon. C. B. Letton. Subsequently when a motion of the appellees was made for longer time to prepare and file their briefs, the chief justice was again upon the bench and when the motion was read, he likewise referred to his disqualification, retired from the bench and withdrew from the court. When the cases were reached for argument upon the merit of the appeals and subsequently when counsel appeared by virtue of the order of the court to argue motion of the appellees for a rehearing the chief justice was upon the bench, again referred to his disqualification, retired and withdrew from the court, and so far as I or either of the appellants I represent have known the chief justice has not sat or participated in any of the public proceedings or

hearings of the court in these cases, nor in any of the private consultations of the court in any matter connected with these cases until his action in casting the deciding vote allowing a re-hearing in these cases appeared in the order presented for extension upon the record of this court on January 7, 1914 and in the dissenting opinion of Judges Barnes, Hamer and Rose against the allowance and entry of said order for rehearing. In each instance of the re'irement of the chief justice from the bench in these cases, the court and counsel for the parties acquiesced in and assented to such action without protest or objection. Although on several such occasions and
180 to the best of my recollection upon the first occasion the said Mr. Harry Jones was present in the court and his counsel was present on every such occasion and I therefore state from such information and believe that the chief justice was counselled in and acted as attorney for at least one of the plaintiffs in these actions the Jones National Bank, and is therefore disqualified from acting as Judge in any of the matters or proceedings of the court in these cases.

Sometime during the month of February, 1911, on or before the time of the trial of these actions in the District Court of Seward County, which lasted for nearly that whole month, but the exact date I cannot state, Mr. Harry Jones in my presence, in substance said that the four cases above named were being prosecuted by the plaintiffs in common, that the money obtained upon the judgment against the defendant A. P. S. Stuart had been used first to pay attorneys' fees and costs and expenses of the plaintiffs in common and the net proceeds applied to their claims in the four cases in common, as would also be the recovery in these cases if it was realized and that he was acting as the representatives of all of the plaintiffs in this litigation. So that when the chief justice counselled with Mr. Harry Jones, he was in fact counselling with regard to each one of the plaintiffs. Neither of the appellants Charles E. Yates, or Louisa P. Hamer, or myself ever consented in writing or otherwise that the chief justice might act on any proceeding or matter in these actions as judge or otherwise, notwithstanding his employment as such attorney and his own statement of his disqualification.

The order of May 17, 1913, for an argument on the motion of appellees for rehearing, does not disclose the vote of any judge thereon, but when six judges heard the case and two dissented it appeared that the chief justice may have voted on that order,
181–183 and in consultation with counsel for the other appellant, Mr. D. E. Thompson, I was prepared to file a formal challenge against his right to participate in that hearing if necessary, but upon the hearing, the chief justice withdrew as he had on every other occasion which gave no opportunity nor reason for presenting any such protest. I then supposed and relied upon the fact that he had not voted nor participated in ordering the argument of the motion for re-hearing and confidently expected that he would not participate in or act upon any of the proceedings or matters, before the court in these actions and had no knowledge that he had done so until the filing of the dissenting opinions and the recitation of the

proposed order allowing a rehearing on January 7, 1914 which tentative order recites that three of the six judges voted for and three against allowing a rehearing, and "thereupon chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried."

Under these circumstances and in consideration of the fact that the appellant Charles E. Yates is far advanced in years is in ill health and is at present at some point in the state of Florida, and that the appellant Louisa P. Hamer is well advanced in years and is not acquainted with judicial procedure and could hardly intelligently make affidavit in this matter, I am compelled to the belief that they cannot have a fair and impartial trial of their rights in these cases as required by law, where the action of the court is determined by or participated in by the chief justice on account of possible prejudice and the certain disqualification arising from his having been consulted as attorney for the plaintiffs.

FRANK E. BISHOP.

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184 REESE, *C. J.*:

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form if in court I withdrew, if in the consultation room I kept silent. I was acting in entire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case, I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing, Judges Barnes, Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemenly and personally friendly way. I stated that the vote would not be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer, at a meeting of the State Bar Association at Omaha, a long time member of the Iowa Supreme court and former Chief Justice thereof, and in whose integrity and ability,

I, with all others so far as I know, have the fullest confidence,
185 and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a

matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation, he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are qually divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is, in effect, rendered by the three, while the constitution and statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into which I did fall. It is true that I stated from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

186 At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward, applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure, perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said something about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years

after the bank failure, by other attorneys. I was never at any time consulted by Mr. Jones nor his counsel as to the bringing or maintaining of this suit—never employed as attorney or counselor and have known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know, I never knew any of the plaintiffs nor officers of the other banks, nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, as above stated.

* * * * * * *

187 Lionel C. Burr, being first duly sworn on his oath deposes and says as follows: Several months after the failure of the Capital National Bank in January 1893, the firm of Pound & Burr was employed as attorneys in these several cases and especially by Thomas Bailey Appellee, in No. 17279, who is now absent from this state at Corpus Christi, Texas, where an affidavit has been sent by mail to him and where he has been for a period of about two years. I was at all times familiar and knew about all the pleadings filed, briefs prepared and of the several trials in both State and Federal courts; I knew all the counsel employed in the case; I never heard it claimed that the Honorable Menoah B. Reese, now Chief Justice of this court *as* being either attorney, counsellor or -dvisor in any of these cases until within the past few months, and I am sure he never was. I occupied such a position in these cases, that it had *had* been consulted, retained or counseled in any of the proceedings in these several cases I am sure I would have heard it and would have had knowledge of that fact. I know he was never employed counseled or retained by Thomas Baily.

Further affiant saith not.

* * * * * * *

188 & 189 STATE OF NEBRASKA,
Seward County, ss:

Fritz Becord, being first duly sworn, upon his oath says he is a resident of Utica, Seward county, Nebr., and that ever since the 1st day of January, 1893, he has been the president and managing officer of the Utica Bank, of Utica, Nebr., the plaintiff in the above cause entitled Utica Bank, Appellee, vs. Charles E. Yates et al., Appellants, which cause is now pending in the Supreme Court of the State of Nebraska.

Affiant further says that he is not personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska; that he never at any time talked with, consulted or in any way or manner, made any statement of any kind or nature whatsoever, to him, the said Manoah B. Reese, about said cause, or in relation to the issues therein, nor has he at any time, in any way or manner, either directly or indirectly, talked to, conversed with, or consulted him, regarding said cause, nor has he, or any officer, member or stockholder in said bank, directly or indirectly authorized any person or persons to talk to, consult or converse with

him, regarding said cause, or in regard to any cause now pending or heretofore pending in said court.

Affiant further says that one Harry T. Jones, of Seward, Nebr., who was an officer of the Jones National Bank of Seward, Nebr., and with whom affiant is well and personally acquainted, was never at any time authorized, requested, selected or permitted, in any way or manner, to represent the Utica Bank aforesaid, in the conduct or management of said Utica Bank's cause of action, and that the cause of action of the said Utica Bank has at all times been, since the commencement of the same, in charge and under the management and control of this affiant, and the attorneys of record in said
190 cause for the said Utica Bank.

Affiant further says that the said Manoah B. Reese, Chief Justice of said Supreme Court, was never at any time, either directly or indirectly, employed by the Utica Bank as its attorney in said cause, or otherwise, and that the said Chief Justice, Manoah B. Reese, never at any time acted, or attempted to act, for the Utica Bank in said cause, as its attorney, or otherwise, nor has he the said Manoah B. Reese, at any time ever acted for the said Utica Bank in said cause, as its attorney, in any cause or matter whatsoever; and affiant further says that the said Chief Justice, Manoah B. Reese, has no acquaintance, either personal, professional, or otherwise, with the Utica Bank, the plaintiff and appellee aforesaid, and that he has never spoken to this affiant, or to any officer or agent of the said Utica Bank, upon any subject or matter whatever, with relation to said action or otherwise; and further affiant sayeth not.

FRITZ BECKORD.

* * * * * * *

191 H. T. Jones being first duly sworn deposes and says as follows:

At the time of the failure of the Capital National Bank in January, 1893, my father, Claudius Jones was President of the Jones National Bank, Appellee in the above entitled cause, and I was its Cashier but in fact had the entire management of the bank as I had had for some years prior thereto. I became its President on or about January 1894.

The Capital National Bank of Lincoln, Nebraska, closed on January 21, 1893 at 1 o'clock P. M. and thereafter did not open
192 again. During the afternoon of that day, the Jones National Bank had mailed certain remittances to the Capital National Bank.

I do not think I learned of the failure until Monday morning, January 23, 1893—just a short time before the train departed for Lincoln. I took the first train and came to Lincoln for the purpose of preventing the remittance above referred to from entering into the assets of the Capital National Bank. On arriving at Lincoln, I called on the Honorable Manoah B. Reese, now Chief Justice, whom I had previously known for some time and asked him to assist me in procuring the return of the remittances.

It is my recollection that I accompanied the Chief Justice to the

bank and it was there arranged with the Bank Examiner in charge, that all remittances received by the bank after it closed its doors on the Saturday preceding, should be returned, as was done with all similar remittances sent by other banks.

I do not recall all the conversation between the Chief Justice and myself at that time but I am certain that he was not then or at any other time consulted with reference to any suit against the directors or officers of the Capital National Bank. The Chief Justice made no charge for his services and neither I nor the Jones National Bank paid him any fee or gave him any reward either at that time or at any other time.

I had no thought of instituting suit against the directors or officers of the Capital National Bank for I did not then consider the bank's failure to be serious or that the Jones National Bank would suffer any loss thereby. In fact I did not know that such an action would lie against the officers and directors and did not learn that such an action was possible until several months thereafter.

193 Edward C. Biggs and J. J. Thomas, attorneys at Seward, were the attorneys for the Jones National Bank at the time of the failure of the Capital National Bank but I did not have time to consult them before departing for Lincoln.

At the time of my conversation with the Chief Justice, it was not known that there had been any irregularities in the management of the Capital National Bank. These were not discovered until some time thereafter and it was several months after my visit to Lincoln before the matter of instituting suit against the officers and directors personally was discussed with my said attorneys at Seward.

The transaction above related is the only one in which the Chief Justice had anything to do with any matter growing out of the failure of the Capital National Bank so far as it, in any way directly or indirectly, affected the Jones National Bank.

I did not then nor at any other time, nor did any one else on behalf of the Jones National Bank ever counsel with the Chief Justice with reference to the commencement of this or any other suit against the officers or directors of the Capital National Bank nor was he ever retained or counselled either in this suit or any other suit by myself or the Jones National Bank or any one in its behalf. In fact he was never counselled by me or by any one on behalf of the Jones National Bank at any time after January 23, 1893 either in this matter or in any matter concerning either myself or the Jones National Bank, nor was he ever counselled by me on behalf of any of the other appellees herein.

I think I have been present at every public hearing in this Court in these cases. I think at the first hearing when the Chief Justice retired he made some remark but I can not now recall his words.

194 At all subsequent public hearings, while he retired from the bench, I am quite sure he made no remarks as to why he did so and it is my memory that upon one occasion the Court had taken an intermission immediately preceding the time these cases were reached for argument and that when the members of the

Court reassembled to hear these cases the Chief Justice did not return.

I am quite sure that the Chief Justice never stated at any time that he had acted as attorney for at least one of the parties in these cases or that in more than one consultation with affiant the Chief Justice had been fully advised of the facts and circumstances from the plaintiff's standpoint in these cases or that he had expressed his opinion of the law and the facts herein or that he might not be a fair and impartial Judge to try the cases or that he used any words of like import.

I have read the affidavit of Frank E. Bishop filed herein wherein he refers to a statement made by me during the month of February, 1911, and said statement is untrue and incorrect. The fact is that I never represented any of the appellees except the Jones National Bank and never counselled with the Chief Justice concerning them.

Some time after the commencement of these actions these appellees each obtained judgments against A. P. S. Stuart who was then a defendant therein. Thereafter executions issued in each of said cases and were levied on the property of the defendant Stuart. The executions were all levied at the same time so that they became co-ordinate liens. Upon sale under said executions there were no outside bidders for a portion of the property sold and it was bid in by me on behalf of the several plaintiffs for convenience in subsequently disposing of the same. When the property was thereafter sold the proceeds were prorated among the various plaintiffs in ac-
195 cordance with the amount of their several judgments. I merely held the property as trustee for the plaintiffs. I never stated nor is it true that there was any agreement or understanding that these four cases were to be or being prosecuted by the plaintiffs in common nor that the net proceeds were to be applied on plaintiffs' claims in common. The appellant David E. Thompson is a defendant only in the case of the Bank of Staplehurst and the Jones National Bank and any recovery against him could not be applied on the judgments in the other cases and there is no agreement or understanding that the same shall be so applied and never has been.

These cases were tried together pursuant to a stipulation of all the parties in order to save expense and time in litigation and because the greater portion of the evidence in each case is relevant and material to each of the other cases.

Dated this 17th day of January, 1914.

H. T. JONES.

* * * * * * *

196 STATE OF NEBRASKA,
Seward County, ss:

I, Erich Jacobs, being first duly sworn depose and say that I am the President of the Bank of Staplehurst, Appellee in the above entitled cause of the Bank of Staplehurst, Appellee, vs. Charles E. Yates et al., Appellants, No. 17277, and that I have been President

ereof since February 1st, 1894; that prior thereto and from Febru-
ry 10, 1886 to said February 1, 1894, I was Cashier of said bank.
At the time of the failure of the Capital National Bank of Lincoln
ebraska, I was in charge of the affairs of the Bank of Staplehurst
nd from that time on until this date, I have had sole charge and
anagement of its claim against the Capital National Bank and
gainst the appellants herein and have attended to all matters con-
rning said Bank of Staplehurst in all its litigation growing out of
e failure of the Capital National Bank.
I am not personally acquainted with Honorable Manoah B. Reese,
hief Justice of the Supreme Court of Nebraska. I have never met
im or counselled with him or employed him as attorney in any
atter either for my-self or for the Bank of Staplehurst and I know
at he has never at any time been counselled or employed as coun-
l or attorney on behalf of the Appellee, Bank of Staplehurst either
this case or in any other matter whatsoever.
So far as I know, I have never seen the Chief Justice and do not
ink I would know him if I were to meet him.
I further say that no other person whomsoever has ever directly or
directly counselled, talked to or conferred with the said Chief Jus-
e on behalf of the Bank of Staplehurst in the above entitled cause
or in any other matter whatsoever.
As above stated, I have had full and complete charge of
this case on behalf of the Bank of Staplehurst and am positive
at H. T. Jones of Seward, Nebraska was never authorized by said
nk or by any one on its behalf to represent said Bank in the con-
ct or management of this cause and that he never did so represent
is Appellee in any matters concerning this case or any other mat-
and so far as affiant is aware, he never did counsel or consult with
Chief Justice on Appellee's behalf.
There never was any agreement or understanding between the
nk of Staplehurst and the other appellees that these four cases
ould be prosecuted by the plaintiffs in common nor that the pro-
ds were to be applied on plaintiffs' claims in common. The
pellant David E. Thompson is a defendant only in the cases of
Jones National Bank and the Bank of Staplehurst and any re-
very against him could only be applied on the judgments in those
es and there is no agreement and understanding that the same
all be applied otherwise and there never has been. These cases
re tried together pursuant to a stipulation of all the parties in
der to save expense and time in litigation and because the greater
rtion of the evidence in each case is relevant and material to each
the other cases.
Dated this 16 day of January, 1914.

ERICH JACOBS.

* * * * * * *

Halleck F. Rose, being first duly sworn, on his oath deposes
and says:
I am attorney for appellant David E. Thompson, in the above-
itled cause, whose testimony by affidavit was filed herein with the

motions referred to in the caption hereof. I have read the statement of the Chief Justice, filed herein on the 14th day of January, 1914, subsequent to the filing of the said motions and of my said affidavit in support thereof. The above-entitled cases, in one of which the Jones National Bank is plaintiff, and in one of which the Bank of Staplehurst, is plaintiff, and cases No. 17,278, in which the Utica Bank is plaintiff, and No. 17,279, in which Thomas
199 Bailey is plaintiff, and in the latter two of which David E. Thompson was not a party, were by written stipulation of all of the parties to all of said cases tried together and heard upon the same identical evidence in the District Court of Seward County. The questions involved in all of the cases have always been regarded by all counsel concerned and by all courts in which the causes have been considered, as identical, and the same were in this court and on former writs of error in the Supreme Court of the United States, and upon the present appeals in this court, disposed of in the main by opinions applicable to all the cases. H. T. Jones was for a long time during the pendency of said cases the president of the Jones National Bank. While said Jones was so president of said Bank and as such actively participating and in effect directing the litigation in all of the cases above mentioned, he told me that there was an arrangement between the plaintiffs whereby all sums that had been or would be realized in and by the prosecution of said suits was and would be a common fund for distribution among the plaintiffs in proportion to the amounts which they severally had on deposit in the Capitol National Bank on the date of its failure, and, as he expressed it, whatever was gotten out of the suits was to go into a "pot" and that said Jones was, in a way, appointed and looked to to conduct and manage the suit and the funds and that one division had been made from funds derived from judgments previously recovered against Ambrose P. S. Stuart in the identical suits here and now pending on appeal. I therefore say on oath, upon such information and belief, that the Jones National Bank has a pecuniary interest in the result and avails of each one of the judgments in every one of the said mentioned four suits.

I am informed and am personally familiar with the history of all the litigation that has been prosecuted by the four several
200 plaintiffs hereinabove named against the appellants therein and others, since the failure of the said Capitol National Bank, on January 21, 1893.

On or about the 27th day of October, 1893, as is set forth in the answer of defendant Thompson in case No. 17,278, the Jones National Bank sued the defendants herein in the District Court of Lancaster County, Nebraska on substantially the same cause of action that is set forth in its present amended petition herein, and the object and prayer of said suit was to enforce personal liability against the said defendants for the loss of the previous deposits of the said Jones National Bank in the Capitol National Bank of Lincoln, Nebr.

Subsequently, and without any final judgment having been entered therein, the said suit was dismissed on the motion of the said Jones National Bank and thereupon, on February 25, 1895,

the present suit was brought for the same identical purpose and end. The petition of the said Jones National Bank, embraced in the transcript in case No 17,276, sets forth the plaintiff's previous deposit in the Capitol National Bank, for the loss of which it seeks to recover, in the words following:

"That on the 2nd day of January, 1893, plaintiff had a balance to its credit amounting to Ten Thousand Four Hundred Twenty-nine and 90-100 ($10,429.90) Dollars, money it loaned to and deposited with said Bank, and from January 2nd, 1893, to and including Jany. 21st, 1893 (the day said Bank closed its doors and ceased to do business) the plaintiff loaned and deposited with said Bank the following sums of money, to-wit:

"January	4, 1893	$5660/60
"	6, "	233.35
"	7, "	250.84
"	10, "	254.40
"	13 "	301.57

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"January	16, 1893	162.15
"	19, "	5000.00
"	20, "	400.79
Balance due plaintiff on January 1st, 1893		10429.90
"Making total amount due plaintiff from Capital National Bank		22793.11

"That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $5,263.88, leaving still due and owing from said Capital National Bank to the plaintiff the sum of Seventeen Thousand Five Hundred Twenty-nine and 23-100 ($17,529.23) Dollars, which said sum now remains due plaintiff and wholly unpaid except as hereinafter stated."

In the previous performance of service as attorney for appellant D. E. Thompson, in the conduct of two trials of the present suits, I ascertained and state the fact to be that Mr. H. T. Jones was not personal depositor in the Capitol National Bank, and I therefore suggest and say that the reference in the statement filed herein by the Chief Justice, to Mr. Jones having consulted the Chief Justice after the failure of the Bank "about bringing a suit for his previous deposits in the bank" is an error and that the said conversations must have related to the deposits of the "Jones National Bank of Seward", whose remittances, delivered at or just subsequent to the failure of the bank, the Chief Justice assisted in procuring the return of; and in which bank the said Jones was at the time the managing officer.

Upon my information and definite knowledge of the transactions of the Jones National Bank with the Capitol National Bank, prior to January 21, 1893, and my knowledge that H. T. Jones was not a personal depositor in said bank, obtained while serving and conduct-

ing the defense of said cases, as aforesaid, and as shown
202 & 203 by the pleadings and evidence in the record herein, I say, on oath, that the Chief Justice was not mistaken and could not have been mistaken upon the several occasions when from the bench in open court, he announced his disqualification to act in the said several cases, and he was not then mistaken "in supposing that this suit was based upon the matter spoken of by Mr. Jones" to him after the failure of the Capitol National Bank. The suit of said Jones National Bank is in fact based upon the loss of the previous deposits of the bank in the Capitol National Bank, about the bringing of a suit for which the Chief Justice in said statement affirms Mr. Jones consulted him and about which Mr. Jones drew the advice and opinion of the Chief Justice.

My recollection of the substance of the oral statement of the Chief Justice, made from the bench at the time he first announced his disqualification in said cases, concurs with the recital thereof contained in the affidavit of Frank E. Bishop, now on file herein. I recollect definitely that the Chief Justice did say, in substance, that in connection with the service he rendered for one of the parties, he was consulted about the subject-matter of the present suits and expressed his opinion, at least, upon some phases thereof, and that in personal conference he had been advised of the facts and circumstances from the standpoint of one of the parties, and for that reason he was disqualified to act in the cases. As attorney for one of the parties herein, I then believed and now believe that upon his own public statement the Chief Justice was disqualified to act in said cases. I never intermeddled with the scruples of the Chief Justice about sitting under such circumstances, but have always acquiesced in his retirement from the case for the reason stated by him.

HALLECK F. ROSE.

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204 STATE OF TEXAS,
County of Nueces, ss:

Thomas Bailey, being first duly sworn, on his oath says he is the plaintiff and appellee in the above cause, entitled Thomas Bailey, Appellee, v. Charles E. Yates, et al., appellants, No. 17279, now pending in the Supreme Court of the State of Nebraska.

Affiant further says that he is not personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska; that he has never at any time talked with, consulted, or made any statement of any kind or nature whatsoever, to the said Manoah B. Reese, about said cause, or regarding the issues therein, nor has he at any time, in any way or manner, either directly or indirectly talked to, conversed with, or consulted him regarding said cause, nor has affiant, either directly or indirectly, authorized any other person or persons to talk to, consult or converse with him regarding said cause, or any other cause pending in said court.

Affiant further says that one Harry T. Jones, of Seward, Nebraska,

who was an officer of the Jones National Bank of Seward, Nebr., and with whom affiant is acquainted, was never at any time authorized, requested, selected or permitted, in any way or manner, to represent this affiant in the conduct or management of affiant's said cause of action, and that affiant's said cause of action has been at all times since the commencement of same, in the charge and under the management of affiant's attorney of record in said cause.

Affiant further says that the said Manoah B. Reese, Chief Justice of said Supreme Court, was never at any time employed by affiant as his attorney in said cause, or otherwise, and that said Chief Justice Manoah B. Reese never at any time acted for affiant in said cause, as his attorney, nor has he at any time ever acted
205–210 for affiant as his attorney, in any cause or matter whatever; and affiant further says that the said Chief Justice, as your affiant verily believes, has no acquaintance, personal or otherwise, with affiant, and has never spoken to affiant upon any subject or matter whatever; and further affiant sayeth not.

THOMAS BAILEY.

* * * * * * *

211 These causes coming on to be heard upon motion of appellees for an extension of time within which to file briefs herein, *was* submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time be, and the same hereby is, sustained and appellees given until February 12, 1914, to serve and file briefs.

M. B. REESE,
Chief Justice.

* * * * * * *

212 THE STATE OF NEBRASKA,
Seward County, ss:

R. S. Norval, being first duly sworn, on his oath deposes and says that he is a regularly admitted and practicing attorney at the bar of this court, and has been such for the past forty years or more, and that ever since the year 1872 he has been engaged in the practice of law at the City of Seward, Nebr.

Affiant further says that he has been for the last twenty-five years and more, attorney for each of the plaintiffs in the above and foregoing entitled causes, and that some time after the failure of the Capital National Bank of Lincoln, Nebr., he was retained by said plaintiffs, and each of them, to represent their interests in the matters growing out of the failure of the said Capital National Bank.

Affiant further says that he is well and personally acquainted with the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of this state, and has known him for over forty years; and he verily believes that he would have known the fact, if the Hon. Manoah B. Reese had ever been employed or consulted by the plaintiffs in either of said causes; and affiant states that the said Manoah B. Reese has never been so consulted or employed by either

of said plaintiffs; at least if he was, it was never brought to affiant's knowledge.

Affiant further says that at the time of the failure of the Capital National Bank, and for some time thereafter, it was not thought that the failure of said bank was of a serious nature, or that the depositors would suffer serious loss thereby; and there was no thought by either of the plaintiffs, of instituting suits against the officers or directors of said bank, until several months after its failure.

213 Affiant further says that he has participated in the prosecution of these suits, and has been present at all public hearings in this court, save one; that he was present when these cases were urged and submitted in this court in February, 1912; that the Chief Justice retired at that time; that while he cannot state the exact words the Chief Justice used at the time he retired, and which words were directed to his associates on the bench, rather than the public, he is quite positive that the said Manoah B. Reese did not then or at any other time, state he had acted as attorney for at least one of the plaintiffs in these cases or that he had more than one consultation with Mr. Harry T. Jones, one of the chief officers of the Jones National Bank; or that he had been fully advised of the facts and circumstances from the plaintiffs' standpoint, in these cases; or had expressed an opinion of the law and the facts therein, and that he might not be a fair and impartial judge to try the cases; or was disqualified under the law to sit or participate in them; or that he stated or used any other word or words of similar or like import or nature.

Affiant further says that he knows the relation that H. T. Jones has sustained towards each of the appellees in these causes, and he knows that he has never acted as their representative in any manner in these cases, except that he held certain property in trust for all of the plaintiffs, which was acquired by reason of certain executions levied upon the property of one A. P. S. Stewart, who was a former defendant in said causes.

Affiant further says that from his connection with said causes, as one of the attorneys for each of the appellees, and from his intimate knowledge of the litigation connected therewith, he

214 is quite certain that Hon. Manoah B. Reese was never at any time employed by either of said appellees, as attorney for them or either of them, in said causes, nor was he ever consulted as an attorney therein, by either of said appellees, or any one for them, and that he was never at any time, by said appellees or any one for them, advised of the facts and circumstances connected with said causes, from the plaintiffs' standpoint; and further affiant sayeth not.

R. S. NORVAL.

* * * * * * *

215 George Dobson being first duly sworn depose- and says as follows:

That from some time in 1892 until January, 1914, I was Cashier

of the First Bank of Ulysses and since said last date have been its President.

I was Cashier and manager of said Bank at the time of the failure of the Capital National Bank of Lincoln, Nebraska, in January, 1893.

I was informed of the failure of the Capital National Bank by telegram received from the First National Bank at Lincoln. This telegram reached me on Monday morning, January 23, 1893,
216 shortly before the train departed for Lincoln.

I took the train going by way of Seward and arrived at Lincoln shortly after 10 A. M. At Seward H. T. Jones who was then Cashier of the Jones National Bank joined me and we sat together and dicussed the failure of the Capital National Bank until we reached Lincoln. Upon our arrival, we immediately went to the place occupied by the Capital National Bank at Lincoln and found it in charge of Bank Examiner Griffith. While there some conversation took place with Mr. Griffith concerning some remittances that had been sent to the Capital National Bank on the Saturday preceding but I can not recall just what was said.

Mr. Jones and I were both acquainted with the Honorable Manoah B. Reese who was then practicing law at Lincoln and I think it was at my suggestion that we called to see him concerning the remittances above referred to. Mr. Reese accompanied us to the Capital National Bank building and it is my recollection that the remittances above referred to were returned. This ended all our transactions with Mr. Reese and we did not return to his office. I was with Mr. Jones during all of the time Mr. Reese was with him and I was with Mr. Jones the remainder of that day returning with him on the same train that evening.

I am quite certain there was no conversation had with Mr. Reese concerning any proposed suits against the officers or directors of the Capital National Bank and know that he was neither counselled nor retained in any such proposed litigation.

Mr. Jones and I conversed that day with a large number of persons residing at Lincoln and it was their universal opinion that the failure was not serious and that the depositors would suffer no loss and we came home that evening feeling that the banks we represented would sustain no loss on account of any deposits they had in the Capital National Bank.

At that time no examination had been made of the affairs
217 of the Capital National Bank and it was not known that there had been any irregularities or mismanagement in its affairs or that the reports and statements issued by the bank were in any particular false or incorrect.

Dated this 21st day of January, 1914.

GEORGE DOBSON.

* * * * * * *

218 I, H. T. Jones being first duly sworn depose and say as follows:

At the time I went to Lincoln on January 23, 1893, I did not know that the appellees, the Bank of Staplehurst, the Utica Bank or Thomas Bailey had any deposits in the Capital National Bank. I do not know just when I learned they had deposits but it was several weeks after my visit to Lincoln on the above date.

I did not know that there had been any frauds or irregularities in the management of the Capital National Bank nor that any statements of its financial condition, were in any respect incorrect, false or untrue until some time after Kent H. Hayden entered upon his duties as Receiver of said Bank.

219 & 220 Shortly after said bank failed, to-wit, on or about Feb. 6, 1893, Mr. McFarland was appointed Receiver of said Bank but resigned on May 4, 1893. Mr. Hayden was appointed Receiver to succeed Mr.McFarland and entered upon his duties as such Receiver on or about May 31, 1893 and it was perhaps during the month of June or July succeeding that I first learned of any of the irregularities, frauds and mismanagement in the bank's affairs.

On or about October 27, 1893, the Appellee Thomas Bailey commenced an action in the district court of Lancaster County, Nebraska, against certain of the officers and directors o fthe Capital National Bank. This case was removed to the Federal Court where a demur-er to the plaintiff's petition was sustained and the case dismissed.

The Appellee Jones National Bank commenced a similar action against certain of the officers and directors of the Capital National Bank in the District Court of Lancaster County, Nebraska on or about December 19, 1893, but it was dismissed on December 29, 1894. In neither of said actions in Lancaster County, Nebraska was the Appellant David E. Thompson a party. Neither I nor the Jones National Bank had anything whatever to do with the suit instituted by Thomas Bailey as aforesaid, and I have no knowledge that the Appellees, Bank of Staplehurst, or Utica Bank, instituted similar suits in Lancaster County. If they did I had nothing whatever to do with them.

The above entitled suits now before this Court for consideration were commenced in Seward County, Nebraska, on February 25, 1895.

H. T. JONES.

* * * * * * *

221 THE STATE OF NEBRASKA,
Seward County, ss:

I, J. J. Thomas, being first duly sworn depose and say that I am a regularly admitted and practicing attorney at the bar of this Court and have been for the past twenty years or more, and since 1891 have been engaged in the practice of law at Seward, Nebraska.

At the time of the failure of the Capital National Bank, Edward C. Biggs and I (under the firm name of Biggs & Thomas) were

the attorneys for the Jones National Bank and had been for several years preceding. And some time after the failure of the Capital National Bank our firm was retained by the Bank of Staplehurst, Appellee, to represent its interests in matters growing out of the failure of said Capital National Bank.

Mr. Biggs departed this life in March 1899 but I have been attorney for said parties in all their matters growing out of the failure of the Capital National Bank — am and have been familiar with all matters pertaining thereto.

I believe I would have known had the Honorable Mahoah B. Reese, Chief Justice, ever been attorney or counselled as an attorney in these cases on behalf of the above parties or either of them, and I state that he never has been so counselled or employed; at least if he was, it was never brought to my knowledge.

I know that at the time of the failure of the Capital National Bank and for some time thereafter it was not thought that the failure was of a serious nature or that the depositors would suffer thereby and there was no thought of instituting suits against the officers or directors until several months after the failure of the Bank.

I have actively participated in the prosecution of these suits and think I have been present at every public hearing in this
222 Court. I was present when these cases were argued and submitted to this Court in February 1912 and presented the argument on behalf of the appellees. I recall that the Chief Justice retired at that time. I could not state his words but it is my recollection that what he did say was directed to his associates rather than to the public.

I am quite certain that the Chief Justice did not then or at any other time state that he had been consulted and had acted as attorney for at least one of the plaintiffs in these cases, or that in more than one consultation with Mr. Harry T. Jones, a chief officer of the Jones National Bank, an appellee herein, he had been fully advised of the facts and circumstances from the plaintiffs' standpoint in these cases or had expressed his opinion of the law and the facts therein, or that he might not be a fair and impartial Judge to try the cases or was disqualified under the law to sit or participate in them, or that he uttered any words of similar or like import.

I recall that when these cases were argued upon appellees' motion for rehearing, the Court had taken an intermission immediately preceding the time these cases were reached for argument and that when the members of the Court reassembled to hear them, the Chief Justice did not return; but no remark was made by him or any other member of this Court as to why the Chief Justice did not sit at that time.

I know the relation that H. T. Jones has sustained toward each of the appellees herein, and I know that he has never acted as their representative in these cases except that he held certain property in trust for all the plaintiffs that was acquired as the result of executions levied upon the property of A. P. S. Stuart, a former defendant herein.

J. J. THOMAS.

* * * * * * *

223 The appellees the Jones National Bank and the Bank of Staplehurst respectfully represent to the Court that they have reason to believe that the Honorable William B. Rose, a mem-
224 ber of this Court is biased and prejudiced against the appellees herein and in favor of the appellant, David E. Thompson, to such an extent that he can not give the issues involved herein a fair, impartial and disinterested consideration and therefore protest and remonstrate against the right of the said William B. Rose to sit or participate in the decision or determination of these cases and respectfully request that he do not so sit or participate.

That the Court may be advised whether appellees' accusation is justified and based upon sufficient grounds, they present herewith the reason that has impelled them to challenge the right and propriety of the said Judge to Sit and participate in the decision of these cases.

1. It is well known to this Court that Halleck F. Rose an attorney at this bar, has throughout the entire proceedings in these cases been the chief, if not the sole, counsel for the appellant, David E. Thompson, and has upon all occasions when hearings have been had in this Court appeared on behalf of said appellant.

2. The said Halleck F. Rose is a brother of the Honorable William B. Rose, a member of this Court, between whom exists the closest ties of kinship.

3. For many years past, the appellant, David E. Thompson and his counsel, Halleck F. Rose, have been the very closest and most intimate friends and there has existed between them and now exists the closest ties of friendship, gratitude and personal interest: so that the said counsel, for reasons well known to himself, has as great an interest in the success of his client in these cases as though he himself were a party to said suit, and has throughout this litigation, for personal reasons manifested most unusual and intense zeal for the success of his client.

225 4. That the relationship existing between the appellant and his counsel is in a great measure shared by the said Judge Rose whose relations with the said appellant have likewise been of a very close and intimate nature for many years past; that by reason of said relationship the interest of said Judge Rose in the success of appellant and in the success, both professional and financial, of his brother is such that it is as potent and effective as though he had a direct personal and pecuniary interest in the outcome of this litigation.

5. In addition to the foregoing, appellees say that since the order of January 7, 1914 granting a rehearing herein they have been informed and upon information and belief allege the fact to be that Judge Rose at prior stages of this litigation prepared or assisted as said appellant's attorney in the preparation of briefs, both upon the law and facts on behalf of appellant, David E. Thompson, in these cases, as well as in other cases in which Halleck F. Rose appeared as counsel and attorney, of which facts appellees had no knowledge prior to said January 7, 1914.

6. That by reason of the foregoing, Judge Rose, prior to the submission of this cause, had unconsciously entertained a fixed and de-

termined opinion upon the merits of these cases and is biased and prejudiced therein in favor of said appellant and is therefore disqualified from giving the same impartial consideration.

7. That the conduct of Judge Rose in the consideration of these cases, has been that of a zealous advocate and intense partisan rather than an impartial Judge, is apparent from the records of the
226 proceedings in this cause, of which the Court will take judicial notice,—all of which clearly demonstrates the injustice and impropriety of his participation in these cases.

Dated this 11 day of February, 1914.

JONES NATIONAL BANK, *Appellee, and*
BANK OF STAPLEHURST, *Appellee,*
By J. J. THOMAS, *Their Attorney.*

* * * * * * *

227 On oral Application of attorney it is by the court ordered that appellants in above entitled causes be, and hereby are, given leave to file reply briefs by March 1, 1914.

M. B. REESE,
Chief Justice.

* * * * * * *

228 Supreme Court of Nebraska, January Term, A. D. 1914.
APR. 3.

No. 17277.

*BANK OF STAPLEHURST, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

The motion of appellant to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion is declared lost, and a rehearing denied.

*Reese C. J. not sitting.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

229 SEDGWICK, *J.*:

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I supposed as a matter of course there would at once be an unanimous court to set aside the former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order of judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done before so far as I know and it did not occur to me that any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to make use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refused to concur in setting aside the former order of this court. I think that such suggestions are improper; that
230 each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know. In the case of Shumway v. State, 82 Neb. 152, after full investigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event and the judgment was affirmed. The constitution provides that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgments of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality,

and thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the Clerk of Said Supreme Court a certain written statement made by Hon. John B. Barnes, one of the Judges of said Court, and which statement was entered of record on the Journal of said Court, and is in the words and figures following, to-wit:

231 Supreme Court of Nebraska, January Term, A. D. 1914.

Apr. 3.

No. 17277.

BANK OF STAPLEHURST, Appellee.
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

BARNES, *J.*:

When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day, there was filed in the office of the clerk of said supreme court, a certain Statement, of Hon. William B. Rose, one of the Judges of said Court, which said statement is in the words and figures following to-wit:

No. 17276.

JONES NATIONAL BANK
v.
YATES.

No. 17277.

BANK OF STAPLEHURST.
v.
YATES.

No. 17278.

UTICA BANK
v.
YATES.

No. 17270.

BAILEY.
v.
YATES.

ROSE, *J.*:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and had voted against plaintiffs' motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a solemn sense of duty to make and place on record the following statement:

232

I have never had any interest, direct, remote or contingent, in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though*t* I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from

participating in a case wherein his brother appears as an attorney, longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, 233 Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all my judicial acts and conduct. As a judge I can not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * * * *

1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th 1913, and January 7th 1914, granting a rehearing in these actions, for the following reasons, to-wit:

2. After appellees had filed their briefs herein in opposi- 234 tion to appellants' motions to set aside the orders of May 17th 1913, and January 7th 1914, the several appellants filed additional briefs herein on the 28th day of February 1914, and appellee herein had neither time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' brief heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law that after a judge had once withdrawn from a case that he had no right to reenter upon his duties, or that the parties had a right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein, a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court has set aside the order granting a rehearing herein and a constitutional majority of the court has not concurred in denying the motion of Appellee for a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a judge of the court granting such order, and appellee had, and now has a

constitutional right to have him give due consideration to this whole case.

235 8. Because said order of court deprives appellee of his property without due process of law.

9. Because said order is prohibited by and in conflict with the Fourteenth Amendment to the Constitution of the United States and denies to appellee equal protection of law and deprives appellee of his property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely on the ground, that the Chief Justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition, whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the cause had proceeded to final judgment operated *was* a judicial determination of his disqualification and effectually excluded him from further participation, although no facts existed constituting a disqualification, and although the Chief Justice'- withdrawal was based upon a mistake of facts.

That said reply brief tendered issues not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein, discloses that when the chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact that upon his discovery of the true facts it was his duty to participate in

236–239 the decision of said cases. And appellee had a constitutional right to all the judges in this court sitting in his case.

BANK OF STAPLEHURST.
By J. J. THOMAS,
R. S. NORVAL,
L. C. BURR,
Its Attorneys.

240 & 241 EXHIBIT A. H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

BANK OF STAPLEHURST, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, acting Chief Justice of the Supreme Court of Nebraska:

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which

was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme Court of the State of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioners.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction; that a citation be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
Acting Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 17,277. Bank of Staplehurst v. Yates. Petition for Writ of Error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

* * * * * * *

242 EXHIBIT "B."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

17277.

BANK OF STAPLEHURST, Appellee.
vs.
CHARLES E. YATES et al., Appellants.

Assignments of Error.

Comes now the said Bank of Staplehurst, Appellee in the above named court and assigns the following as manifest error upon the

face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit;

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of some thing more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States—in conflict with and opposition to the decision of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

243 7. The Court erred in finding and decision that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

8. The Court erred in finding and deciding that the evidence

in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provisions of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily and wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous interpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record, it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States; and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under Section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statements to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false

representation, knowingly made, and liable under section 5239, Revised Statutes of the United States.

14. The Court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

244 15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agent and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239 Revised Statutes of the United States in his personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making

r attesting such statement should have actual personal knowledge f the falsity thereof.

20. The Court erred in not deciding that by their attestation of he official published report shown by the record, the appellant lirectors affirmed and represented they had actual knowledge of the inancial condition of the bank and of the truthfulness of said state- ient, and if they made the same recklessly, without knowledge of ts truth or falsity, or concious that they had no knowledge of ts truthfulness, they are guilty of a false representation in effect nowingly made and liable under Section 5239 Revised Statutes f the United States.

21. The Court erred in deciding that the allegations of appellee's etition are insufficient to sustain the judgment against appellants nder Section 5239 Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because he opinion of Hamer J. as to the findings of fact is not concurred n by a constitutional majority of all the elected and qualified judges of this court,—Letton J. having only concurred on the law—and herefore the findings of fact of the trial court have not been re- versed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dis- nissing the case because the judgment is not concurred in and sup- ported by a majority of the duly elected and qualified judges of this court as provided in Article VI, Section 2, of the Constitu-
245 tion of the State of Nebraska—whereby appellee has been deprived of his property without due process of law and de- nied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the Constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing, and when the final order was made herein there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether attested by the require- ments of the national banking act or the common law action for fraud and deceit, and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to con- stitute a cause of action at the common law for fraud and deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was necessarily drawn in question the validity of an author- ity exercised under the United States, and the decision of said court was against its validity.

There was drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said statutes.

Wherefore appellee prays that the judgment of this court may

be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

[Endorsed:] 17277. Bank of Staplehurst v. Yates. Assignments of Errors. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

246-256 And on the same day, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 27.

No. 17277.

BANK OF STAPLEHURST, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon the assignments of error and petition for writ of error to the Supreme Court of the United States, by Bank of Staplehurst, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein, for their appearance in said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice of the Supreme Court of the State of Nebraska.

* * * * * * *

257 In the Supreme Court of the United States.

File No. 24241.

October Term, 1914. No. 502.

BANK OF STAPLEHURST, Plaintiff in Error,
vs.
CHARLES E. YATES, DAVID E. THOMPSON, and LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, Defendants in Error.

Designation for Printing.

The plaintiff in error in the above-entitled cause intends to rely on the assignments of error contained in the record and requests the clerk of the Supreme Court of the United States to print the following portion of the transcript of the record, which it thinks necessary for the consideration of such errors:

1. Transcript page 1: all of page, except præcipe.

2. Transcript page 5; amended petition, commencing with the words "afterwards, on the 16th day of March, A. D. 1889", and ending with signature- of attorneys on page 16.

3. Transcript page 17: exhibits A and B, commencing with the words "Exhibit A", and ending with the signature- of directors, near center of page 19.

4. Transcript page 21: answer of David E. Thompson, commencing with the words "afterwards, on the 15th day of July, A. D. 1901", and ending with the signatures of attorneys on page 26.

5. Transcript page 27: answer of Yates and Hamer, com-
258 mencing at top of page and ending at bottom of page 31.

6. Transcript page 32: reply of plaintiffs, commencing with the words "afterwards, on the 24th day of August, A. D. 1901", and ending at bottom of page.

7. Transcript page 34: Stipulation, commencing with the word "stipulation", immediately following the title, and ending at the bottom of page 35.

8. Transcript page 39: request for special findings, commencing with the words "afterwards, on the 17th day of February, A. D. 1911", and ending with the signature- of Attorneys, near bottom of page 47.

9. Transcript page 49: stipulation waiving jury, commencing at top of page, and ending with the words "court on January 30, 1911".

10. Transcript page 52: order permitting amendment, commencing with the words "and now on this first day of April, 1911", on sixth line from bottom, and ending with the second line at top of page 53.

11. Transcript page 61: special findings and judgment, commencing with third line at top of page and ending at bottom of page 64.

12. Transcript page 65: motion to amend petition, commencing with the words "motion for leave to amend petition (omitting title), and ending with signatures of attorneys on page 67.

13. Transcript page 67: Yates' motion for new trial, commencing wit the words "defendant, Charles E. Yates, moves the court", and ending with signature of attorney on page 75.

14. Transcript page 76: Hamer's motion for new trial,
259 commencing with the words "the defendant, Louisa P. Hamer, Admx., moves the court", and ending with the signature of attorney on page 83.

15. Transcript page 84: Thomuson's motion for new trial, commencing with the words "the defendant, David E. Thompson, moves the court", and ending with the signature- of attorneys on page 91.

16. Transcript page 92: findings and judgment, commencing at top of page and ending at bottom of page 96.

17. Transcript page 116: order of Supreme Court, commencing at top of page and ending at the bottom of page 134, (omitting in all cases title of the case).

18. Transcript page 135: motion for rehearing (omitting title), commencing at the top of page and ending with signature of attorney on page 144.

19. Transcript page 145: commencing with the words "on application of attorneys for appellee", and ending at bottom of page.

20. Transcript page 147: opinion of Sedgwick, J., commencing at top of page and ending at bottom of page 154.

21. Transcript page 155: last five lines from bottom of page.

22. Transcript page 156: last five lines at bottom of page.

23. Transcript page 158: commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice."

24. Transcript page 158: commencing with the words "Hamer, Rose and Barnes, JJ. dissent", and ending with the signature
260 "J. Fawcett, Acting Chief Justice", near top of page 159.

25. Transcript page 159: motion of Thompson, commencing with the words "appellant, David E. Thompson moves the court", and ending with signature- of attorneys on page 164.

26. Transcript page 164: affidavits commencing with the words "Halleck F. Rose, being first duly sworn", and ending with the signature "David E. Thompson", near bottom of page 170 (including affidavits of Rose, Stout and Thompson)—omitting certificates of notary.

27. Transcript page 173: motion of Yates and Hamer, commencing with the words "the appellants, Charles E. Yates and Louisa P. Hamer", and ending with signature- of attorneys at top of page 177.

28. Transcript page 178: affidavit of Frank E. Bishop commencing with the words "Frank E. Bishop, being first duly sworn", and ending with his signature near bottom of page 181.

29. Transcript page 184: statement of Reese, C. J., commencing

at top of page and ending at bottom of page 186, omitting last two lines.

30. Transcript page 187: affidavit of Lionel C. Burr, commencing with the words "Lionel C. Burr, being first duly sworn", and ending at bottom of page.

31. Transcript page 189: affidavit of Fritz Beckord, commencing at top of page and ending with his signature near the center of page 190.

32. Transcript page 191: affidavit of H. T. Jones, commencing with the words "H. T. Jones, being first duly sworn", and
261 ending with the signature near the center of page 195.

33. Transcript page 196: affidavit of Erick Jacobs, commencing at top of page and ending with his signature near bottom of page 197.

34. Transcript page 198: affidavit of Halleck F. Rose, commencing with the words "Halleck F. Rose, being first duly sworn", and ending with his signature near bottom of page 203.

35. Transcript page 204: affidavit of Thomas Bailey, commencing at top of page and ending with his signature near top of page 205.

36. Transcript page 211: commencing with the words "these causes coming on to be heard", and ending with the signature "M. B. Reese, Chief Justice", on same page.

37. Transcript page 212: affidavit of R. S. Norval, commencing at top of page and ending with the signature near top of page 214.

38. Transcript page 215: affidavit of George Dobson, commencing with the words "George Dobson, being first duly sworn", and ending with his signature near top of page 217.

39. Transcript page 218: affidavit of H. T. Jones, commencing with the words "I. H. T. Jones, being first duly sworn", and ending with his signature near the bottom of page 219.

40. Transcript page 221: affidavit of J. J. Thomas, commencing at top of page and ending at bottom of page 222.

41. Transcript page 223: Recusation of Judge Rose, commencing with third line from bottom of page and ending with signature- of attorneys, near top of page 226.

262 42. Transcript page 227: commencing with the words "on oral application of attorney", and ending with the signature "M. B. Reese, Chief Justice".

43. Transcript page 228: order of court, commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice", on same page.

44. Transcript page 229: statement of Sedgwick, Barnes and Rose, JJ., commencing at top of page and ending with tenth line from top of page 233.

45. Transcript page 233: motion for rehearing, commencing with the words "1. Comes now the appellee herein", and ending with the signature- of attorneys at top of page 236.

46. Transcript page 240: petition for writ of error. All of page.

47. Transcript page 242: assignments of error, commencing at top of page and ending with signature- of attorneys on page 245.

48. Transcript page 246: Allowance of writ of error. All of page.

BANK OF STAPLEHURST,
Pl'ff in Error.
By J. J. THOMAS, *Its Att'y.*

Rec'd copy of above designations this 21st day of August, 1914.

DAVID E. THOMPSON,
Def't in Error.
By STOUT, ROSE & WELLS,
His Attorneys.

263 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamar, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska. Commission Expires Oct. 8, 1912.]

S. C. STONER,
Notary Public.

264 [Endorsed:] 502/24,241. In the Supreme Court of the United States. Bank of Staplehurst, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. File No. 24,241. Oct. Term 1914. No. 502. Designation for printing. J. J. Thomas, Att'y for Pl'ff in Error.

265 [Endorsed:] File No. 24,241. Supreme Court U. S., October term, 1914. Term No. 502. Bank of Staplehurst, plaintiff in error, vs. Charles E. Yates, et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed August 25th, 1914.

266 In the Supreme Court of the United States.

October Term, 1914, No. 502.

File No. 24241.

BANK OF STAPLEHURST, Plaintiff in Error,
vs.
CHARLES E. YATES et al., Defendants in Error.

Designation by Defendant in Error David E. Thompson of Additional Parts of the Record to be Printed.

David E. Thompson, one of the defendants in error in the above entitled case, states that he thinks it material that the following additional parts of the transcript of the record should be printed, and hereby designates and requests that the Clerk print and include in the printed record the parts of the transcript of the record in addition to the parts thereof designated by the plaintiff in error, namely:

1. The mandate of the Supreme Court of Nebraska, found on pages 37 and 38.

2. The motion of David E. Thompson for judgment in his favor on the special findings, found on pages 47 and 48.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson, Defendant in Error.

267 [Endorsed:] 502/24241. File No. 24,241. Octoer Term, 1914. No. 502. In the Supreme Court of the United States. Bank of Staplehurst, Plaintiff in Error, vs. Charles E. Yates et al., Defendants in Error. Designation by defendant in error, David E. Thompson, of additional parts of the record to be printed. Stout, Rose & Wells, 524 Omaha National Bank Bldg., Omaha, Nebraska, Counsel for David E. Thompson, Defendant in Error.

268 [Endorsed:] File No. 24,241. Supreme Court U. S., October term, 1914. Term No. 502. Bank of Staplehurst, Pl'ff in Error, vs. Charles E. Yates et al. Designation by David E. Thompson, defendant in error, of additional parts of record to be printed. Filed November 14, 1914.

Endorsed on cover: File No. 24,241. Nebraska Supreme Court. Term No. 502. Bank of Staplehurst, plaintiff in error, vs. Charles E. Yates, David E. Thompson, and Louisa Hamer, administratrix of the estate of Ellis P. Hamer. Filed May 26th, 1914. File No. 24,241.

3

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914 1915

No. [redacted] 165

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(24,242)

(24,242)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1–4 UTICA BANK
v.
YATES.

No. 17278.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 6th Day of January, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court a certain Transcript in the words and figures following, to-wit:

* * * * * * *

5 In the District Court of Seward County, Nebraska.

THE UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

The plaintiff (for its amended petition) complains of the defendants and alleges that the plaintiff is a corporation duly organized and doing a general banking business with its principal place of business at Utica, Nebraska.

That on, prior, and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they acted as such officers and directors and as such had the control and management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska.

That (acting) as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said Bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its Books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable
6 held by said Bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements, to see that the valuable effects, assets, and other matters including the cash on hand (and in other banks or depositories) agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers and to those who were relatives and favorites of the defendants as officers (or acting officers) of the Bank.

That the books of said Bank were out of balance, that they allowed and permitted forced balance to be made and carried on the Bank books, the deposit account was falsified, being greatly under stated, the real estate, bills receivable, and deposit account each being largely inflated, that they permitted to be carried on the books of the Bank and permitted and caused to be (printed and) published statements and advertisements, wherein they included as valuable assets of the Bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or overdue, without taking steps to collect or secure the same, whereby the same were lost to the Bank and became and were entirely
7 worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless and of no value, and from time to time they published (permitted, allowed) and caused to be (printed and) published to the public and informed and represented to plaintiff (and sent by defendants and their agents to plaintiff through the United States mails and otherwise) in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectable and part of the valuable resources and

effects of said Bank when in truth and in fact they knew (and were in duty bound to know) said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements (and the statements sent by defendants to plaintiff as aforesaid) and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements (and the statements by defendants to plaintiff as aforesaid) showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendant (acting) as such directors and officers managed and superintended the Bank and its said business, and all of which facts and circumstances the defendants and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

8 That after said Bank became insolvent as aforesaid the defendants made (caused, allowed and permitted to be made) statements to the plaintiff and the public (and sent and delivered to the plaintiff statements of its condition,) showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, (cause, allow, and permit to be published and sent and gave to plaintiff) said statement showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said Bank became insolvent as aforesaid the said defendants permitted said Bank to continue in business and receive deposits from plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known, by the exercise of ordinary care in the discharge of their duties as directors (or acting as directors) but of the insolvency of said Bank this plaintiff was at all times entirely ignorant.

That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers, (and as aforesaid caused and permitted to be made and sent and delivered to plaintiff, statements of the Bank's condition) setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to deposit and keep money in said Bank, and the plaintiff relying upon said published statements (and upon the statements of its financial condition sent to and received by plaintiff as aforesaid) as it had the right to do, deposited and loaned its money to said Bank as hereinafter stated.

9 That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would

not have deposited and loaned any money to said Bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid it allowed the same to remain on deposit, when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said Bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made (caused, allowed and permitted) a false statement of the condition of said Bank and its resources and liabilities which said statement is hereto attached and marked "Exhibit A", which said statement was made (caused, allowed and permitted to be made) by the said defendants (acting) as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and induces the plaintiff and others to do and continue doing business with said Bank as aforesaid and said defendants on said date caused (allowed and permitted) said false statements to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the State of Nebraska (and said defendants on or about said date sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid.)

Plaintiff avers that on the 28th day of December, 1886, the said defendants and each of them (acting) as such directors and officers of said Bank, for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid, and solvent, and to induce the plaintiff and others to do business with said Bank as aforesaid made, (caused, allowed, and permitted to be made) a false statement of its resources and liabilities, a copy of which statements is hereto attached, and marked "Exhibit B" and caused (allowed and permitted) said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska, (and sent and caused to be sent to and received by the plaintiff said false and untrue statements aforesaid) for the purpose and with the intent to induce this plaintiff (and others) to loan money and deposit money with said Bank, when in truth and in fact said Bank was not in a sound, solid safe, and solvent condition but was wholly insolvent.

This plaintiff avers that on and between January 3rd, 1887, and January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time made, (allowed, caused, and permitted to be made) at divers intervals false statements of the condition of said Bank as to its resources and liabilities with the

intent and purpose of deceiving the plaintiff and others as aforesaid and caused (acquiesced in, allowed and permitted) said false statements, and each of them severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, (and sent and caused to be sent to and received by the plaintiff said false statements aforesaid, through the United States mails and otherwise and which were received by plaintiff.)

And plaintiff avers that said statements and each of them

11 showed, and the defendants in each of said statements and by said statements represented that said Bank was in a thoroughly sound, safe and solvent condition, and was doing a prosperous business and was in all respects a safe and secure institution with which to do business and a safe Bank in which to make deposits and loans of money, and said statements were prepared and published, (and were caused, permitted and allowed to be prepared and published and sent and delivered to plaintiff) by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published (and as sent and delivered to and received by plaintiff) stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the officers of the plaintiff corporation, which officers were in the full control and management of plaintiff's business and plaintiff avers that it believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time—the exact time of which plaintiff cannot at this time state, the said defendants had conversations with the officers of plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1894, and January 21st, 1895, in which said conversations said defendants represented said Bank, of which they were directors (and acting directors, and officers was thoroughly safe and sound, and believing said published statements and advertisements (and said statements of its financial condition so sent and received by the plaintiff as aforesaid and said verbal representations so made by said defendants to be true and believing them to be true and relying upon the same, that said Bank was sound, safe and solvent and doing a flourishing and prosperous business, as said published

12 statements and advertisements (and other statements as aforesaid) showed, and as represented in said verbal statements, the plaintiff on the 5th day of January, 1895, loaned to and deposited with said Bank, of which defendants were the directors (and acting directors) and officers a sum of money and continued to loan and deposit with said Bank and from time to time large sums of money up to and including the 21st day of January, 1895 which said sums of money so loaned and deposited with said Bank (save as hereinafter during all of said period withdrawn and returned to said Bank said divers sums of money, and plaintiff avers that on the 1st day of January, 1895 plaintiff had a balance to its

credit amounting to Three Thousand Nine Hundred Ninety-eight and 63/100 ($3,998.63) Dollars, money it had loaned to and deposited with said Bank and that from January 1st, 1893 to and including January 21st, 1893, the day said Bank closed its doors and ceased to do business, the plaintiff loaned and deposited with said Bank the following additional sums of money, to-wit:—

January 3rd, 1893	3,806.60
" 5th, "	2,310.60
" 12 "	1,079.21
" 14 "	254.00
" 16, "	909.50
" 18, "	1,100.74
" 19, "	810.60
Balance due plaintiff January 1st, 1893	3,998.63

Making total amount due plaintiff from Capital National Bank $14,810.96

That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank $7,313.79, leaving still due and owing from said Capital National Bank to the plaintiff the sum of $7,497.17, which said sum now remains due plaintiff and wholly unpaid, except as hereinafter stated.

13 Plaintiff avers that said statements (so sent and received by plaintiff as aforesaid) and advertisements (and statements) so published as aforesaid and said statements as verbally announced to the officers of said plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue, and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements and each of them, as well as said verbal statements made and caused, allowed, and permitted to be made and said statements so sent to and received by plaintiff to the officers of plaintiff as aforesaid, showed that said Bank was sound, solid and solvent, and doing a flourishing business when in truth and in fact said Bank was not doing a flourishing and prosperous business, and was in fact at the time said statements (so sent to and received by plaintiff) and advertisements were published and verbally made, in an unsafe, precarious and insolvent condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made said statements and advertisements (and sent to and caused to be received by plaintiff said false and untrue statements) as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them

should and could have known its true condition by the
14 exercise of ordinary care in the discharge of their duties as directors and acting as directors and they each of them willfully, negligently, and recklessly for the purpose and with the intent aforesaid, made, caused, allowed, and permitted to be made, and published said false statements and advertisements (by said statements so sent to and received by plaintiff), and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

Plaintiff further avers that its knowledge of the condition of said Bank was wholly derived from said published statements (and said statements so sent and received by plaintiff) and advertisement, and by said verbal statements so made to its officers by said defendants, and that had said statements and advertisement so published and as verbally made as aforesaid set out and given the true condition of said Bank, it would have appeared, and it would have been shown that said Bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements (and sending to and causing to be received by plaintiff said statements) and making said verbal statements by said defendants to the officers of plaintiff as aforesaid
insolvent and unable to meet its obligations, and could not
15 pay its debts, and did not have the assets and resources that said defendants represented it had in said statements, advertisements, and verbal statements made as aforesaid, and that by reason thereof said Bank could not pay and did not pay this plaintiff any part of said sum of money loaned and deposited with said Bank, except the sum of $1,124.58, and that the remainder of said money so loaned and deposited with said Bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth. Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged, in the sum of Eleven Thousand ($11,000.00) Dollars.

Wherefore plaintiff prays judgment against the defendants and each of them for the sum of Eleven Thousand ($11,000.00) Dollars, its damages with interest thereon from January 21st, 1893, at 7 per cent. and costs of suit.

UTICA BANK, *Plaintiff*,
By BURR & BURR,
GEO. LOWLEY,
BIGGS & THOMAS,
Its Attorneys.

* * * * * * *

16 "EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and discounts	768,601.44
Overdrafts secured and unsecured	6,217.74
United States Bonds to secure circulation	50,000.00
Stocks, securties, etc	325.00
Due from approved reserve agents	107,090.01
Due from other National Banks	17,800.33
Due from State Banks and Bankers	5,394.72
Banking house, furniture and fixtures	5,770.00
Other real estate and mortgages owned	38,716.92
Current expenses and taxes paid	14,286.28
Checks and other cash items	3,698.56
Exchange for clearing house	8,841.16
Bills of other banks	2,355.00
Fractional paper currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes	17,431.00
Redemption fund with United States Treasurer (5 per cent of circulation)	1,350.00
Total	$1,074,867.37

17 Liabilities.

Capital Stock paid in		300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	
		643,632.24
Notes and bills rediscounted		59,054.38
Total		$1,074,867.37

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct—attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

	Loans and discounts	737,462.12
18	Overdrafts	3,974.33
	U. S. Bonds to secure circulation	50,000.00
	Other stock, bonds and mortgages	22,739.34
	Due from approved reserve agents	74,068.63
	Due from other National Banks	56,215.29
	Due from State Banks and Bankers	10,495.36
	Real estate, furniture and fixtures	7,177.33
	Current expenses and taxes paid	8,885.65
	Premiums paid	7,188.43
	Checks and other cash items	13,742.02
	Bills of other Banks	3,712.00
	Fractional paper currency, nickels and cents	216.42
	Specie	27,308.00
	Legal tender notes	10,400.00
	Redemption with U. S. Treasurer (5% circulation)	1,900.00
	Total	$1,035,448.92

Liabilities.

	Capital stock paid in	300,000.00
	Surplus funds	12,000.00
	Undivided profits	28,439.38
	National Bank notes outstanding	45,000.00
	Individual deposits subject to check	$414,962.35
	Demand certificates of deposit	40,859.66
	Due to other national banks	107,648.27
	Due to State Banks and Bankers	37,448.66
		597,918.94
	Notes and Bills rediscounted	52,090.60
	Total	$1,035,448.92

STATE OF NEBRASKA,
Lancaster County, ss:

I, C. W. Mosher, President of the above bank do solemn
19 swear that the above statement is true to the best of n
knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11
day of October, 1886.

E. R. SMITH, *N. P.*

Correct—attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

* * * * * * *

20 In the District Court of Seward County, Nebraska.

UTICA BANK
vs.
CHARLES W. MOSHER et al.

Separate Answer of Charles E. Yates and Ellis P. Hamer to Plai tiff's Petition as Amended by Interlineation March 16, 1899.

Now come the defendants Charles E. Yates and Ellis
21 Hamer, and in obedience to the order of the court, ea
makes answer for himself separately to the plaintiff's pe
tion as amended by interlineation on the 16th of March 1899.

These defendants say that whether the plaintiff made the
posits in the Capital National Bank of Lincoln at the times and
the amounts stated in said amended petition, these defendants ha
not knowledge or information, and they therefore deny that su
deposits were made.

First Defense.

These defendants each for himself alleges that the Capital N
tional Bank of Lincoln, referred to in said amended petition w
organized and had its existence under and by virtue of the natio
banking act passed and approved by the congress of the Unit
States. That Homan J. Walsh was the vice-president of said ba
and Richard C. Outcalt was the cashier of said bank, and that ea
of the other defendants was a director of said bank. That sa
bank was closed by the national bank examiner on or about t
23rd day of January 1893, and that soon after said date a receiv
was duly appointed by the comptroller of the Currency to ta
charge of said bank and wind up its affairs, collect its assets and d
tribute the proceeds to the creditors and stockholders; and said ba
has been in the hands and control of a receiver ever since said a
pointment.

That no forfeiture of the franchises of the said banking association has even been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said Bank was organized and existing.

22 These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And these defendants alleged that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a Federal question is involved in determin-g the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefor stated or admitted.

Second Defense.

These defendants further say, each for himself, that the plaintiff on or about the 27th day of October, 1893, brought an action against these same defendants in the District Court of Lancaster County, Nebraska, on the same cause of action as now set out in the

23 plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Utica Bank, to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said court against the plaintiff and in favor of these defendants in the sum of $125.93 and the plaintiff has failed and neglected to pay the said judgment for costs.

That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and the practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February, 1895, by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July, 1895, the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants, the plaintiff's cause of action
24 being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff, Utica Bank and against the said defendant Stuart has not been reversed or set aside but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff.

And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said Utica Bank against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense.

These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment and not in favor of this plaintiff.

These defendant allege the fact to be that if the plaintiff deposited his money in the said bank as alleged and the Bank then failed and became insolvent the plaintiff could not individually recover the said money from the said bank, and that the
25 said money as well as any damages caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said Bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL, AND
FRANK E. BISHOP,
Att'ys for Def'ts.

* * * * * * *

26 In the District Court of Seward County, Nebraska.

BANK OF UTICA, Plaintiff,
vs.
CHARLES W. MOSHER et al., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt, and denies each and every allegation of new matter contained in their several answers.

BANK OF UTICA,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS &
L. C. BURR.

* * * * * * *

27 *Stipulation.*

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward
28 County, Nebraska, hereby stipulate and agree that all of said causes shal be tried in the District Court at one and the

same time and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and procured and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in-so-far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of
29–32 said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases.

And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate & Hamer Estate.

CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

33 In the District Court of Seward County, Nebraska.

UTICA BANK, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, et al., Defendants.

Request of Defendants for Special Findings.

The defendants Charles E. Yates, and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately and for each one alone, requests the Court to make and find the following special findings of fact and of law:

I.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover dam-
34 ages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in his favor.

III.

That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank;

V.

That the defendants Charles E. Yates and the deceased, Ellis P. Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI.

That the plaintiff was not induced or influenced by any parol or oral statement or representation of the defendant Yates or of the deceased Hamer either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII.

35 That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date December 28, 1886, and of date December 9, 1892, exhibits "A" and "B" attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery;

VIII.

That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained;

IX.

That the defendant Charles E. Yates in attesting said reports of date December 28, 1886, and December 9, 1892, did not, with actual knowledge thereof or intentionally make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities;

X.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case;

XI.

(*a*) That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual personal knowledge or intentionally, made, published, or declared or permitted to be made, published or declared any untrue statement, report or representa-
36 tion of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (*b*) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants

acted in good faith, honestly believing that said statements, reports and publications were true and without any knowledge or intention that any of said statements, reports and representations were untrue.

FRANK E. BISHOP,
For Defendants.
YATES AND HAMER,
As Adm'x.

Afterwards, on the 1st day of April, A. D. 1911, there was filed herein certain Requests of Defendants Yates and Hamer for Additional Findings, in words and figures following to-wit:

In the District Court Seward County, Nebraska.

UTICA BANK, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspaper and the names of the directors of the bank.

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, re-
37–40 quests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspapers and the names of the directors of the bank.

16. That the evidence does not show said Hamer personally took part in the preparation or distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the bank, showing its assets, liabilities and officers' names were printed and carried in the newspapers.

FRANK E. BISHOP,
Attorneys for Defendants Yates and Hamer.

* * * * * * *

41 And now on this 1st day of April, 1911, being a day of the February 1911 term of this Court, these causes came on further to be heard on the motion of each of the plaintiffs
42 & 43 for leave to amend their interlined amended petitions by interlineation upon consideration whereof said motions and each of them are sustained and the plaintiffs and each of them permitted to amend their petitions as prayed; to which ruling of the Court the defendants and each of them except.

* * * * * * *

44 In the District Court of Seward County, Nebraska.

THE UTICA BANK, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer et al., Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates and Louisa P. Hamer, administratrix, defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the
45 facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

Respecting the ninth request, as to the report of December 28, 1886 the Court answers the same in the negative and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line, and the residue thereof contained in sub-division "B", and answers the first question contained in subdivision "A" in the affirmative and the second question contained in sub-division "B" in the negative.

Subject to the foregoing Special Findings of fact made at the request of the defendants the Court now finds generally in plaintiff's favor and gainst the defendants and each of them upon the evidence under the issues joined and that the allegations of plaintiff's amended petition are true, and that plaintiffs *are* entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of $11,737.00.

To each of the findings of fact and conclusions of law
46–53 made by the Court the defendants each severally except.

B. F. GOOD, *Judge.*

* * * * * * *

54 Comes now the plaintiff and moves the Court to amend its last petition filed herein in this to-wit: that it be per-
55 mitted to amend its petition as follows, to-wit:

On page 2, line 36, after the words "to be" add the words "printed and".

On page 2, line 52, after the word "plaintiff" add the words "and sent by defendants and their agents to plaintiff through the United States Mails and otherwise."

On page 2, line 59, after the word "advertisements" add the words "and the statements sent by defendants to plaintiff as aforesaid".

On page 2, line 61, after the word, "advertisements" add the words "and the statements made by the defendants to the plaintiff as aforesaid".

On page 3, line 71, after the word "public" add the words "and sent and delivered to plaintiff statements of its condition".

On page 3, line 73, after the word "published" add the words "and sent and given to plaintiff".

On page 3, line 88, after the word "newspapers" add the words "and as aforesaid caused and permitted to be made and sent and delivered to plaintiff statements of the bank's condition".

On page 3, line 91, after the word "statements" add the words "and on the statements of its financial condition sent to and received by plaintiff as aforesaid".

On page 4, line 116, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be sent to and received by plaintiff said false and untrue statements as aforesaid".

On page 4, line 126, after the word "Nebraska" add the words "and sent and caused to be sent to and received by the plaintiff said false and untrue statements as aforesaid".

On page 5, line 138, after the word "Nebraska" add the
56 words "and sent and caused to be sent to and received by the plaintiff said false statements as aforesaid through the United States Mails and otherwise, and which were received by plaintiff".

On page 5, line 145, after the word "published" where it appears the second time add the words "and sent and delivered to plaintiff".

On page 5, line 149, after the word "published" add the words "and as sent and delivered to and received by plaintiff".

On page 5, line 162, after the word "advertisements" add the words " and said statements of its financial condition so sent and received by the plaintiff".

On page 5, line 166, after the word "advertisements" add the words "and other statements as aforesaid".

On page 5, line 165, before the word "this" insert the following words "and statements sent to plaintiff by defendants and by plaintiff received and examined".

On page 6, line 194, after the word "statements" insert the following words "so sent to and received by plaintiff as aforesaid", and after the word "advertisements" add the words "and statements".

On page 6, line 202, after the word "made" the second time add the words "and said statements so sent to and received by plaintiff".

On page 6, line 206, after the word "statements" add the words "so sent to and received by plaintiff".

On page 7, line 212, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements".

On page 7, line 220, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff".

On page 7, line 224, after the word "statements" add the words "and said statements so sent to and received by plaintiff".

On page 7, line 238, after the word "advertisements" add
57 the words "and sending to and causing to be received by plaintiff said Statements".

On page 7, at the end of line 241, strike out and omit the word "published".

THE UTICA BANK,
Plaintiff.
By NORVAL BROS. &
J. J. THOMAS,
Its Attorneys.

* * * * * * *

The defendant Charles E. Yates moves the court to set aside his findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on
58 either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded

and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepts to said finding.

9. The court erred in finding on the third request that Charles E. Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provisions of the banking act by any of the officers, agents or servants of the bank, and that the defendant is liable at
59 the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The Court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not sup-

ported by sufficient evidence to sustain recovery against the
60 defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in each of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by this defendant or Ellis P.
61 Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The Court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21*c*. The Court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of

liquidation and distribution of assets of insolvent National Banks in that all liabilities of Directors by said act for official neglect, misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is
62 not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and wilfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment persuant to which these further proceedings are had in the following particulars: (*a*) the findings and judgement violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and
63 liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting. (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And

in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in ever- state shall be bound thereby any-thing in the Constitution or laws of any state to the contrary notwithstanding," contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found; this defendant is entitled to judgement in his favor as matter of law and moves the Court to render such judgement thereon notwithstanding his general
64 finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The Court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official state-
ments or advertisements were untrue, either with the knowl-
65 edge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

* * * * * * *

The defendant Louisa P. Hamer Adm'x moves the court to set aside her findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient
66 for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

67 10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports, did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be
68 determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the pro-

visions of said act and Section 5239 thereof and not at com-
69 mon law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16, and 17.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties, are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit
of all creditors while the judgment and findings permit
70 the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of the United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute which makes liability depend upon the fact that directors knowingly

violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment persuant to which these further proceedings are had in
71 the following particulars (*a*) the findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a Nation- Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting" (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (*d*) They are violative of the holding of said Court" that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be international." And in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding," contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgement thereon.

72 29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgement thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published, advertised or
73 sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this state.

FRANK E. BISHOP,
For Defendants.

* * * * * * *

And now on this 8th day of May, 1911, it being the first day of the May 1911 term, of this Court, this cause came on to be heard on the request of the defendants, for additional special findings filed herein, April 1st, 1911, and for final determination
74 and the Court being fully advised in the premises in response to the request of the defendants, Charles E. Yates and Louisa P. Hamer, makes the following additional special findings of fact and conclusions of law:

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business

cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that such printed slips and business cards were compiled, prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be compiled, prepared and distributed under the authority and directions of said defendant Yates, and in his name as one of the directors of the bank.

Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates, did not know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the defendant Yates.

Respecting the 15th request the Court finds that the said Ellis P. Hamer, did know that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared, and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 16th request the Court finds that the said Ellis P. Hamer, did not personally take part in the preparation or distribution of the printed slips or business cards, showing the
75 assets and liabilities of the bank, as shown in the evidence but the Court finds that he did know that such printed slips and business cards were prepared and distributed by the bank from time to time and contained his name as one of the directors thereof, and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

The Court further and upon its own motion finds as to each and all of the defendants, in this action that,—The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements, and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thomp

son, and purported to be made and published under and by their authority in their names and with their sanction and consent.

The Court further finds that the said Ellis P. Hamer, 76-91 and the defendants, Yates and Thompson, each of them, from and after September 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in fact false anduntrut, as in Plaintiff's amended petition alleged and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the Bank to be in a sound solvent and prosperous financial condition, when in fact it was at all times wholly insolvent and unable to pay its liabilities.

The Court further finds on all the issues joined for the plaintiff and against the defendants and each of them and that the allegations of plaintiff's amended petition are true.

To all of which findings the defendants and each of them severally except.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover from the defendants and each of them the sum of $11737.00 *Dollars*, with seven (7) per cent interest thereon from April 1st, 1911, and costs of action taxed at — Dollars.

And thereupon and on the same day, this cause came on further to be heard on the motions of the defendants for new trial and the Court being fully advised in the premises doth overrule the same to which the defendants and each of them except and are allowed Forty (40) days from the rising of the Court within which to prepare and serve bill of exceptions.

* * * * * * *

92 And afterwards, to-wit, on the 31st day of January, 1913, there was rendered by said court and entered of record upon the journal thereof a certain Judgment in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913, Jan 31.

No. 17278.

UTICA BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County

This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted to

the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged
93 that said judgment of the district court be, and the same hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein by them, taxed at $ —, and have and recover from appellee all their costs so expended; that appellee pay all costs incurred herein by it, taxed at $ —, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

94 JONES NATIONAL BANK
v.
YATES.

BANK OF STAPLEHURST
v.
YATES.

UTICA BANK
v.
YATES.

BAILEY,
v.
YATES.

Nos. 17276-7-8-9.
Opinion filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability can not be measured by a higher standard than that which is imposed by the act.

2. Where by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the penalty
95 is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and prescribes a penalty for its performance "the rule prescribed in the statute is the exclusive test of liability." Yates v. Jones Nat. Bank, 206 U. S. 158; Farmers & Merchants Nat. Bank v. Dearing, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of, or approved of, or participated in, the fraudulent acts of which complaint is made.

96 HAMER, *J.*:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed, Yates v. Jones Nat. Bank, 206 U. S. 158; Yates v. Utica Bank, Yates v. Bailey, and Yates v. Bank of Staplehurst, 206 U. S. 181, where it was held that plaintiffs petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiffs' causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original
97 petitions as theretofore amended. The amendments contain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants

knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

To the petitions thus amended each of the defendants demurred. The demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured
98 by the terms of that act and not otherwise.

Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiffs' amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the supreme court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when defendants Yates and Hamer signed the
99 reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Cap-

ital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statements, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in ques-
100 tion. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution; that thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an inducement to him to act in that capacity the law assures
101 him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would

be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in Yates v. Jones Nat. Bank, supra, is based on a single proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability." In the argument on behalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute." (Cochran v. United States, 157 U. S. 286.) The
102 argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violations of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In Briggs v. Spaulding, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors, of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of action together and then say to the defendant—If you are not liable
103 upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of Briggs v. Spaulding, supra, where it was said: "Persons who are elected into a board of directors of a national bank, about which

there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other persons that he has a right to expect that the directors, who are supposed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In Briggs v. Spaulding, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things, said:
104 (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 Morawetz, Private Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director) depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents
105 of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 Morawetz, Private Corporations, (2d ed.) sec. 551, et. seq., and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation

the relation is that of contract and not of trust. * * * (10) There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defendants personaly knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defend-
106 ants. It also is apparent that plaintiffs cannot produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.
Sedgwick and Fawcett, JJ., dissenting.

107 LETTON, J., concurring in part:

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the supreme court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the supreme court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The supreme court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." Yates v. Jones Nat. Bank, 206 U. S. 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the supreme Court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of
108 the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined

the evidence so critically as would be necessary to determine this for the reason that under the holdings of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

* * * * * * *

109 *Appellee's Motion for Rehearing.*

Appeal from Seward County.

B. F. Good, Judge.

The undersigned appellee respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in Yates v. Jones Nat. Bank, 206 U. S. 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dimsissal of this case and of erroneous construction as to the sufficiency of the evidence to support the findings and judgments of the trial court.

1.

It is said in the syllabus of this case, paragraph two, that "where, by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not * that as a condition of liability there should be proof of something more
110 than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." Thomas v. Taylor, 32 Sup. Ct. 403.

2.

The deciding opinion in this case concedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decision of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plain-

tiff has therefore been, in effect, *de*nied a right and privilege conferred upon it by the constitution and statutes of the United States; of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas, by the decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with the opinion of the said United States Supreme Court, when in
111 fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4.

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially §5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5.

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws,—"the rule of responsibility declared by them" have "been satisfied" (Thomas v. Taylor) and the judgment should be affirmed.

6.

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and the measure of duty and of liability
112 established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7.

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of liability announced by the Supreme Court of the United States in this case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8.

It is said in the opinion of Judge Letton that:

"A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, shows that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking acts. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings contained no federal question, and stated merely a common-law liability. The Supreme Court of the United States held that a federal question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act.' Yates v. Jones Nat. Bank, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S.

Thus assuming and deciding that the United States Su-
113 preme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e. reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official

reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiffs' petition was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide and plaintiffs' petition was then and now is sufficient to charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion Judge Hamer says the plaintiff "still charge
114 the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery," whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts, the only requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says: "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank,"—thus assuming that that court held the plaintiffs' petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not decide and plaintiffs' petition does state
115 a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon

false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District Court should be reversed as to all the defendants." This statement assumes that our petitions failed to allege that the defendants personally knew of our personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing — violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and 5239 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally know of or personally participated in the acts charged in the petition whereas the evidence is
116 amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S.; that under the interpretation and construction of that statute made by the United Sates Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the *frame* of our petition precluded that view or theory; whereas the holding of the United States Supreme Court is that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied

for recovery upon any act done pursuant to an express command of the national bank act; also, that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the express commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act; and finally that that act does not require proof of
117–119 actual knowledge but that it is sufficient if it be shown the defendants acted recklessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiffs' amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages * * *." And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank * * * of by the receiver * * *"—they thereby admitted that they neglected their duties as such directors and committed the wrongs complained of in plaintiffs' amended petition whereby the bank became insolvent and that such damages resulted from the conduct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and §5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

UTICA BANK, *Appellee.*
By R. S. NORVAL &
J. J. THOMAS,
L. C. BURR.

* * * * * * *

120 SEDGWICK, *J.*, dissenting:

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the supreme court of the United States that the action is one for deceit at common law and for that reason cannot be maintained. The opinion says that it was held (by the supreme court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit", whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because

the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and concludes that "unless the supreme court of the United States shall recede from its decision of these cases, the petition will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any member of the court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shows. "I concur in the view
121 that the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the supreme court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly — to anyone deceived," etc. Yates v. Jones Nat. Bank, 27 Sup. Ct. Rep. 638 (206 U. S. 158.). This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusals to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. Is proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action, and the right to bring it in the state courts is plainly stated in the fourth para-
122 graph of the syllabus. "State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the supreme court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Re-

vised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and demanded", and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintined. This was decided when this case was formerly before the supreme court of the United States and has been since emphatically decided by that court,
and no such claim can be made in this case. The question
123 is whether these directors are liable under the federal statute,
and this action is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of Gerner v. Mosher, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. Yates v. Jones Nat. Bank, 74 Neb. 734. The supreme court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court upon this point that doubt has emphatically been set at rest by a
later decision where the language used by that court in this
124 case is quoted and its meaning fully stated and made plain.
Thomas v. Taylor, 224 U. S. 73. That case originated in a nisi prius court of the state of New York. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the supreme court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank will not be reversed

when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y.) 53). The supreme court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment that "unless the supreme court of the United States
125 shall recede from its decision of these cases, the petitions will be held, insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such common law liability; that is, that no common law action could be sustained.

The case of Thomas v. Taylor, 224, U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, Yates v. Jones Nat. Bank, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional violation of a
126 statute when one deliberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in Yates v. Jones Nat. Bank. The language there is 'that where by*n* law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the

books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports
127–129 were published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which this decision depends.

Fawcett, J., concurs.

* * * * * * *

130 And afterwards, to-wit, on the 7th day of January, 1914, there was rendered by said supreme court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Jan. 7.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore, ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed and a rehearing herein ordered.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

131 Hamer, Rose and Barnes, JJ. dissent from the order granting a rehearing herein and protest against the entry thereof on the

journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the Chief Justice having been consulted by the plaintiff and having so announced when the cause was on for hearing. Shumway v. State, 82 Neb. 152, 165.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

132 The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for naught so much of the record and proceedings of January 7, 1914 as shows the motion for rehearing was declared carried and orders *and* rehearing to be had for the reasons which follow this and the other two motions.

2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to vacate, set aside and hold for naught the order of May 17, 1913 ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased each separately moves the court to correct the proceedings and order of the court of January 7, 1914 so as to eliminate therefrom the deciding vote of the Chief Justice, the Honorable Manoah B. Reese from said order and proceedings and from the tie vote of the remaining six judges who heard and considered this case to overrule the
133 motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court of January 31, 1913 reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as *much* * * * in any case * * * where he has been attorney for either party in the action or proceeding," without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides,—"The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision," and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914 and by the showing filed
134 herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practise of this court and courts in general, had the legal effect of overruling the motion for rehearing and of adhering to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action, and of dismissing these appellants without day, which rule was illustrated and applied in Shumway vs. State, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated, in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

7. The order of May 17, 1913 directing re-argument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

135–142 8. The order of May 17, 1913 was as the appellants believe, carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants, either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914 and there was no opportunity or occasion so far as the appellants personally or by counsel knew, to challenge or object to such action of the Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914 allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerk of the court with the exception that it should not recite "Was argued by counsel," and after reciting the vote of the six judges, should read,—"And thereupon, upon due consideration whereof the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to execute and carry into effect the prior judgment of this court as directed in the majority opinion therein."

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

* * * * * * *

143 Supreme Court of Nebraska, January Term, A. D. 1914,
Jan. 14.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

REESE, *C. J.:*

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form, if in court I withdrew, if in the consultation room I kept silent. I was acting in entire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case, I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the

question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing, Judges Barnes, Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemanly and personally friendly way, I stated that the vote would not
144 be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer, at a meeting of the State Bar Association at Omaha, a long time member of the Iowa Supreme Court and former Chief Justice thereof, and in whose integrity and ability, I, with all others so far as I know, have the fullest confidence, and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation, he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are equally divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is, in effect, rendered by the three, while the constitution and
145 statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into which I did fall. It is true that I stated from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward, applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure, perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National

Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said something about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years after the bank failure, by other attorneys. I was never at any time consulted by Mr. Jones nor his counsel as to the bringing or maintaining
146–163 of this suit—never employed as attorney or counselor and have known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know I never knew any of the plaintiffs nor officers of the other banks, nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, as above stated.

* * * * * * *

164–176 These causes coming on to be heard upon motion of appellees for an extension of time within which to file briefs herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time be, and the same hereby is, sustained, and appellees given until February 12, 1914, to serve and file briefs.

M. B. REESE,
Chief Justice.

* * * * * * *

177 On oral application of attorney, it is by the court ordered that appellants in above entitled causes be, and hereby are, given leave to file reply briefs by March 1, 1914.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 3rd day of April, 1914, there was filed in the office of the clerk of said supreme court, a certain order, rendered by said supreme court and entered of record on the journal thereof, which said order is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 3.

No. 17278.

*UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

The motion of appellants to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these case be vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion
178 is declared lost, and a rehearing denied.

J. FAWCETT,
Acting Chief Justice

And on the same day there was filed in the office of the clerk of said supreme court, a certain written statement made by Honorable Samuel H. Sedgwick, one of the judges of said court, and which said statement, was entered of record on the journal of said court and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 3.

* * * * * * *

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I suppose as a matter of course

*Reese, C. J., not sitting.

there would at once be an unanimous court to set aside the
179 former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order or judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done before so far as I know and it did not occur to me that any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to made use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refuse to concur in setting aside the former order of this court. I think that such suggestions are improper; that each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know. In the case of Shumway v. State, 82 Neb. 152, after full investigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event
and the judgment was affirmed. The constitution provides
180 that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgments of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality, and thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court, a certain written statement made by Honorable John B. Barnes, one of the judges of said court, and which state-

ment was entered of record on the journal of said court, and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 3.

* * * * * * *

BARNES, *J.*:

When this case was decided a constitutional majority of
181 the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Statement of Honorable William B. Rose, one of the judges of said court, which said statement is in the words and figures following, to-wit:

* * * * * * *

ROSE, *J.*:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and had voted
182 against plaintiffs' motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a solemn sense of duty to make and place on record the following statement:

I have never had any interest, direct, remote or contingent, in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from participating in a case wherein his brother appears as an attorney. Longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during
183 the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all of my judicial acts and conduct. As a judge I can not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * * * *

Motion of Appellee for a Rehearing and Leave to File Additional Brief, on the Motion of Appellants Filed Herein, to Set Aside the Orders of Court of Date January 7th, 1914, Granting a Rehearing.

1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th 1913, and January 7th 1914, granting a rehearing in these actions, for the following reasons, to-wit:

2. After appellee- had filed their briefs herein in opposition
184 to appellants motions to set aside the orders of May 17th 1913, and January 7th 1914, the several appellants filed additional briefs herein on the 28th day of February 1914, and appellee herein had neither time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' brief heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law that after a judge had once withdrawn from a case that the had no right to reenter upon his duties or that the

parties had a right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court *has* set aside the order granting a rehearing herein and a constitutional majority of the court has not concurred in granting a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying, the motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a judge of the court granting such order, and appellee had and now has a constitutional right to have him give due consideration to this whole case.

8. Because said order of court deprives appellee of his property without due process of law.

185 & 186 9. Because said order is prohibited by and in conflict with the Fourteenth Amendment to the Constitution of the United States and denies to appellee equal protection of law and deprives appellee of his property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely on the ground, that the Chief Justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition. Whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the cause had proceeded to final judgment operated as a judicial determination of his disqualification and effectually excluded him from further participation, although no facts existed constituting a disqualification, and although the Chief Justice's withdrawal was based upon a mistake of facts.

That said reply brief tendered issues not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein discloses that when the Chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact that upon his discovery of the true facts it was his duty to participate in the decision of said cases. And appellee had a constitutional right to all the judges in this court sitting in *his* case.

UTICA BANK, *Appellee*.
By J. J. THOMAS,
R. S. NORVAL,
L. C. BURR,
Its Attorneys.

* * * * * * *

187 & 188 Supreme Court of Nebraska, January Term, A. D. 1914, Apl. 17.

No. 17278.

UTICA BANK, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon motion of appellee for a rehearing and leave to file additional briefs on motion of appellants to set aside the order of the court of date January 7, 1914, granting a rehearing, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, overuled.

Sedgwick, J., dissenting.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

189–190 EXHIBIT "A." H. C. Lindsay, Clerk Supreme Court Nebraska.

In the Supreme Court of Nebraska.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, acting Chief Justice of the Supreme Court of Nebraska.

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme Court of the State of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all

of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioner.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction; that a citation be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
Acting Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 17278. Utica Bank v. Yates. Petition for Writ of error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, clerk.

191 EXHIBIT "B." H. C. Lindsay, Clerk Supreme Court Nebraska.

In the Supreme Court of Nebraska.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al. Appellants.

Assignments of Error.

Comes now the said Utica Bank, Appellee in the above named court and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit:

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of some thing more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States—in conflict with and opposition to the decision of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

192 7. The Court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

8. The Court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provision of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made

voluntarily and wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous interpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States; and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under Section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statements to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239 Revised Statutes of the United States.

14. The Court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

193 15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they

each permitted the officers, agent- and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239 Revised Statutes of the United States in his personal fact of the trial court in this case, appellee's judgment should have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The Court erred in not deciding that by their attestation of the official published report shown by the record, the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation in effect knowingly made and liable under Section 5239 Revised Statutes of the United States.

21. The court erred in deciding that the allegations of appellee's

petition are insufficient to sustain the judgment against appellants under Section 5239 Revised Statutes of the United States.

22. The Judgment of reversal and dismissal is erroneous because the opinion of Hamer J. as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court,—Letton J. having only concurred on the law—and therefore the findings of fact of the trial court have not ben reversed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI. Section 2, of the Con-
194 stitution of the State of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing and when the final order was made herein, there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether attested by the requirements of the national banking act or the common law action for fraud and deceit, and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud and deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was necessarily drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said Statutes.

Wherefore appellee prays that the judgment of this court may be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

[Endorsed:] 17278. Utica Bank v. Yates. Assignments of errors. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

195–205 And on the same day there was rendered by said Supreme Court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Apl. 27.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon the assignments of error and petition for writ of error to the Supreme Court of the United States, by Utica Bank, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein for their appearance in said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

206 Rec'd copy of within designation this 21st day of August, 1914.

——— ———.

In the Supreme Court of the United States.

October Term, 1914, No. 503.

File No. 22,242.

UTICA BANK, Plaintiff in Error,
vs.
CHARLES E. YATES and LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, Defendants in Error.

Designation for Printing.

The plaintiff in error in the above-entitled case intends to rely on the assignments of error contained in the record, and requests the Clerk of the Supreme Court of the United States to print the following portions of the transcript of the record, which he thinks necessary for the consideration of such errors:

1. Transcript page 1. All of page.
2. Transcript page 5; amended petition, commencing at top of page (omitting first two lines), and ending with the signature of attorneys on page 15.

3. Transcript page 16. Exhibits A and B, commencing with the words "Exhibit A," and ending with the signature of directors, near top of page 19.

4. Transcript page 20; answer of Yates and Hamer, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signatures of attorneys on page 25.

207 5. Transcript page 26: reply of plaintiff, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signature of attorneys on same page.

6. Transcript page 27: stipulation, commencing with the word "stipulation," on third line from bottom of page, and ending with signature of attorneys on page 29.

7. Transcript page 33: requests for special findings, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signature of attorney on page 37.

8. Transcript page 37: Waiver of jury; remainder of page.

9. Transcript page 41: Leave to amend petition by interlineation, commencing with the last two lines on bottom of page and ending with the first six lines at top of page 42.

10. Transcript page 44: special findings, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signature "B. F. Good, Judge," at top of page 46.

11. Transcript page 54: Motion to amend answer, commencing with the first line at bottom of page, and ending with signature of attorneys, near top of page 57.

12. Transcript page 57: Yates' motion for new trial commencing with the words "the defendant, Charles E. Yates, moves the court," and ending with the signature of attorney at page 65.

13. Transcript page 65: Hamer's motion for new trial,

208 commencing with third line from bottom of page and ending with signature of attorney on page 73.

14. Transcript page 73: findings and judgment, commencing with the words "and now on this 8th day of May, 1911," and ending at the bottom of page 76, but omitting the last line.

15. Transcript page 92: Judgment of reversal, commencing with the words "and afterwards, towit, on the 31st day of January, 1913," and ending with the signature "J. Fawcett, Acting Chief Justice," on page 93.

16. Transcript page 94: Opinions of Hamer and Letton, JJ., commencing at top of page and ending at bottom of page 108.

17. Transcript page 109: motion for rehearing, commencing with the words "appellee's motion for rehearing," and ending with the signatures of attorneys near bottom of page 117.

18. Transcript page 120: Opinions of Sedgwick, J., commencing at top of page and ending with page 127.

19. Transcript page 130: Order granting rehearing, commencing with the words "and afterwards, towit," and ending at bottom of page.

20. Transcript page 131: commencing with the words "Hamer,

Rose and Barnes, JJ. dissent," and ending with the signature "J. Fawcett, Acting Chief Justice," on same page.

21. Transcript page 132: Motion to vacate order for rehearing, commencing with the words "the appellants, Charles E. Yates," and ending with the signature of attorneys at bottom of page 135.

209 22. Transcript page 143: statement of Reese, C. J., commencing at top of page and ending with the words "matters, as above stated," near top of page 146.

23. Transcript page 164: extending time to file briefs, commencing with the words "these causes coming on to be heard," and ending with the signature of the chief justice on the same page.

24. Transcript page 177: order granting rehearing, and opinions of Sedgwick, Barnes and Rose, JJ., commencing at top of page 177 and ending with the words "in the performance of my public duties," near top of page 183, (omitting title to cases).

25. Transcript page 183: Motion for rehearing, commencing with the words "motion of appellee for rehearing," and ending with the signature of attorneys at bottom of page 185.

26. Trans. p. 187. Order overruling request for rehearing, commencing with the words "Supreme Court of Nebraska," and ending with signature of "J. Fawcett, Acting Chief Justice," at bottom of same page.

27. Transcript page 189: Petition for writ of error. All of page.

28. Transcript page 191: Assignments of error, commencing at top of page and ending at bottom of page 194.

29. Transcript page 195: Allowance of writ of error, commencing at top of page and ending with the signature "J. Fawcett, Acting Chief Justice," on same page.

UTICA BANK,
Pl'ff in Error.
By L. C. BURR &
J. J. THOMAS,
Att'ys.

210 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamer, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska, with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska. Commission expires Oct. 8, 1918.

S. C. STONER,
Notary Public.

211 [Endorsed:] 503/24242. In the Supreme Court of the United States. Utica Bank, pl'ff in error, v. Charles E. Yates, et al., def'ts in error. File No. 24,242. Oct. Term 1914. No. 503. Designation for printing. L. C. Burr, J. J. Thomas, att'ys for pl'ff in error.

212 [Endorsed:] File No. 24,242. Supreme Court U. S. October term, 1914. Term No. 503. Utica Bank, plaintiff in error vs. Charles E. Yates, et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed August 25th, 1914.

Endorsed on cover: File No. 24,242. Nebraska Supreme Court. Term No. 503. Utica Bank, plaintiff in error v. Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased. Filed May 26th, 1914. File No. 24,242.

4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914 1915

No. [redacted] 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(24,243)

(24,243)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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No. 17279.

1–5

BAILEY
vs.
YATES.

Pleas Before the Supreme Court of the State of Nebraska, at a Term thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 6th Day of January, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court, a certain Praecipe, in the words and figures following, to-wit.

* * * * * * *

6 Afterwards, on the 16th day of March, A. D., 1899, there was filed herein a certain Amended Petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, Defendants.

Amended Petition.

The plaintiff for his amended petition complains of the defendants and alleges that on, prior and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned the defendants acted as the directors and officers of the Capital National Bank; a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska, and as such directors had the full control and management of said Bank.

7 That acting as such directors and officers of said Bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said Bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements, to see that the valuable effects, assets and other matters including the cash on hand and in other banks or depositories agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers and to those who were relatives and favorites of the defendants as officers or acting officers of the Bank.

That the books of said Bank were out of Balance that they allowed and permitted forced balances to be made and carried on the Bank books the deposit account was falsified being greatly under stated, the real estate, bills receivable, and deposit account each being largely inflated, that they permitted to be carried on the books of the Bank and permitted and caused to be printed published statements

8 and adverti-ements, wherein they included as valuable assets of the Bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or over-due without taking steps to collect or secure the same, whereby the same were lost to the Bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless, and of no value, and from time to time they published permitted, allowed and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectable and part of the valuable resources and effects of said Bank when in truth and in

fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was
9 and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and *and* its said business, and all of which facts and circumstances the defendants and each of them, had full knowledge and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made statements to the plaintiff and the public showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause, allow and permit to be published said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893.

That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said Bank became insolvent as aforesaid the said defendants permitted said Bank to continue in business and receive deposits and loans from plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting as directors and of the insolvency of said Bank this plaintiff was at all times entirely ignorant.
10 That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers, setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to loan, deposit and keep money in said Bank, and the plaintiff relying upon said published statements as it had the right to do, deposited and loaned his money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as he did from time to time as hereafter set forth, nor would he have allowed the same to remain therein, but on account of the false statements referred to aforesaid he allowed the same to remain on deposit, when but for said false and untrue statements he would have promptly withdrawn his loans and deposits before the failure of said Bank, and that he was pre-

vented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound, financial, condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made, caused allowed and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement is hereto attached and marked "Exhibit A" which said statement was made, caused,
11 allowed and permitted to be made by the said defendants as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and induce the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date caused allowed and permitted said false statements to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the State of Nebraska.

Plaintiff avers that on the 28th day of December, 1886, the said defendants and each of them acting as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid, and solvent, and to induce the plaintiff and others to do business with said Bank aforesaid made, caused, allowed and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked "Exhibit B" and caused, allowed and permitted said statements to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank when in truth and in fact said Bank was not in a sound, solid, and solvent condition, but a was wholly insolvent.

This plaintiff avers that on and between January 3rd, 1887 and January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid during all of said time made, allowed, caused and permitted to be made at divers intervals false statements of
the condition of said Bank as to its resources and liabilities
12 with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed and permitted said false statements and each of them severally to be published in the newspapers of general circulation of the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements represented that said Bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business and a safe Bank in which to make deposits and loans of money and

said statements were prepared and published and were caused permitted and allowed to be prepared and published by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the plaintiff, and plaintiff avers that he believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time,—the exact time of which plaintiff cannot at this time state,—the said defendants had conversations with plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1893, in which said conversations said defendants represented said Bank,
of which they were directors and acting directors and officers
13 was thoroughly safe and sound, and believing said published statements and advertisements as *as* aforesaid and said verbal representations so made by said defendants to be true, and believing them to be true and relying upon the same, that said Bank was sound, solid, and solvent, and doing a flourishing and prosperous business as said statements and advertisements showed, and represented as in said verbal statements, this plaintiff on the 11th day of October, 1892, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money and continued to loan and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to his credit in said Bank amounting to Eleven Thousand Five Hundred ($11,500) Dollars money he had loaned to and deposited with said Bank.

That plaintiff loaned and deposited in said Bank the following sums and amounts upon the following dates, to-wit:

October	11th, 1892	$500.00
"	11th, "	1000.00
"	11th, "	8000.00
December	28th, "	500.00
"	28th, "	500.00
"	28th, "	1000.00

Plaintiff avers that said statements and advertisements so published as aforesaid and said statements as verbally announced to the plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false
and untrue and that the liabilities of said Bank were in each
14 of said statements and advertisements grossly misstated, and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements and each of them as well as verbal statements made, and caused allowed and permitted to be made to the plaintiff as aforesaid showed that said Bank was sound solid and solvent and doing a flourishing business, when in

truth and in fact said Bank was not doing a flourishing and prosperous business and was in fact at the time said statements and advertisements were published and verbally made, in an unsafe precarious condition and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made statements and advertisements as published and as verbally made to the plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting as directors and they each of them willfully negligently and recklessly for the purpose and with the intent aforesaid made, caused, allowed and permitted to be made, and published said false statements and advertisements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

15 Plaintiff further avers that his knowledge of the condition of said Bank was wholly derived from said published statements and advertisements and by said verbal statements so made to him by said defendants and that had said statements and advertisements so published and as verbally made as aforesaid set out given the true condition of said Bank, it would have appeared, and it would have been shown that said Bank was not sound, solid, and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit:—on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and making said verbal statements by said defendants to the plaintiff as aforesaid insolvent, and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had, in said statements, advertisements, and verbal statements, made as aforesaid, and that by reason thereof said Bank could not and did not pay this plaintiff any part of said sum of money loaned and deposited with said Bank, except the sum of Seventeen Hundred and Twenty-five and no/100 ($1,725) Dollars, and the remainder of said money so loaned and deposited with said Bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

16 Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendant the plaintiff has been damaged in the sum of Fifteen Thousand ($15,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of Fifteen Thousand ($15,000) Dollars, its damages with interest thereon from January 21st, 1893, at 7 per cent and costs of suit.

THOMAS BAILEY,
Plaintiff,
By BURR & BURR &
GEO. W. LOWLY,
BIGGS & THOMAS,
His Attorneys.

* * * * * * *

17 "EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and discounts		768,601.44
Overdrafts secured and unsecured		6,217.74
United States Bonds to secure circulation		50,000.00
Stocks, securities, *ect.*		325.00
Due from approved reserve agents		107,090.01
Due from other National Banks		17,800.33
Due from State Banks and Bankers		5,394.72
Banking house furniture and fixtures		5,770.00
Other real estate and mortgages owned		38,716.92
Current expenses and taxes paid		14,286.28
Checks and other cash items		3,698.56
Exchange for clearing house		8,841.16
Bills of other banks		2,355.00
Fractional paper currency, nickels and cents		298.71
Specie		26,789.50
Legal tender notes		17,431.00
Redemption fund with United States Treasurer (5 per cent of circulation)		1,350.00
Total		$1,074,867.37

18 Liabilities.

Capital stock paid in		300,000.00
Surplus funds		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and Bankers	47,372.89	
		643,632.24
Notes and bills rediscounted		59,054.38
Total		$1,074,867.37

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct—Attest:

C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

19 "EXHIBIT B."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

Loans and discounts	737,462.12
Overdrafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stock, bonds and mortgages	22,739.34
Due from approved reserve agents	74,068.63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other Cash items	13,742.02
Bills of other Banks	3,712.00
Fractional paper currency, nickels and cents	216.42
Specie	27,308.00
Legal tender notes	10,400.00
Redemption with U. S. Treasurer (5% circulation)	1,900.00
Total	$1,035,448.92

20 & 21 Liabilities.

Capital stock paid in	300,000.00
Surplus funds	12,000.00
Undivided profits	28,439.38
National bank notes outstanding	45,000.00

Individual deposits subject to check....	$414,962.35	
Demand certificates of deposit.....	40,859.66	
Due to other National banks.....	107,648.27	
Due to State Banks and Bankers.....	37,448.66	
		597,918.94
Notes and bills rediscounted		52,090.60
Total		$1,035,448.92

STATE OF NEBRASKA,
Lancaster County, ss:

I, C. W. Mosher, President of the above Bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct—Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

* * * * * * *

22 Now come the defendants Charels E. Yates and Ellis P. Hamer, and in obedience to the order of the Court, each makes answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th day of March 1899.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said petition, these defendants have not knowledge or information, and they therefore deny that such deposits were made.

23 First Defense. These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchise of the said banking association has ever been declared by the Comptroller of the Currency or

adjudged by any court for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said Bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set
24 out in the plaintiff's amended petition, if he have any, is founded upon alleged facts, which, if true, constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to concerning the government and management of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense. These defendants further say, each for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the District Court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made and after the filing of said cause of action in the said
25 United States Court on removal, a motion was duly made by the plaintiff, Thomas Bailey, to remand said cause to the District Court from which it had been removed, and which motion was overruled.

That subsequently, and on or about February 9th, 1894, these defendants, together with the other defendants in said cause then pending in the said United States Circuit Court, filed demurrers to the petition of the said plaintiff, which on consideration of the court were sustained and a judgment was duly entered in favor of the said defendants for costs, amounting to the sum of $125.73; and the plaintiff's cause of action was dismissed by the said court.

That subsequently, and on or about the 13th day of February

1894, the plaintiff in said action, being the same plaintiff as in this action, sued out a writ of error and took an appeal from the ruling and judgment entered by the said Circuit Court of the United States, to the United States Circuit Court of Appeals.

That such proceedings were had on the application of the plaintiff in said Circuit Court of Appeals for a reversal of the said judgment as are necessary to obtain a hearing in said Circuit Court of Appeals, and that a hearing was duly had and an opinion and judgment rendered affirming the judgment of the Circuit Court of the United States in said case; said judgment of affirmance being duly entered in the said Court of Appeals on or about the 10th day of November 1894, and adjudging also that the said plaintiff pay the costs incurred in the said appeal, amounting to the sum of $72.25.

These defendants further say that said judgments entered in the said Circuit Court of the United States for the District of Nebraska and in the United States Circuit Court of Appeals in said cause, have never been set aside or appealed from, and they stand of record in full force and effect as a final adjudication of the plaintiff's
26 cause of action against these defendants.

These defendants further say that the said judgment in the said courts for costs as above stated have never been paid by the plaintiff; that said judgments for costs remain in full force and effect against the said plaintiff and in favor of these defendants.

The defendants therefore allege that the cause of action in this cause or pretended cause of action as set forth in the plaintiff's amended petition herein, has been fully adjudicated and by reason of such adjudication and the non-payment of the said judgments so entered, by the plaintiff, the defendants allege that this last cause of action is simply vexatious and abuse of the process of this court, and that the plaintiff is barred and estopped by reason of said judgment and the non-payment of the same, from maintaining this cause of action.

Third Defense. As a further defense to the plaintiff's pretended cause of action as set forth in his petition as now amended, these defendants say each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895, by said Thomas Bailey, plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart for the full amount of his claim as made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants.

That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bailey and against the said defendant Stuart, has not been reversed or set aside but in due course
27 of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart, and said property was

sold in satisfaction of the said Judgment rendered in favor of the plaintiff Thomas Bailey. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said Bailey against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense. These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment and not in favor of this plaintiff.

These defendants allege the fact to be that if the plaintiff deposited his money in the said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in
28 favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray for judgment for costs.

J. W. DEWEESE,
F. M. HALL,
FRANK E. BISHOP,
Att'ys for said Def'ts.

* * * * * * *

29 & 30 And now comes the plaintiff and for his reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt, and denies each

and every allegation of new matter contained in their several answers.

THOMAS BAILEY,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS, AND
L. C. BURR.

* * * * * * *

31 *Stipulation.*

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward County, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and produced and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence in-so-far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in any case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the
32–36 rulings and directions of the Court, subject to the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from judgment of the District Court in any or in all of said cases a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases. And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. R. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEEDON,
Attorneys for Chas. W. Mosher and Rollo O. Phillips.

* * * * * * *

37 In the District Court of Seward County, Nebraska.

Requests of Defendants for Special Findings.

The Defendants, Charles E. Yates and Louisa P. Hamer as administratrix of the Estate of Ellis P. Hamer, deceased, each separately and for each one alone, requests the court to make and find the following special findings of fact and of law:

I.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in his favor.

III.

That neither defendant Charles E. Yates nor Ellis P. Hamer, the deceased knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under
38 which said Bank operated.

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank:

V.

That the defendants Charles E. Yates and the deceased, Ellis P. Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI.

That the plaintiff was not induced or influenced by any parol or oral statement or representation of the defendant Yates or of the deceased Hamer either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII.

That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date December 28, 1886, and of date December 9, 1892, exhibits "A" and "B" attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery.

VIII.

That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained.

39

IX.

That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not, with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities;

X.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally, made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the National banking act, which reports are shown in the testimony in this case;

XI.

(A) That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual personal knowledge or intentionally made, published or declared, or permitted to be made, published, or declared, any untrue statement, report, or representation of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (B) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants acted in good faith, honestly believing that said statements, reports and publications were true and without any knowledge or intention that any of said statements, reports and representations were untrue.

FRANK E. BISHOP,
For Defendants Yates and Hamer, as Adm'x.

40 Afterwards, on the 1st day of April A. D. 1911, there was filed herein a certain Request of Defendants Yates and Hamer for Additional Findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

* * * * * * *

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the Court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspaper- and the names of the directors of the bank.

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, requests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspapers and the names of the directors of the bank.

41 & 42 16. That the evidence does not show said Hamer personally took part in the preparation *nor* distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the Bank, showing its assets, liabilities, and officers' names, were printed and carried in the newspapers.

FRANK E. BISHOP,
Attorney for Defendants Yates and Hamer.

* * * * * * *

43–45 And now on this 30th day of January, 1911, being a day of the November 1910 term of this court, the above entitled causes came on for trial and by agreement of all parties in open Court each and all of the above entitled causes are consolidated for the purposes of this trial. And Jury having been waived thereupon the trial proceeds to the Court from day to day, upon the pleadings and the evidence until February 3rd, 1911, at which time the trial of said causes is adjourned until February 6th, 1911, at 1:30 P. M.

* * * * * * *

46 THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

And now on this 1st day of April, 1911, being a day of the February 1911 term of this Court, these causes came on further to be heard on the motion of each of the plaintiffs for leave to amend their interlined amended *by* petitions by interlineation upon consideration whereof said motions and each of them are sustained and the plaintiffs and each of them permitted to amend their petitions as prayed; to which ruling of the Court the defendants and each of them except.

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, Deceased, et al., Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates, and Louisa P. Hamer, administratrix, defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

47 Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

Respecting the ninth request, as to the report of December 28, 1886, the Court answers the same in the negative, and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line, and the residue thereof contained in sub-division "B" and answers the first question contained in subdivision "A" in the affirmative, and the second question contained in subdivision "B" in the negative.

48–58 Subject to the foregoing Special Findings of Fact made at the request of the defendants, the Court finds generally in plaintiff's favor and against the defendants and each of them upon the evidence under the issues joined, and that the allegations of plaintiff's amended petition are true, and that plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusively of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of $14085.37.

To each of the findings of fact and conclusions of law made by the Court the defendants each severally except.

B. F. GOOD, *Judge.*

* * * * * * *

59 In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. Homer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, Defendants.

Motion to Amend Petition.

Comes now the plaintiff and moves the Court to amend its last petition filed herein in this to-wit: that it be permitted to amend its petition as follows, to-wit:

On page 2, line 31, after the words "to be" add the words "printed and".

On page 2, line 48, after the word "plaintiff" add the words "and sent by defendants and their agents to plaintiff through the United States Mails and otherwise".

On page 2, line 53, after the word "advertisements" add the words "and the statements sent by defendants to plaintiff as aforesaid".

On page 2, line 55, after the word "advertisements" add the words

"and the statements made by the defendants to the plaintiff as aforesaid."

On page 3, line 66, after the word "public" add the words "and sent and delivered to plaintiff statements of its condition".

On Page 3, line 68, after the word "published" add the words "and sent and given to plaintiff".

On page 3, line 83, after the word "newspaper" add the words "and as aforesaid caused and permitted to be made and sent and delivered to plaintiff statements of the bank's condition.

60 On page 3, line 86, after the word "statements" add the words "and upon the statements of its financial condition sent to and received by plaintiff as aforesaid".

On page 4, line 110, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid".

On page 4, line 120, after the word "Nebraska" add the words "and sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid."

On page 5, line 132, after the word "Nebraska" add the words "and sent and caused to be sent to and received by the plaintiff said false and untrue statements aforesaid through the United States Mails and otherwise, and which were received by plaintiff".

On page 5, line 139, after the word "published" where it appears the second time add the words "and sent and delivered to plaintiff".

On page 5, line 143, after the word "published" add the words "and as sent and delivered to and received by plaintiff".

On page 5, line 153, after the word "advertisements" add the words "and said statements of its financial condition so sent and received by the plaintiff".

On page 5, line 157, after the word "advertisements" add the words "and other statements as aforesaid".

On page 5, line 158, before the word "this" insert the following words "and statements sent to plaintiff by defendants and by plaintiff received and examined".

On page 6, line 174, after the word "statements" insert the following words "so sent and received by plaintiff as aforesaid" and after the word, "advertisements" add the words "and statements".

61 On page 6, line 181, after the word "made" the second time add the words "and said statements so sent to and received by plaintiff".

On page 5, line 184, after the word "statements" add the words "so sent to and received by plaintiff".

On page 6, line 181, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements".

On page 6, line 198, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff".

On page 6, line 204, after the word "advertisements" add the words "and said statements so sent to and received by plaintiff".

On page 7, line 217, after the word "advertisements" add the words "and sending to and causing to be received by plaintiff said statements".

On page 7, line 220, after the word "said" strike out and omit the word "published".

THOMAS BAILEY,
Plaintiff.
By NORVAL BROS. &
J. J. THOMAS,
His Attorneys.

* * * * * * *

62 The defendant Charles E. Yates moves the Court to set aside his findings, and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occuring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant except to said *filing*.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepted to said *filing*.

9. The court erred in finding on the third request that Charles E.
63 Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or

servants of the bank, and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendants excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

64 16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in *such* of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution

and use of said printed matter were all within and authorized
65 by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by this defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The Court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21*c*. The Court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for mi-feasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National
66 Banks in that all liabilities of Directors by said act for official neglect, misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant notwithstanding the defendant was without knowledge of the falsity of any report attested by him with honest belief on information

from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 205 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also
67 of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars:

(*a*) the findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report". (*d*) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in ever- state shall
68 be bound thereby any-thing in the constitution of laws of any state to the contrary notwithstanding", contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgment thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence
31. The Court erred in allowing interest in this action for tor upon the principle amount.
32. The finding and judgment are against the clear weight of th evidence.
33. The court erred in finding on the ninth request in the affirma tive as to the report of December 9, 1892.
34. The court erred in finding on the tenth request in the affirma tive or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.
35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.
36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.
37. The Court erred in its third finding on its own motion
69 that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.
38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.
39. This defendent excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by the defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

* * * * * * *

70 In District Court, Seward County, Nebraska.

* * * * * * *

Motion for New Trial.

The defendant Louisa P. Hamer, Admx., moves the court to set aside her findings and grant a new trial for these reasons:
1. The last amended petition does not state facts sufficient for a

cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886 and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and
71 this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports, did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

72 15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

73 20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16, and 17.

21*a*. The court erred in finding against this defendant on point "A" of the eleventh request.

21*b*. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment
74 should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties, are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which *he* conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute which makes liability depend upon the fact that directors knowingly
75 violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment persuant to which these further proceedings are had in the following particulars: (*a*) the findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Direc-

tors for deceit based upon false official reports of the resources and liabilities of a National Bank. (*b*) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting" (*c*) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report". (*d*) They are violative of the holding of said Court" that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional". And in each and every of these respects the Court

76 has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding", contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgment thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgment are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statements of the financial condition of the

77 bank in the reports made to the comptroller.

35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that

either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published, advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with — the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff, and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

78 Afterwards, on the 8th day of May, 1911, there was had and entered of record herein certain findings and the judgment of the Court, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

And now on this 8th day of May, 1911, it being the first day of the May 1911 term, of this Court, this cause came on to be heard on the request of the defendants, for additional special findings filed herein, April 1st, 1911, and for final determination and the Court being fully advised in the premises in response to the request of the defendants, Charles E. Yates and Louisa P. Hamer, makes the following additional special findings of fact and conclusions of law:

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that such printed slips and business cards were compiled, prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be compiled, prepared and distributed under the authority and direc-

tions of said defendant Yates, and in his name as one of the directors of the bank.

79 Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates, did not know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the defendant Yates.

Respecting the 15th request the Court finds that the said Ellis P. Hamer, did know that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared, and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 16th request the Court finds that the said Ellis P. Hamer, did not personally take part in the preparation or distribution of the printed slips or business cards, showing the assets and liabilities of the bank, as shown in the evidence but the Court finds that he did know that such printed slips and business cards were prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

The Court further and upon its own motion finds as to each and all the defendants, in this action that,—The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all

80 times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements, and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the Plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority in their names and with their sanction and consent.

The Court further finds that the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, from and after September 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in

fact false and untrue, as in Plaintiff's amended petition alleged and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. The said statements and advertisements aforesaid showed and represented the Bank to be in a sound solvent and prosperous financial condition, when in fact it was at all times wholly insolvent and unable to pay its liabilities.

The Court further finds on all the issues joined for the plaintiff and against the defendants and each of them and that the
81-95 allegations of plaintiff's amended petition are true.

To all of which findings the defendants and each of them severally except.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover from the defendants and each of them the sum of $14,085.37 Dollars, with seven (7) per cent interest thereon from April 1st, 1911, and costs of action taxed at — Dollars.

And thereupon and on the same day, this cause came on further to be heard on the motions of the defendants for new trial and the Court being fully advised in the premises doth overrule the same to which the defendants and each of them except and are allowed Forty (40) days from the rising of the Court within which to prepare "and serve bill of exception."

* * * * * * *

96 Supreme Court of Nebraska, January Term, A. D. 1913,
Jan. 31.

No. 17279.

THOMAS BAILEY, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon appeal from the district Court of Seward county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and action dismissed; that appellants pay all costs incurred herein by them, taxed at $—, and have and recover from appellee all their costs so expended; that appellee pay all costs incurred herein by him, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

97 JONES NATIONAL BANK
v.
YATES.

BANK OF STAPLEHURST
v.
YATES.

UTICA BANK
v.
YATES.

BAILEY
v.
YATES.

Nos. 17276-7-8-9.

Opinion. Filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability cannot be measured by a higher standard than that which is imposed by the act.

2. Whereby the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the pen-
98 alty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and prescribes a penalty for its non-performance "the rule prescribed in the statute is the exclusive test of liability." Yates v. Jones Nat. Bank, 206 U. S. 158; Farmers & Merchants Nat. Bank v. Dearing, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of or approved of, or participated in, the fraudulent acts of which complaint is made.

99 HAMER, *J.*:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed. Yates v. Jones Nat. Bank, 206 U. S. 158; Yates v. Utica Bank, Yates v. Bailey, and Yates v. Bank of Staplehurst, 206 U. S. 181, where it was held that plaintiffs' petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiff's causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments con-
100 tain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

To the petitions thus amended each of the defendants demurred. The demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the

newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was
101 measured by the terms of that act, and not otherwise.

Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiff's amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the supreme court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who are simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when defendants Yates and Hamer
102 signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statements, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that they knowingly participated in any of them. There being

nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in
103 question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution: That thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an inducement to him to act in that capacity the law assures
104 him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in Yates v. Jones Nat. Bank, supra, is based on a single proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance

the rule prescribed in the statute is the exclusive test of liability." In the argument on behalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute." (Cochran v. United
105 States, 157 U. S. 286.) The argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violations of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In Briggs v. Spaulding, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of
106 action together and then say to the defendant—If you are not liable upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of Briggs v. Spaulding, supra, where it was said: "Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other persons that

he has a right to expect that the directors, who are supposed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In Briggs v. Spaulding, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things, said:
107 (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 Morawetz, Private Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director) depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents
108 of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 Morawetz, Private Corporations (2d ed.), sec. 551, et. seq., and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. * * * (10) There are many things which, in their management, requires the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that

if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defendants.

109 It also is apparent that plaintiffs cannot produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.

Sedgwick and Fawcett, JJ., dissenting.

110 LETTON, J., concurring in part:

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the supreme Court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the supreme court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The Supreme Court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." Yates v. Jones Nat. Bank, 206 U. S. 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the supreme court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of

111 the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

* * * * * * *

112 The undersigned appellee respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretations of the decision of the United States Supreme Court in Yates v. Jones Nat. Bank, 206 U. S. 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dismissal of this case and of erroneous

construction as to the sufficiency of the evidence to support the findings and judgments of the trial court.

I.

It is said in the syllabus of this case, paragraph two, that "Where, by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not * that as a condition of liability there should be proof of something more than reck-
113 lessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine" Thomas v. Taylor, 32 Sup. Ct. 403.

2.

The deciding opinion in this case consedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decision of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the naional bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, in effect, denied a right and privilege conferred upon it by the constitution and statutes of the United States; of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas, by the decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with
114 the opinion of the said United States Supreme Court, when in fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws Title 62 of the Rev. St. of the

U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4.

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially Section 5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5.

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws.—"the rule of responsibility declared by them" have "been satisfied" (Thomas v. Taylor) and the judgment should be affirmed.

6.

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and
115 liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and measure of duty and of liability established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7.

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of liability announced by the Supreme Court of the United States in this case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8.

It is said in the opinion of Judge Letton that:

"A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, show that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking act. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings con-

tained no federal question, and stated merely a common-law liability. The Supreme Court of the United States held that a federal question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." Yates v. Jones Nat. Bank, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that
116 of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S."

Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e. reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiffs' petition was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide
and plaintiff's petition was then and now is sufficient to
117 charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion Judge Hamer says the plaintiff "still charge- the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery," whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plai-tiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts,—the only requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says: "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants
118 who were simply directors of the Capital National Bank,"—thus assuming that that court held the plaintiff's petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not so decide and plaintiff's petition does state a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court *is* sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District Court should be reversed as to all the defendants." This statement assumes that *our* petitions failed to allege that the defendants personally know of *our* personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the
119 defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and Section 5239 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally know of or personally participated in the acts charged in the petition whereas the evidence is amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S. that under the interpretation and construction of that statute made by the United States Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the *frame* of our petition precluded that view or theory; whereas, the holding of the United States Supreme Court is that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable
120 to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied for recovery upon any act done pursuant to an express command of the national bank act; also, that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the express commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act; and finally that that act does not require proof of actual knowledge but that it is sufficient if it be shown the defendants acted recklessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained

of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant, sounding in damages * * *" And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank * * * or by the receiver * * * "—they thereby admitted that they neglected their duties as such directors and committed the wrongs complained of in plaintiff's amended petition whereby the bank became insolvent and that such damages resulted from the conduct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the
121–122 plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and Section 5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

THOMAS BAILEY, *Appellee,*
By R. S. NORVAL &
J. J. THOMAS,
L. C. BURR, *Att'ys.*

* * * * * * *

123 SEDGWICK, *J.*, dissenting:

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the supreme court of the United States that the action is one for deceit at common law and for that reason cannot be maintained. The opinion says that it was held (by the supreme court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit", whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and concludes that "unless the supreme court of the United States shall recede from its decision of these cases, the petition will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any member of the court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shown. "I concur in the view that
124 the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the supreme court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations

as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly to anyone deceived", etc. Yates v. Jones Nat. Bank, 27 Sup. Ct. Rep. 638 (206 U. S. 158.). This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusals to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. Is proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action and the right to bring it in the state courts is plainly stated in the fourth paragraph of the syllabus.

125 "State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the supreme court of the United States in Yates v. Jones Nat. Bank, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and demanded", and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the supreme court of the United States and has been since emphatically decided by that court, and no such claim can be made in this case. The question is whether

126 these directors are liable under the federal statute, and this action is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly

stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of Gerner v. Mosher, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. Yates v. Jones Nat. Bank, 74 Neb. 734. The supreme court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court upon this point that doubt has emphatically been set at rest
127 by a later decision where the language used by that court in this case is quoted and its meaning fully stated and made plain. Thomas v. Taylor, 224 U. S. 73. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the supreme court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank will not be reversed when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y. 53.) The supreme court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment
128 that "unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held, insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such com-

mon law liability; that is, that no common law action could be sustained.

The case of Thomas v. Taylor, 224, U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their resonsibility is laid down in the National Banking Act, Yates v. Jones Nat. Bank, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional violation of a statute when one de-
129 liberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in Yates v. Jones Nat. Bank. The language there is 'that where by*n* law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports were
130 published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which the decision depends.

Fawcett, J., concurs.

* * * * * * *

131–133 It is by the court ordered that oral argument on the motions of appellees for rehearing herein, be had before the court at the session of court commencing June 2, 1913.

M. B. REESE,
Chief Justice.

* * * * * * *

134 This cause coming on to be heard upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing (and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing) and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed and a rehearing herein ordered.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

135 The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for naught so much of the record and proceedings of January 7, 1914 as shows the motion for rehearing was declared carried and orders a rehearing to be had for the reasons which follow this and the other two motions.

136 2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to vacate, set aside and hold for naught the order of May 17, 1913 ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased each separately moves the court to correct the proceedings and order of the court of January 7, 1914 so as to eliminate therefrom the deciding vote of the Chief Justice, the Honorable Manoah B. Reese from said order and proceedings and from the tie vote of the remaining six judges who heard and considered this case to overrule the motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court of January 31, 1913 reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by

him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as
137 such * * * in any case * * * where he has been attorney for either party in the action or proceeding," without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides,—"The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision," and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914 and by the showing filed herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear
138 and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practise of this court and courts in general, had the legal effect of overruling the motion for rehearing and of adhering to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action, and of dismissing these appellants without day, which rule was illustrated and applied in Shumway vs. State, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated, in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

7. The order of May 17, 1913 directing re-argument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

8. The order of May 17, 1913, was as the appellants believe, carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants, either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914 and there was no opportunity or occasion so far as the appellants personally or by counsel know, to challenge or object to such action of the
139–146 Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914 allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerkof the court with the exception that it should not recite "Was argued by counsel," and after reciting the vote of the six judges, should read,— "And thereupon, upon due consideration whereof the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to execute and carry into effect the prior judgment of this court as directed in the majority opinion therein."

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

* * * * * * *

147 REESE, *C. J.*:

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form, if in court I withdrew, if in the consultation room I kept silent. I was acting in entire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case, I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still

believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing, Judges Barnes Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemanly and personally friendly way. I stated that the vote would not be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer, at a meeting of the State Bar Association at Omaha, a long time member of the Iowa Supreme court and former Chief Justice thereof, and in whose in-
148 tegrity and ability, I, with all others so far as I know, have the fullest confidence, and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation, he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are equally divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is, in effect, rendered by the three, while the constitution and statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into
149 which I did fall. It is true that I stated from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure,

perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said something about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years after the bank failure, by other attorneys. I was never at any time consulted by Mr. Jones
nor his counsel as to the bringing or maintaining of this
150–180 suit—never employed as attorney or counselor and have
known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know I never knew any of the plaintiffs nor officers of the other banks, nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, "as above stated."

* * * * * * *

181 Supreme Court of Nebraska, January Term, A. D. 1914.
Apl. 3.

No. 17279.

*THOMAS BAILEY, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

The motion of appellant to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has
182 full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be

*Reese, C. J., not sitting.

vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion is declared lost, and a rehearing denied.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. Samuel H. Sedgwick one of the Judges of said Court and which statement was entered of record on the Journal of said Court and is in the words and figures as follows to wit:

Supreme Court of Nebraska, January Term, A. D. 1914. Apl. 6.

No. 17279.

THOMAS BAILEY, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

SEDGWICK, *J.*:

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had
183 made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I supposed as a matter of course that there would at once be an unanimous court to set aside the former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order or judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done before so far as I know and it did not occur to me that any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in

reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to make use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refuse to concur in setting aside the former order of this court. I think that such suggestions are improper; that each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know.

In the case of Shumway v. State, 82 Neb. 152, after full in-
184 vestigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event and the judgment was affirmed. The constitution provides that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgments of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality, and thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. John B. Barnes, one of the Judges of said court and which statement was entered of record on the journal of said court and is in the words and figures as follows, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914. Apl. 3.

185 No. 17279.

THOMAS BAILEY, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from District Court, Seward County.

BARNES, *J.:*

When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and

judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. William B. Rose, one of the Judges of said Court and which statement is in the words and figures as follows, to-wit:

No. 17276.

JONES NATIONAL BANK
v.
YATES.

No. 17277.

BANK OF STAPLEHURST
v.
YATES.

No. 17278.

UTICA BANK
v.
YATES.

No. 17279.

BAILEY
v.
YATES.

ROSE, *J.*:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and had voted against plaintiffs' motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a

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solemn sense of duty to make and place on record the following statement:

I have never had any interest, direct, remote or contingent, in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from participating in a case wherein his brother appears as an attorney. Longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by
187 them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all of my judicial acts and conduct. As a judge I can not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * * * *

188 1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th, 1913, and January 7th, 1914, granting a rehearing in these actions, for the following reasons, to-wit:

2. After appellee had filed their briefs herein in opposition to appellants' motions to set aside the orders of May 17th 1913, and January 7th, 1914, the several appellants filed additional briefs herein on the 28th day of February, 1914, and appellee herein had neither time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' briefs heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law

that after a judge had once withdrawn from a case that he had no right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein, a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court has set aside the order granting a rehearing herein and a constitutional majority of the court has concurred in granting a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying the motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a
189 & 190 judge of the court granting such order, and appellee had and now has a constitutional right to have him give due consideration to this whole case.

8. Because said order of court deprives appellee of his property without due process of law.

9. Because said order is prohibited by and in conflict with the Fourteenth amendment to the Constitution of the United States and denies to appellee equal protection of law and deprives appellee of his property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely upon the ground, that the chief justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition. Whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the *cause* had proceeded to final judgment operated as a judicial determination of his disqualification and effectually excluded him from further participation, although no facts existed constituting a disqualification, and although the Chief Justice'- withdrawal was based upon a mistake of facts.

That said reply brief tendered issue*d* not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein discloses that when the Chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact; that upon his discovery of the true facts it was his duty to participate in the decision of said cases. *a* And appellee had a constitutional right to all the judges in this court sitting in his case.

THOMAS BAILEY, *Appellee;*
By J. J. THOMAS,
R. S. NORVAL,
L. C. BURR,
His Attorneys.

* * * * * * *

191 This cause coming on to be heard upon motion of appellee for a rehearing and leave to file additional briefs on motion of appellants to set aside the order of the court of date January 7, 1914, granting a rehearing, was submitted to the court; upon due consideration whereof, it is by the court ordered that said
192 motion be, and the same hereby is, overruled.

Sedgwick, J., dissenting.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

193 & 194 EXHIBIT "A."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

THOMAS BAILEY, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, Acting Chief Justice of the Supreme Court of Nebraska:

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme court of the state of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioners.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction; that a citation

be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
Acting Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 17279. Bailey v. Yates. Petition for Writ of Error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

* * * * * * *

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EXHIBIT "B."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

No. 17279.

THOMAS BAILEY, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Assignments of Error.

Comes now the said Thomas Bailey, Appellee in the above named court and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit:

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of something more than recklessness—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute

when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court & in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States in conflict with and opposition to the decision of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

7. The Court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

196 8. The Court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provisions of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily & wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous in-

terpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroreous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States, and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statement to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239 Revised Statutes of the United States.

14. The court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agent- and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

197 16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true

or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239 Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under Section 5239 Revised Statutes of the United States in his personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under Section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The Court erred in not deciding that by their attestation of the official published report shown by the record, the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation in effect knowingly made and liable under Section 5239 Revised Statutes of the United States.

21. The Court erred in deciding that the allegations of appellee's petition are insufficient to sustain the judgment against appellants under Section 5239 Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because the opinion of Hamer J. as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court—Letton J. having only concurred on the law—and therefore the findings of fact of the trial court have not been reversed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI Section 2 of the Constitution of the

State of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing and when the final order was made herein, there was not a ma-
198 jority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether attested by the requirements of the national banking act or the common law action for fraud and deceit and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud or deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was necessarily drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said statutes.

Wherefore appellee prays that the judgment of this court may be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

[Endorsed:] 17279. Bailey v. Yates. Assignments of Error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

199–210 And on the same day there was rendered by said supreme court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 27.

No. 17279.

THOMAS BAILEY, Appellee,
v.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon the assignments of error and petition for writ of error to the Supreme Court of the United

States, by Thomas Bailey, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein, for their appearance in said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice.

* * * * * * *

211 In the Supreme Court of the United States, October Term, 1914.

File No. 24243.

No. 504.

THOMAS BAILEY, Plaintiff in Error,
vs.
CHARLES E. YATES and LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, Defendants in Error.

Designation for Printing.

The plaintiff in error in the above-entitled case intends to rely on the assignments of error contained in the record, and requests the Clerk of the Supreme Court of the United States to print the following portions of the transcript of the record, which he thinks necessary for the consideration of such errors:

1. Transcript page 1: All of page.
2. Transcript page 6: amended petition, commencing with the words "afterwards, on the 16th day of March, A. D., 1899", and ending with the signatures of attorneys on page 16.
3. Transcript page 17: Exhibits A and B, commencing at top of page and ending with signature- of directors, near bottom of page 20.
4. Transcript page 22: answer of Yates and Hamer, commencing with the words "and now come the defendants", and ending with the signature- of attorneys on page 28.

212 5. Transcript page 29: reply of plaintiff, commencing with the words "and now comes the plaintiff", and ending with the signature- of attorneys on same page.

6. Transcript page 31: Stipulation, commencing at top of page and ending with signature- of attorneys on page 32.
7. Transcript page 37: request for special findings, commencing at top of page and ending with signature of attorney, near top of page 41, but omitting titles.
8. Transcript page 43: commencing at top of page and including first eight lines.

9. Transcript page 46: leave to amend by interlineation and special findings, commencing at top of page and ending with the signature "B. F. Good", near center of page 48.

10. Transcript page 59: motion to amend, commencing at top of page and ending with signature- of attorneys on page 61.

11. Transcript page 62: Yates' motion for new trial, commencing at top of page and ending with signature of attorney on page 69.

12. Trans. p. 70: Hamer's motion for new trial, commencing at top of page (omitting title), and ending with signature of attorney at bottom of page 77.

13. Transcript page 78: findings and judgment, commencing at top of page and ending on page 81, with the words "and serve bill of exceptions".

14. Transcript page 96: judgment of reversal, commencing at top of page and ending with signature "J. Fawcett, Acting
213 Chief Justice".

15. Transcript page 97: opinions of Hamer and Letton, JJ., commencing at top of page and ending at bottom of page 111.

16. Transcript page 112: motion for rehearing, commencing with the words "the undersigned appellee", and ending with signature- of attorneys at top of page 121.

17. Transcript page 123: opinion of Sedgwick, J., commencing at top of page and ending at bottom of page 130.

18. Transcript page 131: order for oral argument, commencing with the words "it is by the court ordered", and ending at bottom of page.

19. Transcript page 134: order granting rehearing commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice", near top of page 135.

20. Transcript page 135; motion to vacate order for rehearing, commencing with the words "the appellants, Charles E. Yates", and ending with signature- of attorneys on page 139.

21. Transcript page 147: statement of Reese, C. J., commencing at top of page and ending with the sixth line from top of page 150, with the words "as above stated".

22. Transcript page 181: order setting aside rehearing, commencing with the words "Supreme Court of Nebraska", and ending with the words "in the performance of my public duties", on p. 187 including the statements of Sedgwick, Barnes and Rose, but omitting in all cases the title of the case.

23. Transcript page 188: motion for rehearing, commencing at top of page and ending at bottom of page 189.

214 24. Transcript page 191: order denying rehearing, commencing with the words "this cause coming on to be heard", and ending with the signature "J. Fawcett, Acting Chief Justice", near top of page 192.

25. Transcript page 193: petition for writ of error. All of page.

26. Transcript page 195: assignments of error, commencing at top of page and ending at bottom of page 198.

27. Transcript page 199: allowance of writ of error, commencing

at top of page, and ending with signature "J. Fawcett, Acting Chief Justice".

THOMAS BAILEY,
Pl'ff in Error,
By L. C. BURR &
J. J. THOMAS.

Rec'd copy of above designations this 21st day of Aug., 1914.

——, ——.

215 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamer, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska, with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska.]

S. C. STONER,
Notary Public.

Commission expires Oct. 8, 1918.

216 [Endorsed:] 504/24243. In the Supreme Court of the United States. Thomas Bailey, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. File No. 24243. Oct. Term, 1914. No. 504. Designation for printing. L. C. Burr & J. J. Thomas, Att'y for P'ff in Error.

217 [Endorsed:] File No. 24,243. Supreme Court U. S., October Term, 1914. Term No. 504. Thomas Bailey, Plaintiff in Error, vs. Charles E. Yates et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed August 25th, 1914.

Endorsed on cover: File No. 24,243. Nebraska Supreme Court. Term No. 504. Thomas Bailey, plaintiff in error, vs. Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased. Filed May 26th, 1914. File No. 24,243.

Office Supreme Court, U. S.
FILED
DEC 12 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

October 1914 Term.

Number 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

Number 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

Number 165

UTICA BANK, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

Number 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE.

IN THE

Supreme Court of the United States

October 1914 Term.

Number 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

Number 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

Number 503.

UTICA BANK, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

Number 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE.

The above named defendants in error, Charles E. Yates, David E. Thompsan and Louisa Hamer, administratrix of the

estate of Ellis P. Hamer, deceased, move the court to advance these cases for hearing, agreeably to rule 26, paragraph 4, for the reason that these cases were once adjudicated by this court upon the merits as appears by the records on file herein.

For a statement of the matters involved and of the particular reasons for this application, the defendants in error state:

The cases are here on several writs of error to the supreme court of the state of Nebraska to review a judgment which reversed several judgments of the district court of Seward county, Nebraska, in favor of the several plaintiffs in error and against the defendants in error, charging defendants in error with liability for deposits of the Capital National Bank of Lincoln, Nebraska, on the ground that they knowingly made or participated in the making and publication of false reports to the comptroller of the currency, of the resources and liabilities of said Capital National Bank.

The Nebraska supreme court, in its several judgments which the present writs of error seek to review, held that the evidence was not sufficient to establish that the defendants in error, or any one of them, knowingly made or knowingly participated in the false official reports complained of, and dismissed the defendants in error without day.

These cases were once heard and adjudicated by this court upon the merits, at the October 1906 term, the opinion by the present Mr. Chief Justice being reported under the title of *Yates* v. *Jones National Bank*, in 206 U. S. 158-181, decided May 13, 1907. This court in the decisions mentioned, adjudged erroneous and reversed the several judgments of the supreme court of Nebraska in the same identical suits affirming judgments of the district court of Seward county in said state, which imposed liability on these defendants for the deposits of said Capital National Bank, upon the ground that the said state court had denied to these defendants in error a right or immunity granted by section 5239 of the Revised Statutes of the United States.

The proceedings and several judgments, for review of which the present writs of error were sued out, were had under and in obedience to the several mandates of this court issued to carry into effect its prior decisions and judgments in these identical suits, rendered May 13, 1907.

Each of the records returned with and in obedience to the commands of the writs of error issued in these cases, now on file with the clerk of this court, shows upon its face that it is the identical suit once heard and determined on the merits in this court. There is in the record of each one of these cases a copy of a mandate issued therein by the supreme court of Nebraska to the district court of Seward county, Nebraska, stating and reciting that the judgment of said court had been reviewed on a writ of error by the supreme court of the United States. Said mandates in all these cases are alike in form, substance and purport, and vary only in respect to the docket numbers and names of the parties, so that a copy of one thereof truly exhibits the facts stated and recited in all of them. In *Bank of Staplehurst* v. *Charles E. Yates, et al.*, term No. 502, pages 37 and 38, appears a copy of the mandate mentioned, containing the following statements and recitals:

> "That afterwards, upon a writ of error issued (sued) out by said Charles W. Mosher, Charles E. Yates, David E. Thompson, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, and Richard C. Outcalt, said cause was appealed to the supreme court of the United States, wherein, during the October term, 1906, thereof, the said cause coming on to be heard before the supreme court of the United States, in consideration whereof it was ordered and adjudged by the said supreme court of the United States, that the said judgment of our supreme court in this cause be reversed with costs, and that the said Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover against the said The Bank of Staplehurst the sum of $584.75, for their costs therein expended, and that execution issue therefor; and it was also by the said supreme court of the United States ordered that the said cause in the said supreme court of the United States as to the said Charles W. Mosher and Richard C. Outcalt be dismissed for want of prosecution; and it was by the said

supreme court of the United States further ordered that said cause be, and the same duly was remanded to our supreme court for further proceedings not inconsistent with the opinion of said supreme court of the United States.

"That afterwards, and on the 4th day of May, 1908, said mandate from the supreme court of the United States was duly filed in this court."

In all of the trials and hearings heretofore had in these cases in the district and supreme courts of the state of Nebraska, and in this court upon writs of error, the causes have been tried or heard together, and in the appellate proceedings they have been heard upon a common bill of exceptions and ruled by one opinion. In the records now presented to this court for review on writs of error the same bill of exceptions is returned and filed in all of the cases, and the legal issues arising on the records are identical and common to all of them, and it is appropriate that they be argued together upon the present writs. The application to advance is, therfore, presented in all of the above entitled cases by a single motion.

FRANK M. HALL,

FRANK E. BISHOP,

Counsel for Charles E. Yates and Louisa Hamer, Administratrix, etc., Defendants in Error.

JOHN F. STOUT,

HALLECK F. ROSE,

ARTHUR R. WELLS,

Counsel for David E. Thompson, Defendant in Error.

NOTICE OF MOTION TO ADVANCE.

To Messrs. J. J. Thomas, R. S. Norval, T. L. Norval and L. C. Burr, Counsel for Plaintiffs in Error:

You are hereby notified that the defendants in error shall submit to the supreme court of the United States, at a stated term thereof, on Monday, December 14th, 1914, at the capitol in the city of Washington in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, their motion to advance the above entitled case, a copy whereof is annexed hereto.

November 30, 1914.

FRANK M. HALL,
FRANK E. BISHOP,
Counsel for Charles E. Yates and Louisa Hamer, Administratrix, etc., Defendants in Error.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson, Defendant in Error.

Service of above notice and of the motion to advance thereto annexed is hereby acknowledged this.....day of ....., 1914.

.....

Counsel for Plaintiffs in Error.

6

Office Supreme Court, U. S.
FILED
FEB 1 1915
JAMES D. MAHER
CLERK

BEFORE THE

SUPREME COURT OF THE UNITED STATES.

No. 501, 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 502, 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 503, 165

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 504, 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

PETITION FOR REASSIGNMENT.

ARTHUR B. HAYES,
Counsel for Plaintiffs in Error,
Colorado Building, Washington, D. C.

FEBRUARY 1, 1915.

BEFORE THE

SUPREME COURT OF THE UNITED STATES.

No. 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

PETITION FOR REASSIGNMENT.

Come now the above-named plaintiffs in error, by one of their counsel of record, Mr. Arthur B. Hayes, and move the court for a reassignment of the hearing or oral argument in the above-named cases, from Tuesday, the twenty-third

day of February, 1915, to Monday, the fifth day of April, 1915, for the following reasons, to wit:

That the advanced assignment of these cases before this court for February 23, 1915, was upon motion made on behalf of Charles E. Yates and others, defendants in error; that the records in these several cases are very voluminous, and that these records are still in the hands of the printer, and it is not known when the printing of said records will be completed.

That when said records are printed they must be transmitted to Seward, Nebraska, to the chief counsel for the plaintiffs in error, and that there is not sufficient time for said counsel to prepare his brief prior to the said twenty-third day of February, 1915, even should the rule of this court be waived requiring the services of plaintiffs' brief upon counsel for defendants three weeks before the time set for argument.

That notice of this motion has been served upon counsel of record for the said defendants in error.

And herein plaintiffs in error will ever pray this honorable court.

Respectfully submitted,

ARTHUR B. HAYES,
Counsel for Plaintiffs in Error,
Colorado Building, Washington, D. C.

FEBRUARY 1, 1915.

S[illegible]

JONES BATC[illegible]
Plaintiff [illegible]
vs.
CHARLES E. [illegible]

BANK OF [illegible]
Plaintiff [illegible]
vs.
CHARLES E. [illegible]

UTICA BANK[illegible]
Plaintiff [illegible]
vs.
CHARLES E. [illegible]

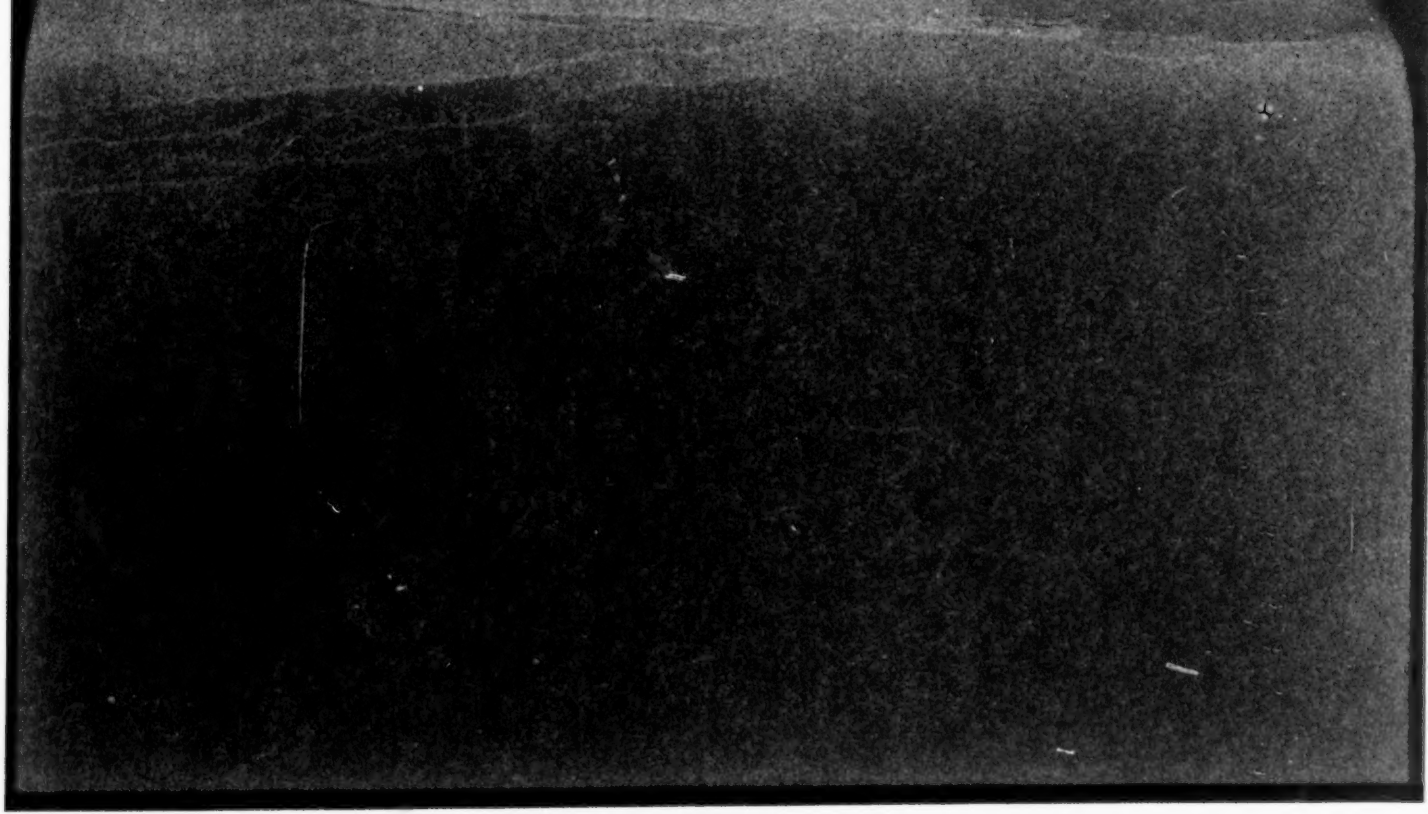
THOMAS BAR[illegible]
Plaintiff [illegible]
vs.
CHARLES E. [illegible]

ERROR TO THE SUPREME COURT OF [illegible]

BRIEF FOR PLAINTIFFS IN ERROR.

J. J. THOMAS and L. C. [illegible],
Attorneys for Plaintiffs in Error.

WEEDSPORT, N.Y.: [illegible]



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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

JONES NATIONAL BANK, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 501 General Number 24240
BANK OF STAPLEHURST, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 502 General Number 24241
UTICA BANK, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 503 General Number 24242
THOMAS BAILEY, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 504 General Number 24243

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR PLAINTIFFS IN ERROR.

HISTORY OF CASES.

These cases come to this court by writ of error to the supreme court of the state of Nebraska. The four cases involve identically the same issues.*

They were tried together upon stipulation (Trans., p. 17) and were before this court in *Yates* v. *Jones National Bank*, 206 U. S. 158.

The defendant in error David E. Thompson, is a party only in the cases of Jones National Bank and the Bank of Staplehurst.

The actions were commenced in the district court of Seward county, Nebraska, February 25th, 1895. They were twice removed to the federal court and remanded, and were once before the circuit court of appeals (74 Fed. 15; 95 Fed. 223; 107 Fed. 561). They were first tried to a jury in the district court of Seward county, Nebraska, in May, 1902, which resulted in verdicts and judgments for the plaintiffs. Defendants prosecuted error to the supreme court of Nebraska and the judgments were affirmed (54 Nebr. 734). Thereupon the cases were reviewed in this court and reversed and remanded (206 U. S., 158).

Pursuant to the mandate of this court the cases were again tried in the district court of Seward county in February, 1911; the parties, by stipulation, waiving a jury and submitting the questions of fact and law to the court. The trial again resulted in judgments for the plaintiffs, whereupon defendants prosecuted error to the supreme court of Nebraska.

When the causes came on for submission Reese, C. J., believing he had been counseled some years previously by H. T. Jones, who was then the cashier of the Jones National Bank (but who was neither an officer or stockholder of that institu-

* Note.—Since the issues are alike in all cases, in referring to matters contained in the transcript, reference will be made to the case of Jones National Bank v. Yates et al., No. 501, October term, 1914.

Note.—Italics used throughout the brief are ours unless otherwise indicated.

tion at the time of the last trial [B. of Ex., p. 179]), did not take part in the decision, thus leaving but six judges to decide the case.

Hamer, J., wrote the opinion of the court reversing and dismissing the cases (Trans., p. 50), which was concurred in by Barnes and Rose, JJ.

Letton, J., concurred in part (Trans., p. 55), and Sedgwick and Fawcett, JJ., dissented (Trans., p. 61).

Plaintiffs filed motions for rehearing (Trans., p. 56). On consideration of these motions Letton, J., having been convinced that he was wrong (Trans., p. 93), voted with Sedgwick and Fawcett, JJ., in favor of a rehearing. Hamer, Barnes and Rose, JJ., voted against the rehearing. Reese, C. J., having in the meantime discovered he was in error in believing himself disqualified, voted in favor of the rehearing (Trans., p. 75), and his statement shows that he did not originally take part in the decision because he thought he had been consulted by one of the parties at the time of the failure of the Capital National Bank (January, 1893)—over twenty years previously—but afterwards discovered his error. Affidavits were filed on behalf of the plaintiffs in error (Trans., pp. 77 to 89, inclusive), showing conclusively that the chief justice had never been retained or counseled by any of the parties in any of the cases, nor by any one in their behalf. It should be observed also that the supposed disqualification did not exist except as to the case of the Jones National Bank, yet the non-participation applied to all—apparently for the reason that all the cases were briefed and argued together.

The chief justice's right to participate was challenged by judges opposed to granting the rehearing. Speaking of the situation, Reese, C. J., says: "Judges Barnes and Hamer, while protesting against my vote, did it in a gentlemanly and personally friendly way"—leaving it to be inferred that such was not the case with Judge Rose.

The defendants filed motions to set aside the order granting the rehearing for the reason that the chief justice was dis-

qualified from participating in said proceedings and that the order was therefore void and of no effect. Plaintiffs thereupon challenged the propriety of Judge Rose's further participation in the cases on account of bias and prejudice (Trans., p. 90), he being the brother of Halleck F. Rose, who has been the active attorney for defendant David E. Thompson throughout this litigation. The recusation was, however, disregarded, Rose, J., deeming himself qualified to sit.

The motions to set aside the former orders granting rehearing were sustained. Thereupon Sedgwick, J., moved as follows:

> "Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court has now full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be vacated and set aside, and the cases re-submitted for further consideration and final decision."

On this motion the court stood equally divided, Reese, C. J., not sitting, and the rehearing was considered denied (Trans., p. 92; see opinion of Sedgwick, Trans., p. 93).

We have thus the anomalous situation of a reversal not concurred in by a majority of the court when the cases were finally disposed of.

STATEMENT OF THE CASE.

The defendants were directors of the Capital National Bank of Lincoln, Nebraska. The Bank was organized in June, 1883, with a purported capital stock of $100,000, under the name "Marsh National Bank." In May, 1884, the name was changed to "Capital National Bank," and the capital stock increased to $200,000. It was at this time that the defendants became directors, and so continued until the failure of the bank, January 21st, 1893.

In July, 1886, the capital stock was increased to $300,000, where it remained until its failure (B. of Ex., p. 185).

It is undisputably established by the evidence that the Bank was insolvent from the very day of its organization, and at the date of its failure its liabilities exceeded its assets more than a million dollars. These facts were not controverted in the state court.

While the Bank was a going concern the defendants published, pursuant to the call of the comptroller, statements of its financial condition which were published in accordance with the provisions of the national bank act. All of these statements represented the Bank to be in a solvent and flourishing condition, whereas it was at all times hopelessly insolvent. The books of the Bank were a mass of falsehoods. They grossly exaggerated the assets of the Bank and understated its liabilities—while the published reports disclosed a condition even more favorable than the books from which they purported to be taken.

The plaintiffs in error were depositors in the Capital National Bank, and had been for several years prior to its failure. After the Bank failed plaintiffs brought these actions against the defendants to recover damages for false and fraudulent representations made as to the financial condition of the Bank—statements made by the defendants as aforesaid while acting as its directors, and in reliance upon which plaintiffs lost their deposits.

The allegations of plaintiff's petition are referred to later in this brief. They contain all the allegations contained in the complaint in *Thomas* v. *Taylor*, 224 U. S., 73, which, it has been decided, states a cause of action under Sec. 5239, Rev. St. U. S.

In the early stages of this litigation plaintiffs, acting upon the authority of *Prescott* v. *Hughey*, 65 Fed. 653, and *Gerner* v. *Hosher*, 58 Neb. 135, assumed that the remedy provided in Sec. 5239 *supra* was cumulative—not exclusive; and that for

a false representation contained in an official report of a national bank's condition, published pursuant to law, a depositor might sue to recover under the national bank act, or pursue his remedy at the common law for fraud and deceit. It was upon this theory these cases were first tried in the district court.

The state supreme court being committed to the rule that the common law action of deceit was available, the trial court instructed the jury accordingly, and when the cases reached the supreme court of the state on review that court, consistent with its former decisions, affirmed the judgments (*Yates* v. *Jones National Bank*, 74 Neb. 734). It was on account of the error of the trial court in omitting the element of *scienter* in its instructions to the jury that these cases were reversed by this court (*Yates* v. *Jones National Bank*, 206 U. S. 158).

We urged that the cases should be affirmed as based on "representations other than those contained in the official reports made by the association to the comptroller of the currency and published in conformity to the National Bank act," but this court examining the evidence, concluded that the so-called "official reports" * * * "were, if not exclusively, certainly principally, the grounds of the alleged false representation covered by the proof," and reversed the cases.

Upon the second trial—which is now before this court for review—the parties waived jury and the issues of both law and fact were submitted to the court, where judgment again went for plaintiffs. The record establishes that in September, 1891, and February, 1892, the comptroller sent warning letters to the associations' officers (to which reference is made later in this brief), and that some of the published reports complained of were made *prior* and some *subsequent* to that time. The findings of the trial court therefore deal with the nature and extent of the liability *before* and *after* the receipt of those letters; and, also, the liability for the publication

of *statements attested* by the directors and those which they permitted the officers to make and publish *without their attestation.*

The record establishes that the director, Yates, attested official reports both before and after the comptroller's letter; that those attested by Director Thompson were before and those attested by Director Hamer were after that time.

Director Hamer was not a witness in the cases, having died some years previous.

Directors Thompson and Yates testified they had nothing to do with the management of the Bank; had positively no knowledge as to the conditions of its affairs, and accordingly, contend that the reports made by them (which are admittedly untrue) were not made with knowledge of their falsity.

Plaintiffs contend: (1) That as to reports made prior to the receipt of the comptroller's letters defendants knew they had no actual knowledge concerning the matters therein stated (for if their testimony be true, knowledge was impossible), yet they gave out the reports as positive and unqualified statements of facts susceptible of knowledge, and which it was their duty to know; that even if they believed the statements to be true they were guilty of knowing misrepresentation in passing off their opinion or belief in the guise of positive knowledge; or of making the reports recklessly.

(2) That subsequent to the comptroller's letters it became the directors' imperative duty to at once enter upon the performance of their duties; that if they obeyed, they knew the Bank's condition; if not, they are charged with such knowledge as the performance of duty would have given; and thereafter are conclusively presumed to know the untruthfulness of the reports.

(3) That they knew these untrue reports were being published by the officers of the Bank and are therefore liable, whether they personally attested them or permitted and assented to their publication without such attestation.

(4) That the evidence sustains the finding that subsequent to the comptroller's letters the directors had actual knowledge of the Bank's condition and of the publication of untrue official reports.

In determining liability the trial court found, in response to request for special findings made by defendant Thompson, that the defendant (Trans., p. 27) "failed to perform his duties as a director * * * in failing to personally assist his fellow directors in managing and superintending the business of such bank, and to examine the loans and securities thereof, and to see that the general condition of the Bank correspond with its books, and to see that only good bills receivable were entered upon the Bank's books and its statements, and to see that the assets which were worthless or of little value were charged off," and that while said director "had no actual, personal knowledge of the truth or falsity of the reports made to the comptroller, attested by him," * * * yet "in attesting such reports" * * * "the defendant relied upon the statements made to him by the president and cashier of the Bank, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports, and that the same were attested recklessly and without performing his duties, * * * and in this respect the court finds that the same were not made in good faith."

As to the official reports published *subsequent* to the comptroller's letters, the court, in response to defendants' requests for special findings, found that the attesting directors knew said reports "contained material false representations of the financial condition of said Bank, and were, in fact, false and untrue"; and as to the non-attesting directors, that they "had knowledge and knew" that official reports of the Bank's condition "were being published in the newspapers"; that they "had knowledge and knew said statements * * * contained material false representations of the financial condition of said Bank, and were, in fact, false and untrue, * * *

and with knowledge of all the matters and facts aforesaid they, and each of them, *knowingly* permitted, assented to and allowed the same to be made" and "published" by the officers of the Bank (Trans., pp. 44, 45, 46); that the reports represented the Bank to be sound, solvent and prosperous, when it was, in fact, at all times insolvent (Trans., p. 46); that its losses at all times greatly exceeded its capital stock; that it, in fact, never had any capital stock, undivided profits or surplus, and when it closed its doors its liabilities exceeded its assets by more than a million dollars (Trans., p. 45).

It is thus apparent that the trial court applied the rule of liability prescribed by Sec. 5239 *supra*, as construed by this court in *Yates et al. v. Jones National Bank*, 206 U. S. 158, and *Thomas v. Taylor*, 224 U. S. 73.

It is quite as apparent that the state supreme court misconceived the import of those decisions and decided these cases upon the theory that to incur liability directors must personally attest the report upon which such liability is predicated, and must have actual personal knowledge of the falsity of the statement.

In speaking of the first decision of the Nebraska supreme court in these cases, Mr. Justice White (now Mr. Chief Justice White) said:

> "The doctrine, as we have seen, upon which the court below rested its judgment, was that directors of a national bank who merely negligently participated in and assented to the making and publishing of an untrue official report * * * were civilly liable to any one deceived to his injury by such report. Indeed, in one respect, the ruling below went further than this, since it was, in substance, decided that, despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable * * *"

and concluded that to entail liability "proof of something more than negligence is required; that is that the violation must 'in effect,' be intentional."

The state supreme court's error was perhaps largely due to its misunderstanding of the words "knowingly," and "in effect

intentional." It construed the former as necessarily implying the existence of *actual personal knowledge* and the latter as necessitating the existence of a willful intent to injure another —excluding the consideration of gross recklessness and deliberate violation of duty.

It is now made clear in the opinion of Mr. Justice McKenna (*Thomas v. Taylor, supra*) that "proof of something more than negligence" does not require "proof of something more than recklessness," and that "there is 'in effect' an intentional violation of a statute" where a director deliberately refuses to do his duty.

This error into which the state court fell is shown in the opinion of Hamer, J. He says (Trans., p. 52):

> "A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable * * * for the frauds and wrongs of the officers of the bank unless he has *personal knowledge* thereof, or *participates* in such fraudulent acts." * * * (Trans., p. 55). "The plaintiffs having failed to allege and prove that the defendants *personally knew of*, or *personally participated in*, the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover." (93 Neb. 126-130.)

To disclose its utter failure to grasp the issues or apply the correct measure of responsibility, we quote further from the opinion:

> "These cases were taken on error to the supreme court of the United States where our judgments were reversed * * * where it was held that plaintiff's petitions were insufficient to charge the defendants with a common law liability for fraud and deceit" (Trans., p. p. 50).

That

> "Plaintiffs amended their petition by interlineation and thereby sought to change the cause of action so as to avoid the federal question," but that defendants "contend * * * that the amendments above mentioned were wholly insufficient to change the plaintiff's cause of

action; that they still charge a violation of the national banking act"; and that the "interlineations * * * consisted of some slight amplification of the statements contained in the original petition," but "contained no material additional statements of fact and the petition charged the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery."

"By the amendment plaintiff attempts to charge that the defendants knowingly and fraudulently, and with intent to deceive the plaintiff, made such statements, and that they thereby induced the plaintiffs to become depositors in the Capital National Bank. * * * Each of the defendants demurred. The demurrers were overruled. * * * It is probable the demurrers should have been sustained." (For what reason we are not advised) (Trans., p. 50).

The opinion concludes that branch of the discussion with the statement:

"It is sufficient to say that we are of the opinion that the amendments in no way changed the nature of the plaintiff's causes of action; and, unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit."

Coming then to a discussion of the nature of the liability established by Sec. 5239, *supra*, the opinion continues (p. 126):

"A *knowledge must be brought home* to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has *personal knowledge* thereof, or participates in such fraudulent acts * * * (Trans., p. 52). It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of *Briggs* v. *Spaulding*" (Trans., p. 53).

And concludes that,

> "The plaintiffs having failed to *allege* and *prove* that the defendants *personally know* of or *personally participated* in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases they are not entitled to recover" (Trans., p. 55).

Speaking of the liability of the defendant Thompson (Trans., p. 126), the opinion says:

> "While it may be said that for a *considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned*, still, so far as the record shows, defendant Thompson did not *personally participate* in any of the acts of which the plaintiffs complain" (Trans., p. 52).

The concurring opinion of Letton, J. (Trans., p. 55), shows he also misconceived the decision of this court. While the cases were pending upon rehearing he realized his error and endeavored to rectify it, but without avail—although without his concurrence there could have been no reversal.

One familiar with this record can not but sympathize with the lamentations of Sedgewick, J., in his dissenting opinion (93 Neb. 132):

> "It seems to me wonderful that any member of this court should so completely misunderstand the opinion of that (United States supreme) court" (Trans., p. 62).

ASSIGNMENTS OF ERROR.

The assignments of error are twenty-five in number. The plaintiffs in error, however, respectfully request the court that if errors "not assigned or specified" are essential to a reversal of the judgment that the court, under Sec. 4, rule 21, will act upon such omitted or non-assigned errors.

The Assignments to be Considered Are as Follows:

1. The supreme court of the state of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants, or either of them.

3. The court erred in deciding that "where, by the federal statutes concerning national banks, a responsibility is made to arise against the directors from its violation knowingly proof of something more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The court erred in that it has violated and disobeyed the mandate and decision of the United States supreme court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States supreme court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States supreme court, and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon section 5239 Revised Statutes of the United States in conflict with and opposition to the decision of the United States supreme court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and com-

mand of the comptroller of the currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The court erred in deciding that in order to bring appellants within the rule of liability announced by the supreme court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

7. The court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants, and each of them, under sections 5211 and 5239, Revised Statutes of the United States.

8. The court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The court erred in deciding that the provisions of section 5239, Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily and wholly outside of the requirements of the National Banking act, and not pursuant to the call of the comptroller of the currency or other proper official.

10. The court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States supreme court in this case so decided.

11. The court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants, and each of them, because its decision is based upon an erroneous interpretation and construction of section

5239, Revised Statutes of the United States, and the decision of the United States supreme court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements; "that knowledge must be brought home to the director that he is deceiving the individual wronged, and may thereby occasion a loss to him," or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said section 5239, Revised Statutes of the United States.

12. The court erred in not deciding that after receiving the letters from the comptroller of the currency, shown by the record, it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the bank; and that their deliberate refusal or failure to so do constituted "in effect" an intentional violation of section 5239, Revised Statutes United States, and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under section 5239, Revised Statutes of the United States, to depositors of the bank for all damages sustained in consequence of such violation, even if they did not know the statement to be false.

13. The court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239, Revised Statutes of the United States.

14. The court erred in deciding that appellants, Yates and Hamer, did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the comptroller of the currency, shown in the record.

15. The court erred in deciding that the appellants, and each of them, did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agents and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the comptroller of the currency, shown in the record.

16. The court erred in not deciding that where a director of a national banking association, who had paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the comptroller of the currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association, and that his failure to do so is gross negligence and recklessness, or a deliberate refusal to perform such duty, and constitutes an intentional violation of section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239, Revised Statutes of the United States, in his personal and individual capacity for all damages

which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The court erred in not deciding that under the findings of fact of the trial court in this case appellee's judgment should have been affirmed.

18. The court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under section 5239, Revised Statutes of the United States, and as such are supported by the evidence.

19. The court erred in deciding that in order to incur liability under section 5239, Revised Statutes of the United States, for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The court erred in not deciding that by their attestation of the official published report shown by the record the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation in effect knowingly made and liable under section 5239, Revised Statutes of the United States.

21. The court erred in deciding that the allegations of appellee's petition are insufficient to sustain the judgment against appellants under section 5239, Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because the opinion of Hamer, J., as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court—Letton, J., having

only concurred on the law—and therefore the findings of fact of the trial court have not been reversed or modified, but stand approved and affirmed by this court.

23. The court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court, as provided in article VI, section 2 of the constitution of the state of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the fourteenth amendment to the Constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing, and when the final order was made herein there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The court erred in not deciding that appellee's petition states a cause of action against appellants, whether tested by the requirements of the National Banking act or the common law action for fraud and deceit, and in assuming that the United States supreme court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud or deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was drawn in question the construction and application of the statutes of the United States, and the decision of said court was against the right, title and privileges especially set up in said suit and claimed by appellee under said statutes.

Some of the assignments of error cover points included in part in others, and we believe we can present the issues more methodically and logically by departing from the order and manner of their assignment.

STATEMENT OF POINTS RAISED IN BRIEF.

Thus considered, our contentions may be stated as follows:

(1) Plaintiff's petitions state a cause of action whether tested by Sec. 5239, Rev. Stat. U. S., or the common law.

Thomas v. *Taylor*, 224 U. S. 73.

Davis v. *Central Land Co.* (Ia.), 143 N. W. 1073.

(2) The provisions of Sec. 5239, Rev. Stat. U. S., requiring a "knowing" violation in order to subject a director to the liability therein imposed do not demand proof of an "intentional" violation, but a violation "in effect" intentional. And there is "in effect" an intentional violation of the statute when a director deliberately fails or refuses to examine that which it is his duty to examine.

Thomas v. *Taylor*, 224 U. S. 73.

(3) While bank directors may delegate the performance of ministerial duties to subordinate officers, agents or servants under their supervision and direction, they may not abdicate their trust as directors by committing the management of the affairs of the association to others, and thus avoid responsibility and liability. It is their duty to actually, actively and diligently manage its affairs, and from this obligation they cannot absolve themselves; and they will be held to such knowledge as the performance of that duty would give—or conversely, they will not be absolved from liability on account of ignorance which could only result from gross negligence, wilful recklessness or deliberate refusal to perform their duty.

Bank v. *Drake*, 29 Kans. 236.

Hall v. *Henderson*, 126 Ala. 495, 28 So. 544.

Society v. *Underwood*, 9 Bush 609.

Rankin v. *Cooper*, 149 Fed. 1010.

Warren v. *Robison*, 19 Utah 289, 57 Pac. 287, 75 Am St. 734.
Auten v. *U. S. National Bank*, 174 U. S. 147, 19 Sup. Ct. 637.
McClure v. *People*, 27 Colo. 371, 61 Pac. 617.
Henry v. *Dennis* (Maine), 85 Am. St. 388-399, note.
Solomon v. *Bates*, 118 N. C. 311, 54 Am. St. 725.
Houston v. *Thornton*, 122 N. C. 365, 65 Am. St. 699.
Marshall v. *F. & M. Savings Bank*, 85 Va. 676, 17 Am. St. 84, note, p. 100.
Fletcher v. *Eagle* (Ark.), 109 Am. St. 100.
Martin v. *Webb*, 110 U. S. 7, 7 Sup. Ct. 428.
Bank v. *Caperton*, 87 Ky. 306, 88 S. W. 885.
Williams v. *McKay*, 40 N. J. Eq. 190, 11 Am. & Eng. Corp. cases 613.
Delano v. *Case*, 121 Ill. 247, 12 N. E. 676.
Seale v. *Baker*, 70 Tex. 283, 7 S. W. 742.
Hun v. *Cary*, 82 N. Y. 71.
Huntington v. *Attrill*, 118 N. Y. 365.
Uttley v. *Hill*, 155 Mo. 632, 49 L. R. A. 323, 78 Am. St. 569.
Briggs v. *Spaulding*, 141 U. S. 132.
Gerner v. *Mosher*, 58 Neb. 135.

(4) That by the act of "attesting" as "correct" an official report of the financial condition of a national bank directors thereby affirm and represent that they have actual knowledge of the bank's condition and of the truthfulness of the report, as distinguished from mere opinion or belief, and

(a) If they make or "attest" untrue statements without knowledge of whether they are true or false, they are guilty of false representation in effect knowingly made.

(b) If they make or attest such statement recklessly without knowledge of its truth or falsity, or conscious that they have no actual knowledge of its truthfulness, they are guilty of a false representation "knowingly" made.

(c) So, where directors, who through gross neglect of duty or reckless inattention have not participated in the management of the bank's affairs, and are ignorant of its financial condition, make a representation of such condition, and they do not know whether it be true or false, and it is actually untrue, they are guilty of a false representation, knowingly made.

Boyd v. *Schneider*, 131 Fed. 223.
Vincent v. *Corbett*, 94 Miss. 46, 21 L. R. A. (N. S.) 85, 20 *Cyc.* 24-29.
Cooper v. *Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360.
Lehigh Zinc & Iron Co. v. *Bamford*, 150 U. S. 665, 14 Sup. Ct. 219.
Hindman v. *First National Bank*, 112 Fed. 924.
Taylor v. *Commercial Bank*, 68 App. Div. (N. Y.) 460.
Haddock v. *Osmer*, 153 N. Y. 604, 47 N. E. 923.
Rothschild v. *Mack*, 115 N. Y. 7, 21 N. E. 726.
Cole v. *Cassidy*, 138 Mass. 437, 52 Am. Rep. 284.
Chatham Furnace Co v. *Moffat*, 147 Mass. 403, 18 N. E. 168.
Gund Brewing Co. v. *Peterson*, 130 Ia. 301, 106 N. W. 741.
Thomas v. *Taylor*, 224 U. S. 73.
Joines v. *Combs* (Okla.), 132 Pac. 1115.
Arrowsmith v. *Nelson* (Wash.), 132 Pac. 743.
Grant v. *Ledwidge* (Ark.), 160 S. W. 200.
Plate v. *Blades* (N. C.), 79 S. E. 608.
Davis v *Central Land Co.* (Ia.), 143 N. W. 1073.
Gerner v. *Mosher*, 58 Neb. 135.
Morse on Banks and Banking, Secs. 132-3.

(5) That after receiving the letters from the comptroller of the currency, shown by the record, it was the directors' duty to enter upon the exercise of their functions and acquaint themselves with the affairs of the association, and their failure to do so was gross negligence and recklessness, or a deliberate refusal to perform their duty and constituted

an intentional violation, actionable under Sec. 5239, Rev. Stat. U. S.

(a) And if, thereafter, directors make or attest statements of the associations' financial condition, or permit its officers, agents or servants to do so, and such statements are in fact false and untrue, they are liable in their personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not the directors had actual personal knowledge of the falsity.

(b) That upon receipt of the letters aforesaid it was the duty of the directors to acquaint themselves with the affairs of the association, and they are presumed to have such knowledge of its condition as a performance of their duty would have given them.

Thomas v. *Taylor*, 224 U. S. 73.

Chesbrough v. *Woodworth*, 195 Fed. 875.

C., St. L. & P. R. Co. v. *Nash*, 1 Ind. App. 298, 27 N. E. 564.

(6) It follows that the state court erred in deciding that to entail liability under section 5239 for the publication of false official reports of the bank's condition, it must be shown that the director had actual knowledge of its falsity—that knowledge must be brought home to the director that he is deceiving the individual wronged, and may thereby occasion a loss to him—or that they personally participated in the act complained of.

(7) The state court, in testing the sufficiency of the evidence to sustain recovery, having weighed it under an erroneous interpretation of section 5239, *supra*, and a misconception of the decision of this court in these cases, it follows its conclusions in that regard are erroneous. Measured by the correct rule of responsibility, the evidence establishes no-

doubted liability, and the finding and judgment of the trial court should be affirmed.

Yates v. *Jones National Bank*, 93 Neb. 137.
Black v. *Epstein*, 221 Mo. 286.
Stuart v. *Hayden*, 169 U. S. 1, 18 Sup. Ct. 274.
F. & M. National Bank v. *Mosher*, 68 Neb. 724.

(8) The judgments of the supreme court of Nebraska were not concurred in by a majority of the duly elected and qualified judges of said court, as required in article VI, section 2, of the constitution of Nebraska—wherefore plaintiffs in error have been deprived of their property without due process of law and denied the equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States.

ARGUMENT.

POINT I.

The Petitions State a Cause of Action Whether Tested by Sec. 5239, supra, or the Common Law.

It would seem needless to discuss this proposition. A mere reading of the petitions will suffice. We refer the court to the complaint in the case of *Thomas* v. *Taylor*, 224 U. S. 73. A comparison of that complaint with the petitions in these cases will disclose that the latter contain every element necessary to state a cause of action, whether tested by the federal statute or the common law.

See also *Davis* v. *Central Land Co.* (Ia.), 143 N. W. 1073.

The statement in the majority opinion that our petitions do not charge *scienter* can only be accounted for on the assumption that they were not carefully examined.

POINT II.

The Provisions of Sec. 5239, Rev. Stat. U. S., Requiring a Knowing Violation in Order to Subject the Director to the Liability Therein Imposed, do Not Demand Proof of an Intentional Violation But a Violation "in Effect" Intentional. And There is, "in Effect," an Intentional Violation of the Statute Where a Director Deliberately Fails or Refuses to Examine That Which it is His Duty to Examine.

In support of this proposition it is unnecessary to do more than quote briefly from the opinion of Mr. Justice McKenna in *Thomas* v. *Taylor*, *supra*, a case identical in its facts with the ones at bar:

> "Let us consider the argument of plaintiffs in error. It is that the statement was not voluntary, having been made under the command of the national banking act, and therefore an element of the action of deceit is wanting; and that such act requires 'proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice.' *Yates* v. *Jones Nat. Bank* and other cases are cited to support the contention. The contention goes beyond what was said in *Yates* v. *Jones Nat. Bank*. The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required,—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the comptroller of the currency that $194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This 'was a direct warning to them,' as the trial court said, 'by the bank examiner and comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful.' They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and author-

ity cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

POINT III.

While Bank Directors May Delegate the Performanec of Ministerial Duties to Subordinate Officers, Agents or Servants Under Their Direction, They May Not Abdicate Their Trust as Directors by Committing the Management of the Affairs of the Association to Others and Thus Avoid Responsibility and Liability. It is Their Duty to Actually, Actively and Diligently Manage Its Affairs, and From This Obligation They Cannot Absolve Themselves, and They Will be Held to Such Knowledge as the Performance of That Duty Would Give—or Conversely, They Will Not be Absolved From Liability on Account of Ignorance Which Could Only Result From Gross Negligence, Wilful Recklessness or Deliberate Refusal to Perform Their Duty.

It is the duty of directors to actively and actually manage the affairs of the bank. Directors of a bank are its only visible representatives. It is through them alone it manifests its existence. Persons dealing with the bank meet only this visible representative, and have a right to presume they are doing their duty.

Bank v. *Drake*, 29 Kans. 236. Opinion by Justice Brewer.

> "Bank *directors* are *not mere agents*, like cashiers, tellers, and clerks. They *are trustees for the stockholders;* and as to their dealings with the bank they not only act for it, and in its name, but, in a qualified sense, are the bank itself. It is the duty of a board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The *community have the right to assume that the directory does its duty*, and to hold them personally liable for neglecting it. Their *contract is not alone with the bank.* They *invite the public* to deal with the corporation, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and, if they fail

in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation."

Hall v. *Henderson*, 126 Ala. 495, 28 So. 544. Quoting with approval from *Society* v. *Underwood*, 9 Bush. 609.

We invite special attention to *Rankin* v. *Cooper*, 149 Fed. 1010. It was an action against directors of a bank by stockholders and not by depositors. Speaking of the duties of directors, it declares, in substance, that while they are not expected to watch the daily routine of every days business, they should have a general knowledge of the manner in which the business is conducted, upon what securities its larger lines of credit are given, generally know of and give direction to its important and general affairs, and cause to be made frequent examinations of its resources and liabilities.

Warren v. *Robison*, 19 Utah 289, 57 Pac. 287, 75 Am. St. 734, was an action by stockholders against directors of a bank—agents of their own selection—for an accounting and damages occasioned by reason of negligence in the management of the bank. The opinion by Bartch, C. J., contains an exhaustive review of the authorities. It is an able discussion of the propositions for which we contend. We can present no better argument than to quote from the opinion (75 Am. St. 737-8):

"It is not contended that the directors knowingly permitted any violation of law in any banking transaction, or that they were dishonest in the administration of the bank's affairs, but it is insisted that they wrongfully intrusted the exclusive management and control of the banking business to the cashier and manager, and were negligent in the performance of the duties imposed upon them by law. The directors were not intended to be mere figureheads without duty or responsibility. The manifest design of the law-makers was that the officers, elected by the board, were to look after and attend to the details of business, and generally to conduct ordinary business matters. They are the means with which the directors are to administer the affairs of the bank. It is, therefore, the right and duty of the directors to take upon themselves the management of the institution, and to exercise and

maintain a supervision over all business operations upon the skillful and wise conduct of which depend the prosperity of the institution and the safety of those dealing with it. This duty of management and supervision they cannot shift upon the officers, and such duty is imposed as to no department of the banking business more certainly than that of making loans and discounts. *Morse on Banks and Banking*, sec. 117.

(p. 739) "While such directors are not required to watch the ordinary routine of business or observe the exact state of each day's accounts, still they are bound to possess a general knowledge of the manner in which the business is transacted, and of the character of the transactions, and to maintain such a degree of vigilance over, and intimacy with, the business as will enable them to know to whom, and upon what security, the large lines of credit are given. Especially is this so as to large loans and discounts, or matters at once affecting the stability and prosperity of the bank, and the safety of depositors.

"The duties of officers appointed by the board are of an executive character and relate mainly to details, and doubtless the making of a loan or discount in any considerable amount, or the transaction of other business of moment, should be preceded by an authorization from the board. The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution, incompetency, or gratuitous service, or that the management of the banking business was in the hands of the cashier or other executive officer.

(p. 740) "'Where there is a duty of finding out and knowing, *negligent ignorance has the same effect in law as actual knowledge*. While the directors of a corporation may and must, as already stated, commit the details of its business to inferior officers, this does not absolve them from the duty of maintaining a reasonable supervision, and if such inferior officers waste the assets of the corporation, it is conceded that the directors can not escape liability on the ground that they did not know of the wrongdoing, provided that it appear that their ignorance was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances.' *Thompson on Corporations*, sec. 4108. And their liability does not depend upon statute. 'The liability of directors to the corporation for damages

caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed' (citing authorities). * * *

(p. 741) "By taking such positions, although without compensation, directors invite confidence that they possess at least ordinary knowledge and skill, and that they will do all that men of reasonable prudence and caution ought to do to protect the interests of stockholders and depositors, or those dealing with the institution. The public, therefore, have a right to suppose that they are men of high character for integrity, of reasonably sound judgment, and of such good business sense as is necessary to conduct the affairs of the bank wisely and with reasonable safety. Acting upon this supposition, the public trust their deposits with the bank in the confidence that the important duty of management and direction will be discharged by the directors. * * * (p. 742) Under this rule it is necessary for them to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is therefore incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution, and to supervise and direct its operations. * * *

(p. 744) "So, in *Williams* v. *McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, where the observations of Lord Chancellor Hardwicke and Hatherley were referred to with approval, Mr. Chief Justice Beasley, delivering the opinion of the court, said: 'I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then, when disaster to the innocent and helpless *cestuis que trustent* ensued, stifle all complaints of their neglects by saying, We did not do these things, and we know nothing about them.' And again he said: 'The misconduct in question was manifested in frequent, glaring instances, and it is not easy to imagine how they, or some of them, failed to be discovered by these board of managers on the supposition which, in their favor the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question *can not be regarded* by the court *as isolated instances*, for

they run through the whole period of the life of this institution, and thus evince a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference with regard to the security of the money held in trust by them.' * * *

"So in 3 *Thompson on Corporations*, section 4108, with reference to the *liability of directors for negligent ignorance of corporate affairs*, it is said: 'The true theory disregards the subtle and impracticable distinction between ordinary negligence and inattention and gross negligence and inattention, and holds directors responsible for not knowing that of which they had the means of knowledge; and while relieving them from the responsibilities of insurers, ascribes liability on the ground of ignorance of that which could have been discovered by that good business diligence which is incumbent upon them.' (Citing a large number of authorities in support of this proposition.) * * * (p. 752) Some of the directors, as is indicated by their statements on the witness stand, seem to have acted upon the theory that by the *appointment of executive officers* in whom they had confidence and who were reputed honest, they *discharged* their *duties as directors;* that the burdens and responsibility of management and supervision were then shifted to such officers. As we have seen, *such is not the law*. The *directors* were *not mere ornaments* to the bank *to lure public confidence*. When they became directors, the law cast upon them the important duties of supervision and direction, which they *could not delegate to the executive officers*, and therefore the stockholders and depositors had the right to intrust the institution with their money in confidence that the directors would perform those duties. When sued for losses which resulted from careless or unlawful acts, and unfortunate transactions, they *can never set up as a defense* that they *did not examine the books or accounts* of the bank, *knew nothing about the loans or discounts, were ignorant of banking business*, or that they *intrusted* the *management* and *supervision* of *the business to the executive officers in whom they had confidence*. The welfare of the public and the interests of banking institutions alike forbid this."

This language could be no more apt had it been intended to apply to the conduct of the directors in the cases at bar.

The Duties of Directors Considered in Connection With the Presumption as to Their Knowledge of the Bank's Affairs, and the Right of Depositors to Rely Thereon.

The duties of directors are to supervise and direct the affairs of the bank. That they can leave this to the executive officers, and then, when disaster follows, avoid liability on the ground of ignorance, is a notion which must be repudiated.

> "Where there is a duty of finding out and knowing, negligent ignorance has the same effect, in law, as actual ignorance."
>
> *Warren* v. *Robison*, *supra*.

> "This court said by Mr. Justice Harlan, in *Martin* v. *Webb*, 110 U. S., at page 15, 3 Sup. Ct. 433: 'Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of those officers. They have something more to do than from time to time to *elect the officers of the bank and to make declaration of dividends*. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they *may be presumed to have known* in any *contest between the corporation and those* who are justified by the circumstances in *dealing with its officers* upon the basis of that course of business.'"
>
> *Auten* v. *U. S. National Bank*, 174 U. S. 147, 19 Sup. Ct. 637.

The record in these cases proves that the defendant directors did nothing but to elect the officers of the bank and declare dividends.

In *McClure* v. *People*, 27 Colo. 371, 61 Pac. 617, plaintiff in error was convicted of statutory larceny in that, as president of a bank, he assented to the reception of deposits, knowing at the time that the bank was insolvent. The statute provided, in substance, that if the president of any bank should receive or assent to the reception of any deposit of money in such bank after he shall have had knowledge of the fact that such bank is insolvent, he shall be deemed guilty of larceny. The defendant "offered to show that he

did not reside in the town in which the bank was doing business, *gave little or no attention to it, that the actual management and control were in the hands of others, and that he did not possess any actual knowledge whatever as to its condition; * * * that he was an illiterate man, possessing no knowledge of banking or bookkeeping*, and that he was totally unable to determine from the books of the bank its condition, even if he had made an examination with that purpose in view; that he was unacquainted with the people of the town of Rico and with the value of the securities held by the bank." Campbell, C. J., who wrote the opinion of the court, said:

> "The question then is, may a banker or officer of a bank exempt himself from criminal liability under the statute by intentionally absenting himself from the bank and abstaining from participating in its management and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that if he had given attention to its business his lack of fitness or unfamiliarity with banking methods would not enable him to ascertain its true condition. The mere statement of the proposition, it seems to us, is its own refutation."
>
> (Syl. par.) "An officer of a bank can not relieve himself from criminal liability for receiving deposits when the bank was insolvent by intentionally absenting himself from the bank and abstaining from participating in its management and purposely neglecting to avail himself of means of information as to its financial condition, or by showing if he had given his attention to its business *by reason* of his *lack of fitness and ignorance of banking methods*, he could not have ascertained its true condition."

In *Hall* v. *Henderson*, 126 Ala. 495, 28 So. 544, the court said:

> "The doctrine is stated by *Thompson on Corporations*, (Sec. 3308) to be: 'It is a sound view, at least insofar as the question respects the rights of third parties, that the directors of a corporation are in law *conclusively presumed* to know its condition, its business, its receipts and expenditures and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. *The reason of this is that it is their duty to know these things in the exercise of their official functions.* This doctrine is said to be one founded in

public policy, essential to the safety of third parties in their dealings with corporations, and to the protection of stockholders interested in the welfare and safe management of corporations.' Justice Brewer, now of the supreme court of the United States, while a member of the supreme court of Kansas, in the case of *Bank v. Drake*, 29 Kan. 326, said: '*The directory, as has been said, is the visible representation of the bank. Persons dealing with it meet only this visible representation and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its conditions and business.* On the other hand, the stockholders and depositors—the persons who are pecuniarily interested in the safe management and prosperity of the bank—look to the directors as the chosen guardians of their interests, and have a right to demand of them that they watch over all those interests in their *minute details. So that all of these parties have a right to assume that the directors know all the transactions, business and conditions of the bank, because they ought to know them and because otherwise they do not discharge their full duties to these various parties.*'"

Quoting with approval from *Society v. Underwood*, 9 Bush. 609, the court further said:

"It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. *They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements and statements of the bank, and which would have come to their knowledge except for their* GROSS NEGLECT OR INATTENTION. *It is not necessary in many cases to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidence of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were* GROSSLY NEGLIGENT OR WILFULLY CARELESS IN THE DISCHARGE OF THEIR DUTIES."

In note to *Henry v. Dennis* (Maine), 85 Am. St. 388-389, it is said:

"Before making representations as to the condition of the corporation, as inducements to take stock therein or

> extend credit thereto, it is the duty of the officers to use reasonable diligence to know that the representations are true, and they will be *presumed to have used such diligence and to possess the knowledge which its exercise would bring them.* * * * If false and fraudulent statements are put forth, under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true and they are liable for damages sustained by anyone dealing with the corporation relying on the truth of such reports. *Solomon* v. *Bates*, 118 N. C. 311, 54 Am. St. 725; *Houstin* v. *Thornton*, 122 N. C. 365, 65 Am. St. 699."

Rankin v. *Cooper*, 149 Fed. 1010, seems to us squarely in point, and reviews the leading cases on the question. In substance, it states the rule to be that while directors are not expected to watch the daily routine of every day's business, they should have a general knowledge of the manner in which the business is conducted, upon what securities its larger line of credits is given, generally know of and give direction to its important and general affairs, and cause to be made frequent examinations of its resources and liabilities. They must exercise reasonable control and supervision over the bank's affairs and use such care and diligence in ascertaining its affairs and conditions as an ordinarily prudent and diligent man would do with his own affairs. That if they knew or by the *exercise of ordinary care should know*, any facts which should awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the danger to be avoided is required, and a failure to exercise such care makes them responsible. "*Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them*" (p. 1013).

> "And the mere fact that a director does not attend to his duties by reason of continued ill health or other business engagements does not necessarily relieve him from liability. (p. 1016) * * * He has no right to hold on to the position and at the same time decline its corresponding liabilities. By doing so, he invites others to trust the bank on the strength of his name and in such case he ought to bear his share of the consequences growing out of such a dual situation."

In this case the directors were held to have been negligent in the conduct of the bank's affairs. One of the defendants claimed to be an invalid and unable to give the bank's affairs proper attention, although it appeared he attended forty-six meetings in 1890, thirty-eight in 1891, and forty-eight in 1892, while the directors of the Capital National Bank held *fifteen regular and two special meetings* during the nearly *nine years of its existence*, of which Directors *Thompson and Hamer attended nine each and Director Yates fourteen*. It was also held that where directors became aware, through the report of a committee of their own number, or by a *letter from the comptroller*, that the Bank had been making excessive loans, but took no effective steps to prevent loss, they would be held jointly and severally liable for all losses sustained by the Bank which might have been prevented by a proper discharge of their duties, upon the principle that their attention having been called to the matter *they could not thereafter plead ignorance*.

(Syl. 2) "Ignorance on the part of directors of a bank of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited."

(Syl. 3) "Directors of a bank owe a duty to its depositors and in the security of possible breaches of this duty the rigid rules which govern trustees have been applied. To exculpate a director, it is not sufficient that no actual dishonest action be shown or that he cannot be proved to have been influenced by interested motives."

(Syl. 6) "Bank directors are liable to the depositors for losses resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, and from not being properly protested or enforced by appropriate proceedings. *The fact that any particular director did not know of these wrongdoings*

will not exonerate him because he could not be without such knowledge except from his own negligence."

Marshall v. *F. M. Savings Bank*, 85 Va. 676, 17 Am. St. 84; note, p. 100.

See also *Fletcher* v. *Eagle*, 74 Ark. 585, 109 Am. St. 100.

In *Martin* v. *Webb*, 110 U. S. 7, 3 Sup. Ct. 428, this court said:

"Directors cannot, in justice to those who deal with the bank, *shut their eyes* to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends. That which they ought, by *proper diligence*, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In *Marshall* v. *F. & M. Savings Bank of Alexandria*, 85 Va. 676, 17 Am. St. 85, previously referred to, it was held that directors hold to stockholders, depositors and creditors the relation of trustees to *cestui que trustent*, and as such are personally responsible for fraud and loans resulting from negligence and inattention to their duties, even though they be not guilty of bad faith and are ignorant of the affairs of the bank.

To the same effect are:

Bank v. *Caperton*, 87 Ky. 306, 88 S. W. 885;

Williams v. *McKay*, 40 N. J. Eq. 190, 11 Am. & Eng. Corp. Cases 613;

Delano v. *Case*, 121 Ill. 247, 12 N. E. 676;

Seale v. *Baker*, 70 Texas 283, 7 S. W. 742.

In *Hun* v. *Cary*, 82 N. Y. 71, suit was brought by the receiver of a savings bank against directors to recover damages because of misconduct in the management of the affairs of the bank. Earl, J., speaking of the duties which directors owe the bank and its depositors, said:

"Few persons would be willing to deposit money in savings banks or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has a right to expect, that the trustees or directors, who are chosen to take his place in the management and control of the property, will *exercise ordinary* care and prudence in the trusts committed to them; the same degree of care and prudence that men, prompted by self interest, generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such degree of care and prudence, and it is a *gross breach of duty—crassa negligentia*—not to bestow them."

"It seems that officers assuming the responsibility and charged with the duties of the management of the business of a corporation are chargeable with knowledge as to matters which are open to observation and legitimately subject to their inspection and control. * * * The officers assuming the responsibility and charged with the duties of management of the business of a corporation, are not supposed to *shut their eyes* to that which is open to observation and legitimately subject to their inspection and control."

Huntington v. *Attrill*, 118 N. Y. 365.

And in the case of *Uttley* v. *Hill*, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. 569, cited in the decision in these cases (206 U. S., p. 158) the court, after reviewing numerous decisions, said:

"Of course, it must not be understood that it is intended to be held that a director can shut his eyes to facts, circumstances and conditions, and then say he did not know what he must have seen if he had used his senses; for such conduct would be fraudulent and wilful disregard of duty."

To require proof of actual personal knowledge is to confer complete immunity upon directors; for knowledge, like intent, is rarely susceptible of positive proof. The rule deducible from the decisions is to charge directors with knowl-

edge of the things it is their duty to know and of which they could not be ignorant but for gross negligence, recklessness or deliberate refusal to act. Otherwise, they can escape all responsibility and liability by purposely refraining from participation in the management of the association.

The case of *Briggs* v. *Spaulding*, 141 U. S. 132, cited in the opinion of Hamer, J., in these cases (93 Neb. 128) does not sustain his conclusion, and is clearly distinguished by Norval, J., in *Gerner* v. *Mosher*, 58 Neb. 135-153, wherein it is said:

> "That the result probably would have been different in *Briggs* v. *Spaulding*, *supra*, if that suit had been grounded as the present one, or had been brought by a creditor to recover loss occasioned by his having been induced to make deposits in the bank through false statements as to its financial condition made to the comptroller, is clearly inferrable from the following excerpt from the majority opinion prepared by Chief Justice Fuller: 'The theory of this appeal is that the defendants are liable, not to stockholders nor to creditors as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants in fact, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations. * * * Treated as a cause of action in favor of the corporation, a liability of this kind should not be lightly imposed in the absence of any element of positive misfeasance and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part.'
>
> "A bare majority of the court concurred in the decision in *Briggs* v. *Spaulding*, *supra*, four of the justices having dissented therefrom. The able dissenting opinion of Justice Harlan filed therein, in which Justices Gray, Brewer and Brown concurred, held that the directors of a national bank could not abdicate their duties and functions, and leave the administration and managements of its affairs solely to the executive officers, but that the law requires of directors 'such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the ob-

ligations they assume, they must do all that reasonable, prudent and careful men ought to do for the protection of the interest of others intrusted to their charge.'"

But even in this case it was said in the majority opinion by Mr. Chief Justice Fuller (141 U. S. 132, 165; 11 Sup. Ct. 924, 935):

> "Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than *officiating as mere figure-heads*. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this *does not absolve them from the duty of reasonable supervision*, nor ought they to be permitted to be *shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention*."

POINT IV.

By the Act of Attesting as Correct an Official Report of the Financial Condition of a National Bank, the Directors Thereby Affirm and Represent That They Have Actual Knowledge of the Bank's Condition and of the Truthfulness of the Report, as Distinguished From Mere Opinion or Belief.

(A) If They Make or Attest Untrue Statements, Without Knowledge Whether They Are True or False, They Are Guilty of a False Representation, in Effect, Knowingly Made.

(B) If They Make or Attest Such Statements Recklessly, Without Knowledge of Their Truth or Falsity, or Conscious That They Have no Actual Knowledge of Their Truthfulness, They Are Guilty of a False Representation, Knowingly Made.

(C) So Where Directors, Through Gross Neglect of Duty, Reckless Inattention, or Deliberate Refusal, Have Not Participated in the Management of the Bank's Affairs, and Are Therefore Ignorant of Its Financial Condition, Make a Representation of Such Condition and They do Not Know Whether it be True or False, and it is Actually Untrue, They are Guilty of a False Representation Knowingly Made, Although They Believed it to be True.

Sec. 5211, Rev. Stat. U. S., requires the association to make to the comptroller not less than five true reports each year

of its resources and liabilities, which shall be attested by the signatures of at least three of the directors, and published in a newspaper in the place where such association is established.

The publication can have but one purpose, and that to give notice to the world of its financial condition. It is designed for the protection of those who do business with the Bank. Depositors have no other source of information, and can look for guidance alone to the published reports.

When depositors entrust their money to the Bank it is with the implied agreement, inherent in the contract of deposit, that the directors will do their duty and conform to the safeguards provided by law.

Boyd v. *Schneider*, 131 Fed. 223.

The law makes it the duty of directors to diligently and honestly manage the affairs of the association and they are presumed to have such knowledge of its affairs as the performance of that duty will give them.

When they "attest" a report as "correct," as was done in these cases, it is equivalent to saying, "we have performed our duties as directors; we know the condition of the affairs of the association entrusted to our care; and we present you a true statement of its resources and liabilities for your information and guidance."

To "attest" means to certify as accurate, genuine and true; to vouch for or certify to (New Standard Dictionary, Webster's International Dictionary).

To "attest" as "correct" is a positive assertion that the report is true within the knowledge of the director, and not a mere certificate of confidence in the employee who made it.

It is a representation that he who makes the statement knows whereof he speaks, and, coupled with the circumstance that it comes from the only one in position to know, it must be accepted as an assertion of actual knowledge, and not mere opinion and belief.

Gerner v. *Mosher*, 58 Neb. 135.

"To bring a case within the principle above stated (requiring proof of scienter), it is not necessary that the party who has made the false statement of fact shall have unqualifiedly declared himself possessed of knowledge, or, in other words, that he shall have asserted in express terms that he knew his statement to be the truth. If a person makes a positive and unqualified false statement of a fact which is susceptible of knowledge, an affirmation of knowledge is implied from the positive character of the statement; and, if he has no knowledge, he is guilty of actual fraud."

Vincent v. *Corbett*, 94 Miss. 46, 21 L. R. A. (N. S.), 85-87, quoting from 14 Am. & Eng. Enc. Law, 2d Ed., p. 99.

"It is well settled that to support an action of deceit based on a false representation a scienter must be proved; that is, the representation must either (1) be false to the knowledge of the party who makes it, or (2) must be made as a positive assertion calculated to convey the impression that he has actual knowledge of its truth when in fact he is conscious that he has no such knowledge. It is generally held too that if the speaker honestly believes his representation to be true he is not liable, an honest mistake or error in judgment being regarded as insufficient grounds on which to base a charge of fraud. But the speaker's belief will not in all cases protect him from liability in an action for deceit, as where he makes the statement recklessly.

"It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent. The rule just stated applies, although the speaker honestly believes that the fact which he represents as existing actually does exist. In such a case it is apparent that he cannot believe in the truth of the statement he makes—that he knows the fact to exist—and the fraud consists in *passing off his opinion or belief in the guise of positive knowledge*. Consequently the speaker is not relieved from liability, although in making the assertion he relies upon trustworthy information."

20 *Cyc.*, pp. 24-29.

"This rule is not an exception to, but an application of, the principle that actual fraud must be shown to sustain an action of deceit; and is not in conflict with the rule requiring a scienter."

20 *Cyc.* 29, note, and cases cited.

Davis et al. v. Central Land Co. et al. (Ia.), 143 N. W. 1073, is one identical in principle with the cases at bar, and contains an able review of the authorities on the question of *scienter*.

The action was one in deceit against the agents of a vendor of real estate for false representation, in stating that the lot purchased by plaintiffs extended to the alley, when it lacked 35 feet or more of doing so.

Speaking of the situation, the court said:

"The size was a matter of definite knowledge and readily ascertainable as distinguished from mere matter of opinion and judgment which might vary, and the assertion that it extended to the alley, if made, carried with it the implied assurance that Trent (a defendant) knew this to be a fact. If the Davises (plaintiffs) are to be believed, he was asked if the lot extended back to the alley and the reason for wanting to know explained, and Trent in answering must have intended to give them to understand that he knew the boundary and that it was as stated. He was showing the lot for the purpose of selling it to them and in so doing they quite naturally would assume that he knew its location. The jury then might have found that Trent did not know whether the premises extended to the alley or not, and yet *asserted as of his own knowledge* that they abutted thereon, and, if so, and plaintiffs were induced thereby to enter into the contract of purchase to their damage, a verdict must have been returned for the plaintiff."

The rule deducible from the opinion upon the authorities cited is:

(1) That the charge of fraudulent intent in actions for deceit is sustained if the misrepresentation is made with knowledge of its falsity or couched in such positive and unqualified terms as to amount to an affirmation of knowledge of the truth.

(2) If such statement is made in such absolute or positive terms as implies knowledge, and the party making it has

no knowledge of its truth, he has knowingly told what is untrue in putting his statement in such form as to amount to an assertion of knowledge when he in fact has none.

(3) If such representation is made as aforesaid of a matter susceptible of actual knowledge, as distinguished from matter of opinion, estimate or judgment, the fraud consists in stating that he knows the thing to exist, when he does not know it, and in such case a belief in its existence will not warrant or excuse a statement of actual knowledge, and it is not necessary to make proof of actual intent to deceive.

(4) Where, from the party's special situation or means of knowledge, it becomes his duty to know, the rule requiring proof of *scienter* is satisfied by showing that the situation of the defendant was such as to possess him with special means of knowledge as to the truth or falsity of his assertions.

(5) Positive assertion of knowledge is not required. If a man makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, such statement, unqualified amounts to an affirmation as of one's own knowledge—and the falsehood is intentional. The law will impute a fraudulent purpose. In the language of Judge Cooley: "The fraud here consists in the reckless assertion that it is true of which the party knows nothing and in deceiving the other party thereby."

> "A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule."
>
> *Cooper* v. *Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360.

In the foregoing case the court approved the following instruction:

> "It is not necessary, to constitute a fraud, that a man who makes a false statement should know precisely that it is false. It is enough if it be false, and if he made it recklessly, and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon and has been acted upon by him accordingly."

In *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, Mr. Justice Harlan, delivering the opinion of the court, said:

> "The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon, by the purchaser or lessee, *the truth of which representations the vendor or lessor is bound, and must be presumed, to know.* * * *; but where the representations are material, and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is *bound to know*, or *is presumed to know, his actual knowledge of their being untrue is not essential.*"

Hindman v. *First Natl. Bank*, 112 Fed. 934, was a common law action of deceit against the bank for false representation as to the condition of the Columbia Fire Insurance Company, made by the cashier, by reason of which complainant was led to buy shares of the insurance company's stock. The circuit court of appeals sustained the right to the action, and held:

> "To sustain an action for fraud and deceit, based on false representations by defendant, by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false, and (2) that the person making it knew it to be false; *but if the fact was one within his means of knowledge, and he had no knowledge of it, the jury is authorized to find that the statement was knowingly made.* * * * If the fact be one within his means of knowledge and he have no knowledge of the fact, the jury would be authorized to believe that the statement was knowingly false."

The opinion was by Lurton, J., and a writ of error in the case was denied by this court April 28th, 1902 (186 U. S. 483).

"At all events, according to plaintiff's testimony, he made a material representation assuming to have knowledge of the facts, and therefore the liability is precisely the same as if made with knowledge of its falsity."

Taylor v. *Commercial Bank*, 68 App. Div. (N. Y.) 460.

"An action to recover 'damages for deceit' can not be maintained without proof of fraud, as well as injury, but the fraud may consist in the *affirmation of positive* knowledge of that which one *does not positively know;* and where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, *even if he believes it to be true.*"

Haddock v. *Osmer*, 153 N. Y. 604, 47 N. E. 923.

In the foregoing case, Vann, J., quotes with approval from the opinion of Judge Peckham in *Rothschild* v. *Mack*, 115 N. Y. 7, 21 N. E. 726:

"He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and endorsers, was without value. If he did not know its condition, he yet *assumed to have actual knowledge* of the truth of his statement. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false, or else he was conscious that he had no actual knowledge while assuming to have it, and intending to convey such impression. If damages ensue, this makes an actionable fraudulent representation."

"Directors are liable for injuries to a person who relies upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false.

"What the directors ought to have known by a proper diligence as to the general course of the bank's business, they are presumed to have known in any contest between the bank and third parties dealing with it in good faith.

"Where the cashier of a bank, acting within the scope of his authority, and for the purpose of enabling the bank to collect or secure a debt owing to it, makes false representations concerning the financial responsibility of a debtor to a person from whom such debtor is endeavor-

ing to purchase goods upon credit, with knowledge that such representations are false, or assuming to have positive knowledge of the facts, when as a matter of fact he has not such knowledge, and thereby induces the party to whom the representations are made to sell the goods to the debtor upon credit, the bank is liable for the wrongful act of such cashier, although it was done without its authority or knowledge and resulted in no profit to it."

Morse on Banks and Banking, Sections 132-133.

To the same effect see:

Cole v. *Cassidy*, 138 Mass. 437, 52 Am. Rep. 284.

Chatham Furnace Co. v. *Moffat*, 147 Mass. 403, 18 N. E. 168.

"Where one falsely asserts a material fact to be true as of his own knowledge and injury and damage result therefrom, he is not thereafter permitted to assert that he had no knowledge on the subject."

Gund Brewing Co. v. *Peterson*, 130 Ia. 301, 106 N. W. 741.

The following recent cases support our contention:

Joines v. *Combs*, (Okl.) 132 Pac. 1115.

Arrowsmith v. *Nelson*, (Wash.) 132 Pac. 743.

Grant v. *Ledwidge*, (Ark.) 160 S. W. 200.

Plate v. *Blades*, (N. C.) 79 S. E. 608.

And many other cases might be cited.

But it is unnecessary to multiply cases, for the same principle has been approved by this court in *Thomas* v. *Taylor*, 224 U. S. 73, a case on all fours with the ones at bar.

THOMAS V. TAYLOR, SUPRA.

We trust we may be pardoned a review of the proceedings in that case, as it seems to us decisive of the issues involved herein.

The records of this court (*Thomas* v. *Taylor*, No. 21928, October term, 1911, No. 171) show that liability was not grounded on proof of actual knowledge.

The findings of fact upon which judgment was based were, in substance, as follows:

(1) That the published statement on which liability was predicated was true as shown by the books (while in the cases at bar they were untrue even in this respect) (Trans., p. 10, par. 9).

(2) That the defendants fully believed the published statement to be true (Trans., p. 13, par. 32).

(3) That the statements were not signed "correct, attest," with the intention of deceiving the public or anyone who might deal with the Bank (Trans., pp. 13-14).

(4) "That at the time the defendants attested the said report to be correct, they knew or had reason to believe that it was not correct, and they either knew that the statement was untrue or they *wilfully refused to make an examination and attested the report recklessly.*" (Trans., p. 21, par. 14.)

There was no proof of actual knowledge—the only evidence on this point being the stipulation of the parties that the defendants had knowledge of the comptroller's letter calling attention "to the situation of the bank" (Trans., pp. 42-43), and the court, in the published opinion, says "what actual facts they knew concerning the condition of the Bank is not disclosed by the evidence." In fact, it was strenuously urged by plaintiff in error in this court (brief, point VII, p. 64; point XII, p. 76), that there was no proof of actual intentional fraud; and that the findings did not support the judgment (point VI, p. 59, and see pp. 50 to 58).

Discussing the question of *scienter* Justice Van Kirk says, (106 N. Y. S. 538) (Trans., p. 49):

> "The defendants urge that, though the report should be found false, there is not sufficient proof that the defendants knew it to be false, and that they cannot be held liable in an action for deceit based upon the false report, unless they attested the report knowing it to be false. * * * Had they examined as they *should have done*, they would have learned that the capital was impaired to its full amount. The failure to make any examination is *not mere negligence, misjudgment or want of caution*,

nor is it mere casual indifference to results or breach of duty. It amounts either to actual recklessness of results or to a wilful refusal to make the examination, so that they could innocently make a good report, when a true statement of the condition of the bank would perhaps have been ruinous * * *. After the warning of the comptroller and proof of the actual condition of the bank at the time of which the report speaks, the *court is bound* to hold that *either defendants knew the actual condition and concealed it, or made the report recklessly. It is not necessary for the plaintiff to show that these defendants actually knew the report to be false; it is sufficient to maintain the action if he shows that the defendants attested this report, not knowing whether it was true or false, and not caring what the fact might be*, BUT RECKLESSLY *paying no heed to the injury which might ensue. Kountze* v. *Kennedy*, 147 N. Y. 124-129. Fraud is proven when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether it be true or false.. Head note, *English Ruling Cases*, Vol. XII, p. 250. *Derry* v. *Peek*, 14 Ap. Cases 337. The fact that the defendants had reason to believe that the report was false and still made it, is evidence of their intent to deceive. *Salisbury* v. *Howe*, 87 N. Y. 135. The defendants, as directors of the bank, evidently were, at the time, in a difficult position. They at least knew, from the warning given by the comptroller, that the bank was probably in a bad financial condition. *What actual facts they knew concerning the condition of the bank is not disclosed* by the evidence. A report, however, showing losses to the amount of $194,000, would more than wipe out the capital stock, surplus and undivided profits, as shown in the report, and would probably cause the ruin of the bank. The officers and directors of the bank *would naturally hesitate to make a report which would cause its ruin;* but, however, loyal this sentiment may be to the bank, it *cannot relieve* these defendants *from the consequences of making a report, either falsely or recklessly.* After the warning of the comptroller, and before attesting the report, the defendants *must have proceeded upon some reasonable inquiry and have had some apparently good ground for attesting the report as it stood.* (*Hammond* v. *Pennock*, 61 N. Y. 145-151) in order to relieve themselves from responsibility * * * When the report was made of the standing of the bank, it was made and published to disclose the financial condition of the bank, and to assure those who would deal with the bank; and, when it was attested by di-

rectors, they knew that, if not true, they were deceiving those who read it, both as to the standing of the bank and as to the value of the stock. In this particular case the statement assured the public that, not only the capital stock was unimpaired, but there was a surplus and undivided profits of $63,000.00, when in fact there was no surplus or undivided profits, *and the capital was lost.* It is *not sufficient* here to say that this *report disclosed* the *actual condition* as shown by the *books of the bank.* These defendants *could not rely upon the books* after the warning they had received from the comptroller * * *

"It is said in *Haddock* v. *Osmer*, 153 N. Y. 608:

"'An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. *Actionable deceit* cannot be practiced without an *actual intention to deceive*, resulting in actual deception and consequent loss. *But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of* FALSEHOOD, *even if he believes it to be true; and, if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud. Kountze* v. *Kennedy*, 147 N. Y. 124-130; *Rothschild* v. *Mack*, 115 N. Y. 7; *Marsh* v. *Falker*, 40 N. Y. 562-573; *Bennett* v. *Judson*, 21 N. Y. 238; *Addison on Torts*, 1007; 1 *Bigelow on Fraud*, 514.'"

Upon review before the appellate division (108 N. Y. S. 454) that court decided that:

"The complaint contains all of the allegations necessary for the maintenance of the action under the national bank law; the findings of the court are sufficient to sustain the complaint; the evidence is sufficient to sustain such findings;"

And upon the record thus presented this court affirmed the decision, notwithstanding the lower court based its judgment upon the very principle for which we contend.

In discussing this case in the court below, defendants insisted it should be distinguished from the cases at bar be-

cause in the former the directors did not take the witness stand in their own behalf.

Suppose they had done so and admitted receiving the comptroller's letter, but testified that thereafter they never went near the bank, made no examination of its condition, took no part in the administration of its affairs and attested the report on the mere request of the cashier, knowing they had no actual knowledge of the Bank's true condition,—would they have been exonerated because of their blind faith in the integrity of the cashier? Certainly not,—for that decision was not predicated on the assumption that there had been proof of actual knowledge. The findings were in the alternative.

While two of the defendant directors in the cases at bar testified in their own behalf, their testimony shows they deliberately ignored the comptroller's directions and had no grounds for believing they had any knowledge of the Bank's condition. More than that, it shows it to have been impossible for them to know, for they never at any time participated in the least in the management of the Bank's affairs. It helps them less than if they had stood mute (as did the directors in the New York case), for they do not even attempt to give an excuse for violating the comptroller's directions; or to explain how they thereafter managed to keep themselves ignorant—if, indeed, they were ignorant.

EVIDENCE AFFECTING POINT IV.

It may be well to consider briefly at this time, the evidence on the question of knowledge prior to the receipt of the comptroller's letter.

It being undisputed that the bank was hopelessly insolvent from its very beginning, defendants attempt to evade liability by showing they had nothing to do with its management and knew nothing of its affairs, and, hence, could not knowingly make a false report.

Prior to January 10th, 1888, the by-laws provided for quarterly meetings. At this time they were amended on motion of defendant, Thompson, to provide for only semi-annual meetings—at the dividend declaring periods—and so they continued during the remainder of the time (Exhibit "X-26," B. of Ex. pp. 326, 339). And as before suggested the directors held but fifteen regular and two special meetings during nearly nine years of its existence.

TESTIMONY OF DAVID E. THOMPSON.

At the former trial of this case Mr. Thompson testified (B. of Ex., pp. 230-1):

Q. "Then you sign these reports and take these mens' words for it, and send them out to the world as correct?"

A. "Yes, and you do, too."

Q. "You sign your name irrespective of the facts, you don't know what the true conditions are?"

A. "How could I know better?"

Q. "I simply want you to state this, that you are signing statements of the condition of that bank and taking someone else word entirely for the truth or falsity of the report?"

A. "That is what I am doing and I could not do different if I tried."

Q. "And that is what you did with the Capital National Bank?"

A. "Yes, sir."

Q. "And you did not know at that time whether the report was true or false?"

A. "I couldn't have known."

At the second trial he endeavored to avoid admitting he was conscious he had no actual knowledge, but his testimony shows it to have been impossible to have entertained a *bona fide* belief of actual knowletlge. We quote from the record (B. of Ex., p. 433):

Q. "How much of your personal time did you devote, if any, to the affairs of the bank and the administration of the bank?"

A. "None at all, except to attend meetings when I was in town. I was much of the time away from Lin-

coln, but when I was there I gave time enough to attend their annual meetings."

Bill of exceptions, pages 445-6:

Q. "Did you have any knowledge of the deposit account of Mosher and Outcalt?"

A. "I had no knowledge of it whatever."

Q. "At any time during the——"

A. "I had no knowledge of anything back of the room there where the directors and the executive committee met, and what came up there for discussion was the only knowledge I had of the condition of the bank."

Bill of exceptions, page 461:

Q. "Would you be able to check over a report?"

A. "No, sir, I would not."

Q. "Would it have been possible for you to have done otherwise than to credit the information such as you could obtain from anywhere other than the officers?"

A. "There would be no way that I could take a report and check it from any records, if that is what you mean?"

Q. "Yes, sir."

A. "I could not do it."

Bill of exceptions, pages 508-9:

Q. "Now in reference to various statements of the condition of the Capital National Bank. When these various statements were made that bear your signature, what effort did you make before permitting them to go out in that way to ascertain whether or not they were true?"

A. "Well, my only effort to know the truthfulness of *any statement* that was *ever made* there was simply through the executive committee, the finance committee and through the officers of the bank."

Q. "You never looked over any of the assets yourself?"

A. "No, sir, never."

Q. "Never counted any of its money?"

A. "Never counted any of its money."

Q. "Never made any examination into the actual assets at all?"

A. "No, sir, I never did."

Q. "Never examined any of the books of the bank?"

A. "No, sir, I never did; there was a committee that always had that in charge, a committee appointed by the

directors, a finance or executive committee and the officers of the bank who always did that; I never had anything to do with that; *anything on the inside of that bank.*"

Q. "You never looked into the books of the bank?"

A. "I don't see how a question of that kind can be answered."

Q. "I mean you never examined a book of that bank?"

A. "No, I never did; looking into a book is like looking into the Bible, you may look into it and not read it."

Q. "You never looked into the Bible much?"

A. "Well, I did a little."

Q. "When these statements went out purporting to give the condition of the bank, over your signature, you hadn't at that time any knowledge concerning its actual condition?"

A. "*Nothing at all*, except the information I would get from those I had trusted."

Q. "*But so far as personal knowledge went you knew nothing?*"

A. "*So far as personal knowledge, I knew nothing.*"

Q. "And you were aware of that fact?"

A. "Well, there was never a question entered my mind—never has been in anything I was interested in—that there could be anything wrong."

Q. "Well you were aware of the fact that you did not really know anything about its condition?"

A. "It never entered my mind in that way; I thought I did."

Q. "*But you never made any investigation?*"

A. "How could I make any?"

Q. "I am not asking you that."

A. "*I never did.*"

Q. "Then you never could know, of your own knowledge, what its condition was—you could know how much cash it had?"

A. "I could have counted the money, but that wouldn't mean anything."

Q. "You could have looked over its bills receivable?"

A. "Why, yes, I could have looked over its bills receivable and tell that they had eight hundred or two hundred thousand, but that would be all."

Q. "But you never did it?"

A. "No, sir, I never did it."

Q. "And yet you made these statements in which you stated there are a certain amount of liabilities and assets and cash?"

A. "I made those statements after the sworn statements of the officers."

Q. "*Absolutely on the statement of someone who handed you the statement?*"

A. "*That is very true.*"

Q. "And you say you have never examined any book of the bank?"

A. "I never have."

Bill of exceptions, page 510:

Q. "You say you did not know that either Mr. Mosher or Mr. Outcalt were borrowing from the bank?"

A. "I have no recollection of knowing that they were borrowing of the bank; those things, Mr. Thomas, are all things that did not come under my notice in any way at all."

Bill of exceptions, page 511:

Q. "Did you know there was any of the Western Manufacturing Company paper had been discounted by the Capital National Bank?"

A. "No, I never did."

Q. "Did you know that it carried any of the paper of that company in its bills receivable?"

A. "Well, I don't know that I would know definitely whether they did or did not. I have got to keep saying to you what I said before; we might have that in there and it *would not concern me at all*, because there were men there who were appointed to attend to those things and to look after the welfare of the bank, *and with me everything ended there.*"

Bill of exceptions, page 489:

Q. "Now these various banks in which you have been interested; you have kept some sort of an account of what they were doing?"

A. "Nothing only what the men in charge have reported, and in there the same as that card, or what they would tell me; that is all, nothing else."

Bill of exceptions, pages 523-4:

Q. "The only meetings that you attended was at dividend declaring times, or did you attend other meetings than at the dividend declaring times?"

A. "I never, so far as I remember, attended any called meeting while I was in Lincoln, nor missed any of the regular meetings while I was in Lincoln. A man in business in Lincoln would be there most of the time, but I was in Lincoln comparatively little; my business was of a character that took me away from home most of the time."

Were it true the directors had committed the making and approval of loans to a discount or executive committee and delegated to it the entire management of the Bank's affairs, it would not relieve defendants from responsibility and liability. But even this contention is without foundation in fact —a mere pretense.

The Bank never had a discount committee in the sense in which that term is ordinarily used. Mr. Outcalt, the cashier, was asked (B. of Ex., p. 654):

Q. "Did the bank have a discount committee?"

A. "No, sir, not exactly, as we would understand a discount committee. They had a committee to examine the loans of the bank."

In the comptroller's letter of February, 1892 (Exhibit "948," B. of Ex., p. 78), he states that the bank examiner reports, the Bank has no discount nor examining committee and suggests that by law the conduct of the affairs of a national bank is devolved upon the board of directors. In answer to this letter the directors wrote the comptroller, under date of February 19th, 1892 (Exhibit "944," B. of Ex., p. 64), that

"About a year since Mr. W. W. Holmes died suddenly *and left only one member.* The place has *now* been supplied by the appointment of Mr. E. P. Hamer."

Speaking of the February, 1892, meeting at which this appointment was made, Mr. Hamer testified (B. of Ex., p. 597): "*There was no finance committee and one of the things done was to say that I should serve on the finance committee.*"

It is quite evident the committee was not active and was not considered of much importance.

The directors' minute book clarifies the situation. It shows (B. of Ex., p. 340), that at a directors meeting (held probably in January, 1889):

"Mr. Thompson moved that directors Holmes and Stuart be appointed a committee to *examine the notes of the bank* and also to make as many such examinations of notes and books as they may see fit."

Under this appointment the committee apparently made the following report (B. of Ex., p. 340):

"Lincoln, Neb., Jan. 20, 1889.

"As per instructions of board of directors we have examined paper of Capital National Bank and find same satisfactory.

(Signed) "W. W. HOLMES,
"A. P. S. STUART."

This committee is never heard from again until February, 1892, when, in response to the criticism of the comptroller, E. P. Hamer was put on the committee in place of W. W. Holmes, deceased (B. of Ex., p. 344). It is quite evident it was not a "discount committee" at all. The Bank never had one.

The language of Mr. Thompson's motion creating this committee, shows it was merely to "*examine notes of the Bank*"—functions of an auditing committee.

It gave them no authority to pass on applications for loans—proper functions of a discount committee.

TESTIMONY OF CHARLES E. YATES.

Bill of exceptions, pages 572-3:

Q. "Now do you say that you never attended a meeting when any of the bills receivable—paper of the bank was taken up and looked over and discussed?"

A. "No, sir, not when I was at the meeting."

Q. "You did not know of any of this Western Manufacturing Company paper?"

A. "No, sir."

Q. "Of which Hurlbut was manager?"

A. "No, sir."

Q. "Well, did you sign any reports of the Bank's condition?"

A. "You mean those statements?"

Q. "Yes, sir."

A. "Why, *when I was in the office there if Hal Young or some other employee of the bank would bring one of the statements down, I would see it was signed and attested by Mosher and Outcalt, and in good faith I signed it.*"

Q. "*And that's about all you knew about it?*"

A. "*That is about all I knew about it; I had my confidence in those* people, and in the examiner of the bank."

Q. "You never made an investigation yourself as to what the bank had in the way of assets?"

A. "No, sir."

Q. "Never looked over the bills receivable?"

A. "No, sir."

Q. "Never looked over its assets?"

A. "No, sir, never was behind the counter."

Q. "Never counted its cash?"

A. "Oh, no."

Q. "Never attempted to look over its depositors?"

A. "No, sir. I had my faith in the officers of the bank."

Q. "You never made any inquiry of that kind?"

A. "No, sir."

Q. "I suppose you had no knowledge whatever of its financial condition?"

A. "Oh, no."

Q. "*And of course you were aware of that fact—that you did not know anything about it of your own knowledge?*"

A. "Oh, yes,—yes, sir,—but the truth of the matter was, Mr. Thomas, that I was a pretty busy man, and was out on the road about three-fourths of the time and when I came in I suppose if they wanted anything I would have signed it."

Bill of exceptions, page 574:

Q. "And your recollection is that you don't remember of any discussion at a directors' meeting in regard to any of the paper?"

A. "Oh, no."

Q. "Never was anything of that kind?"

A. "Oh, no."

Bill of exceptions, pages 570-1:

Q. "Never heard about the Donnell, Lawson & Simpson account?"

A. "No, sir."

Q. "Nor about any of the Marsh paper?"

A. "No, sir."

Q. "Nor any of the Western Manufacturing Company paper?"

A. "No, sir."

Q. "Nor any of Mosher's paper?"

A. "No, sir."

Q. "Nor Outcalt's paper?"

A. "No, sir."

Q. "In fact you did not know anything about any of the paper that was in the Bank?"

A. "No, sir."

Q. "Did not know there was any directors' paper in the bank except your own?"

A. "No, sir."

Q. "You say you did not even know E. Hurlbut, Jr.?"

A. "No, sir."

Q. "Did not know that the Bank ever had any losses of any kind?"

A. "No, sir."

Q. "That never came to your attention in any way?"

A. "No, sir."

Q. "Was never discussed at a directors' meeting?"

A. "No, sir."

Q. "You say you never examined any paper of the bank?"

A. "No, sir."

Q. "Never looked at a note?"

A. "No, sir."

Q. "Or any of the documents of the bank at all?"

A. "No, sir."

Q. "*Well then you hadn't very much to do with the directing of the Bank, had you?*"

A. "*Hadn't anything.*"

Q. "I suppose you attended the meetings when it came time for the dividends and voted aye?"

A. "Oh no, there were lots of times that they passed dividends that I wasn't there."

Bill of exceptions, page 577:

Q. "Now, Mr. Yates, you never knew that the bank carried any real estate either did you?"

A. "No, sir."

Q. "And did not know that it carried any overdrafts?"

A. "No, sir, did not know anything about it."

Q. "Or re-discounts?"

A. "No, sir."

How could they have been less attentive or more grossly negligent? In these circumstances no one could have honestly believed he had any actual knowledge of the Bank's affairs. There was no possible ground for such a belief. Knowledge was impossible. They could have attested a report of the condition of the Bank of England with the same assurance, for they had as much knowledge of its condition as they had of the Capital National Bank.

POINT V.

That After Receiving the Letters from the Comptroller of the Currency, Shown by the Record, It Was the Directors' Duty to Enter Upon the Discharge of Their Functions and Acquaint Themselves With the Affairs of the Association, and Their Failure to Do So Was Gross Negligence and Recklessness, or a Deliberate Refusal to Perform Their Duty, and Constituted an Intentional Violation Actionable Under Sec. 5239, Rev. Stat. U. S.

(A) That if, Thereafter, Directors Make or Attest Statements of the Association's Financial Condition, or Permit Its Officers, Agents or Servants to Do So, and Such Statements Are in Fact False and Untrue, They Are Liable in Their Personal and Individual Capacity for All Damages Which a Depositor May have Suffered in Consequence of Such False Representation, Regardless of Whether or Not the Directors Had Actual Personal Knowledge of Their Falsity.

(B) That Upon Receipt of the Letters Aforesaid It Was the Duty of the Directors to Acquaint Themselves With the Affairs of the Association, and They Are Presumed to Have Such Knowledge of Its Condition as a Performance of Their Duty Would Have Given Them.

We submit the foregoing propositions are fairly established by *Thomas* v. *Taylor*, *supra*, and the cases discussed in the preceding points.

The comptroller's letters, to which reference is made, are set forth and discussed in Point VII. After these letters it were bold to further simulate excuses. Here was a direct warning that by law the conduct of the affairs of a national bank devolved upon the board of directors; that regular and frequent meetings are therefore *very* desirable. That they meet but twice a year and then only to go through the empty form of declaring dividends; that they do not examine the loans and discounts; that they have neither a discount nor examining committee; that the bank examiner reported $30,000 in losses that were charged off during the examination; that the affairs of the Bank had suffered through the inattention of its executive officers. And it specifically called attention to matters which, if investigated, would have inevitably led to a discovery of the Bank's desperate condition.

To instance: The bank examiner evidently thought $30,000 in losses had been charged off during his examination, but he was deceived. Nothing was, in fact, charged off. And at the following meeting the usual dividend was declared (directors' meeting July 12, 1892, B. of Ex., pp. 995-8), where, had the examiner's directions been obeyed, the directors would have known the losses exceeded more than twice the apparent earnings.

This $30,000 was not charged off at all; and the startling truth is that never, during its existence as the Capital National Bank, were any bad debts charged off.

That the directors were not without knowledge of this matter is established by their letter of September 19th, 1892, to the comptroller, wherein, among other things, they pretend

to justify the July dividend. This letter was in answer to the comptroller's letter of August 31st, 1892, which we were unable to find. It no doubt expressed surprise that a dividend of $12,000 could be declared in July, 1892, after having suffered $30,000 in losses in February preceding.

With all this information (and other to which reference is made later):

> "They, notwithstanding, represented the assets to be good. Such disregard of the directions of the officers appointed by the law to examine the affairs of the Bank is a violation of the law. Their directions must be observed. Their functions and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."
>
> *Thomas* v. *Taylor, supra.*

The directors cannot plead ignorance, for it could not exist except for their own most gross negligence, recklessness and deliberate refusal to do their duty. And in this circumstance every director is liable in his "personal and individual capacity" for false statements of the Bank's condition, which he made or permitted to be made by "any of the officers, agents or servants of the association,"—or which he "participated in or assented to" (Sec. 5239, Rev. St. U. S.).*

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* Note.—Sec. 5239—

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." Rev. Stat. U. S.

He is not relieved from liability because he did not personally "attest" a particular report. He knew that under the law, the association, of which he was a director, was required to make and publish not less than five reports during each year exhibiting in detail and under appropriate heads the resources and liabilities of the association. He knew the reports were being so published and that the depositors were looking to them as their only source of information—to guide them in safeguarding their interests and the deposits of their own patrons. He knew, or must have known, the reports to be false, and cannot escape liability by the simple expedient of refraining from affixing his signature to the statement. His duty is to assert his authority,—to be active,—and his obligation is not performed by mere passive acquiescence. Unless this be true, the statute, intended to protect the public, becomes a farce, for Sec. 5211, Rev. Stat. U. S.* does not require the published report to bear the names of the attesting directors. It provides that "in the same *form* in which it (the report), is made to the comptroller (it) shall be published in a newspaper."

At the time the reports in controversy were published, the comptroller of the currency required the reports prepared for publication to be sworn to by the president or cashier and

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* Note—

"Sec. 5211. **Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him,** verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day specified by him; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, **and in the same form in which it is made to the Comptroller shall be published in a newspaper** published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition." Rev. Stat. U. S.

attested by the signature of at least three directors,—and so it was done in these cases (Exhibit "972," p. 419).

At the present time the form prescribed for the published report contains the following directions of the comptroller:

> "This form is for publishers' copy and does not have to be sworn to.
>
> "The affidavit, jurat and signatures of officers are to be copied from report of condition."

Under the law, the comptroller need not require the names of the attesting directors to appear in the published report, (as we understand was at one time the practice), and still be within the requirements of section 5211, Rev. Stat. U. S., for that section provides for the making of reports to the comptroller "according to the *form* which may be prescribed by him, verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors,"—and it is in the "*form* in which it is made" to him that it shall be published.

This plainly commands publication of neither the verification nor the attestion and should the comptroller dispense with this requirement, directors could never become liable, if it be true that they are only responsible for reports personally attested by them.

The attested report sent to the comptroller is not open to public inspection and could not become the basis of an action of this sort, hence, by the selection of an irresponsible cashier, a depositor would be left without an effective remedy.

It cannot be congress intended that directors should thus be permitted to be relieved from liability.

Under the present regulations of the comptroller for the preparation of copy for the published report, a director might plausibly assert his non-liability for the reason that he had not personally attested the report. He could be held, if at all,

on the ground that he knew, or must have known, that the officers of the association would cause to be published a report of its condition, upon which the directors' attestation would appear, and if he assented to or permitted it, his liability would become fixed.

The principle for which we contend is supported by *Chesbrough* v. *Woodworth*, 193 Fed. 875. This was an action involving liability of directors for false reports not attested by them. The court said:

> "In such a case as this, the making of the report, its attesting by the directors, and its publication do not constitute the underlying wrong. They make only the means of representation to plaintiff—the medium of necessary casual relation between wrong and damage. Under what is said to be the universal practice of national banks in making such reports and under what the undisputed testimony shows to have been the regular practice in this Bank, the making and publishing of the reports were the automatic results of the bookkeeping. Whatever the books and the daily statements showed the resources to be, appeared as resources on the report. If a line of paper was carried at its face among the 'loans and discounts' on the books, it would normally appear at that same amount in every one of the five reports in each year. Both defendants knew this. It follows that *it is not important whether each did or did not attest each report* (except so far as plaintiff's conclusion to buy might rest on the presence of a particular name at the foot of the report plaintiff saw). All directors who participate in and approve a long-continued carrying on the books, among loans and discounts, of a line which they know is worthless, and in amount sufficient materially to affect the standing of the bank, *are bound to know* that under the practice prevailing in this Bank such worthless paper will become an element of the published reports, and that these reports will insofar falsely represent to the public the Bank's condition; and so, in a fair sense, *such director permits the making of a report which is a violation of the act.* Hence his primary duty here involved, and a breach of which causes a violation of the statute, is the duty to charge off assets which have become worthless."

Our contention is in harmony with the oath the directors are required to take (Sec. 5147, Rev. Stat. U. S.)*,—that they "will not knowingly violate or *willingly* permit to be violated any of the provisions of this title" (Title LXII, National Banks).

According to the directors' testimony they very *willingly* abdicated their entire functions and left the sole management of the Bank's affairs to subordinate officers,—in which was included the publication of reports of the Bank's condition.

They did it not only *willingly*, but were apparently anxious to rid themselves of their duty. They thus violated the very terms of their oaths when they permitted the officers to publish untrue reports.

The word "*willingly*" does not mean wilfully. It "is a weaker word, meaning voluntarily; readily; without reluctance; in the manner of being ready to do an act; of free choice; with one's free choice or consent."

> *C., St. L. & P. R. Co.* v. *Nash*, 1 Ind. App. 298, 27 N. E. 564.

There is no pretense that their conduct in this regard was other than voluntary; of their own free choice. For, notwithstanding the comptroller's letters directing attention to their violation of duty and urging them to act, they continued their policy of inaction and non-participation and willingly permitted their officers, agents and servants to have unlimited and unrestrained control of the Bank's affairs.

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* Note—

"Sec. 5147. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office." Rev. Stat. of U. S.

POINT VI.

The State Court Erred in Deciding That to Entail Liability Under Sec. 5239, Supra, for the Publication of a False Official Report of the Bank's Condition, It Must Be Shown That the Director Had Actual Personal Knowledge of Its Falsity—"That KNOWLEDGE MUST BE BROUGHT HOME TO THE DIRECTOR That He Is Deceiving the Individual Wronged, and May Thereby Occasion a Loss to Him," or That He Personally Participated in the Act Complained of.

This follows as a corollary from the preceding propositions and requires neither demonstration nor citation of authority.

POINT VII.

The State Court Erred in Deciding That the Evidence in the Record Is Insufficient to Sustain Plaintiff's Judgment, Because Its Decision Is Based Upon an Erroneous Interpretation of Sec. 5239, Supra, and the Decision of This Court in These Cases.

It is apparent throughout the opinion of Hamer, J., that in weighing the evidence he applied an erroneous test of liability, —but for which his conclusion would have been otherwise.

The same is true of Letton, J., but he afterwards saw his error and voted to grant plaintiff's rehearing.

The dissenting opinion of Sedgwick, J., presents the situation correctly (93 Neb. 137), (Trans., p. 65):

> "There is evidence that the comptroller became dissatisfied with the conditions of the Bank, and wrote to the officers of the Bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done, and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the Bank. After this the reports were published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it, in view of the total inadequacy of the opinion and concurring opinion to discuss, or even to state, the questions of law upon which this decision depends."

There is indeed a mass of testimony, much of which it will be unnecessary to review.

The decision of the state supreme court does not disturb the findings of fact of the trial court, as such, but holds those facts do not entail liability because they do not positively establish actual personal knowledge or personal participation. So the error really consists in mistaking the legal effect of the evidence.

Under the decision of the state supreme court the findings of fact of the trial court might be admitted and yet no liability ensue.

The concurring opinion of Letton, J., without which there could be no reversal, states that (93 Neb. 131), "under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion."

This does not impeach the findings of fact of the trial court, but assumes that those findings do not establish liability under the rule laid down in the opinion of Hamer, J.

To illustrate: Suppose the comperoller's letters called specific attention to the fact that the report of September, 1891, was an untrue statement of the Bank's condition and tells the directors they must enter upon the performance of their duty and acquaint themselves with the Bank's condition; that they ignore his directions; give no attention to the Bank's affairs; acquire no knowledge of the Bank's condition, and thereafter attest an untrue report of such condition not knowing it is in fact false. Under the state court's view of the law, this does not establish liability under the national bank act.

However, whatever view may be taken of the situation, we maintain the evidence is sufficient to sustain the findings and judgments in these cases. Indeed, no other result was possible under the evidence.

EVIDENCE

That the Bank was insolvent from its inception is not denied. The trial court so found and the correctness of its

findings is not questioned. While this is true, we think a brief review of the Bank's early history is necessary to a comprehensive view of the situation.

The Bank was in such condition and its affairs managed in such manner that it is impossible to imagine the defendants ignorant of its condition and affairs without being guilty of the most wanton recklessness and wilful disregard of duty or a deliberate determination to remain ignorant.

Review of Bank's Condition From Time of Organization.

The Capital National Bank grew out of the Marsh Brothers, Mosher & Company, a concern organized mainly to attend to the collection affairs of the Marsh Harvester Companies and its kindred concerns at Sycamore, Ill., and incidentally doing some banking business (Hale, B. of Ex., p. 45; Scott, B. of Ex., pp. 349-50).

While these Marsh concerns were on the verge of bankruptcy (B. of Ex., p. 351) the Marsh National Bank was incorporated (June, 1883), with a purported capital stock of $100,000.00. The Marshs, Mosher and Outcalt, became its officers and stockholders. Not a cent of actual money went into the assets of this corporation. It was a mere book transfer of the assets and liabilities of the Marsh Brothers, Mosher & Company *en masse*, to the Marsh National Bank. "The assets, liabilities and accounts of the Marsh Brothers, Mosher & Company, were transferred to the books of the Marsh National Bank and became the assets and liabilities of the Marsh National Bank" (Hale, B. of Ex., p. 417; Whitmore, B. of Ex., p. 106; Jones, B of Ex., p. 184; Scott, B. of Ex., p. 350).

After the Marshs and their various concerns had become notoriously insolvent (Carnes, B. of Ex., pp. 16-17; Alden, B. of Ex., p. 21), the name of the Bank was changed to the Capital National Bank (May, 1884) (B. of Ex., p. 184). The capital stock was increased to $200,000.00 (B. of Ex., p. 330). The Marshs withdrew as stockholders and officers and the present defendants became stockholders and directors and so con-

tinued until the failure of the Bank in January, 1893 (Stockholders' meeting, B. of Ex., pp. 332-344).

Among the so-called assets which were transferred from the books of Marsh Brothers, Mosher & Company, to the books of the Marsh National Bank were the following:

A.	Bills receivable	$248,029.33
B.	Stocks and bonds	30,540.00
C.	Collection account (overdrawn)	14,573.32

A. Bills Receivable, $248,029.33.

Bills receivable, $248,029.33, consisted principally of paper taken by the various Marsh concerns for its manufactured products. Most of this was given for a "low-down binder" which proved a failure and payment of the paper was resisted and became very poor. It realized but 25 to 30 per cent of its value (Carnes, B. of Ex., pp. 19-20).

The Marshs and all their companies went into bankruptcy in June, 1884. Shortly before their failure, the Marsh National Bank held at least $200,000.00 in such paper (Alden, B. of Ex., pp. 22-23). The assets of the Marshs and their various concerns did not realize sufficient to pay preferred claims of laborers—the general creditors receiving nothing (Carnes, B. of Ex., p. 17; Alden, B. of Ex., pp. 21-24).

The witnesses, Carnes and Alden, were thoroughly familiar with the affairs of the Marshs and their testimony shows how hopelessly insolvent they were (B. of Ex., pp. 15 *et seq.* and 20 *et seq.*).

Particular reference to this is made because notwithstanding their insolvency, a large amount of their paper was carried by the Capital National Bank. In fact there was not a time in the history of the Bank that it had not large amounts of such paper (Whitmore, B. of Ex., p. 314). On July 1st, 1891, the Marsh paper aggregated $23,354.17 (Exhibit "UU," B. of Ex., p. 223). When the Bank failed it still carried over $18,000.00 in notes of the Marshs (B. of Ex., p. 231).

The account of bills receivable, $248,029.33, was probably worth not to exceed from 25 per cent to 30 per cent of its face value or approximately $173,000.00 less than par.

B. Stocks and Bonds, $30,540.00.

When the stock and bond account was transferred to the ledger of the Marsh National Bank it amounted to $30,540. but on July 27, 1883, $30,000.00 of this item was eliminated by erasing the figures "30," and in order to keep the apparent assets of the Bank the same, the bills receivable account was raised from $240,029.33 to $270,029.33 by erasing the figure "4" and substituting the figure "7." These changes occur in the books every day from July 2nd until July 27, 1883 (Hale, B. of Ex., pp. 47-50; Whitmore, B. of Ex., pp. 106-114; Jones, B. of Ex., pp. 187-8).

No bills receivable actually came to the Bank through these transactions. The entry was fictitious and made to secrete the loss of $30,000 because this item of "stocks and bonds" consisted of stock in the Marsh Binder Mfg. Co., which had become worthless (Jones, B. of Ex., p. 188; Whitmore, B. of Ex., pp. 113-14).

C. Collection Account, $14,573.32.

When this account was transferred its name was changed to "collection account, Marsh Brothers, Mosher & Co." It was a *debit in red ink* indicating it was overdrawn which would be an impossibility if it were an honest account (Jones, B. of Ex., p. 185). It was in fact fictitious and valueless and was diminished to the extent of $10,000.00 by erasing the first figure "1," and increasing the debit balance of the Omaha National Bank by $10,000.00 by a false entry.

In these three items alone were valueless assets of approximately over $200,000.00, or twice the Bank's nominal capital stock.

Donnell, Lawson & Simpson, $28,174.70.

Shortly before the name of the Bank was changed to the Capital National Bank, it had on deposit with Donnell, Law-

son & Simpson, as its New York correspondents, the sum of $28,174.70. This firm failed about May 14, 1884, and the entire amount was lost. No part of it was ever paid (Lawson, B. of Ex., p. 54). Mr. Lawson was a member of the firm and testified that he had intimate knowledge of its affairs including this particular account with the Marsh National Bank (B. of Ex., pp. 52-53). That this loss was sustained was known to the stockholders and directors when the name was changed to the Capital National Bank and was discussed at the directors' meeting held at that time—May 23, 1884 (D. E. Thompson, B. of Ex., p. 430; E. P. Hamer, B. of Ex., p. 597). Yet the regular dividend was declared and $1,500.00 "carried to surplus account" (Minutes, B. of Ex., p. 332), notwithstanding this loss amounting to 28 per cent of the bank's purported capital stock at that time. Not a cent of this was ever charged off on the books of the Bank.

Donnell, Lawson & Simpson Notes.

Although this firm had failed in May, 1884, and ceased to do business and its creditors realized nothing on their claims, the Capital National Bank continued to discount notes purporting to have been executed by Donnell, Lawson & Simpson, and the following notes of that firm were taken in by the Bank and became part of its assets from October 14, 1884, to August 13, 1885, to-wit (Jones, B. of Ex., pp. 189-90):

October 14, 1884	$ 5,084.76
October 14, 1884	695.79
May 7, 1884	9,391.56
May 7, 1884	9,391.57
July 20, 1884	9,391.57
July 24, 1885	9,391.56
August 13, 1885	10,200.00
August 13, 1885	20,300.00

Altogether notes aggregating $103,864.06 were so taken (Whitmore, Exhibit "ff," B. of Ex., p. 150, folio 654), when in truth no such notes were ever given or paid by the firm of Donnell, Lawson & Simpson; so they were not only worthless, but forged (Lawson's dep., B. of Ex., pp. 55-56).

How long these notes continued to be carried as assets of the Capital National Bank we do not know, but certain it is that as late as August, 1891, some of them were still in the Bank (B. of Ex., p. 150, Exhibit "dd," folio 651), and in the comptroller's letter of September 8, 1891 (which was based upon an examination of the Bank made August 19, 1891), he calls attention to the fact that the Bank expects "to sustain a loss of $2,000.00 upon the notes of Donnell, Lawson & Simpson" (B. of Ex., p. 73). This letter was discussed at a meeting of the board of directors held in September, 1891 (B. of Ex., p. 353).

Bill of Exchange, $29,968.00.

The above item was carried on the books of the Capital National Bank as an asset but on December 14, 1885, it was charged off and in its place was substituted three notes aggregating that amount as follows (Jones, B. of Ex., pp. 190-91):

First National Bank of Hastings, Nebraska.....$10,000.00
First National Bank of Kearney, Nebraska..... 10,000.00
F. S. Johnson & Co., Milford, Nebraska 9,968.00

These notes were shown to have been forged and fictitious (Clark, B. of Ex., p. 99; Johnson, B. of Ex., p. 97).

Interest Paid Account.

It is a matter of common knowledge that banks pay interest on certain of their deposits. In this Bank such payments were charged to what was known as "interest paid" account.

Before a dividend could be honestly declared the amount of this interest paid account would have to be charged to the account of "undivided profits" and would of course diminish the profits to that extent. In order, however, to understate this expense item and thereby relatively increase the apparent profits so as to furnish a basis for dividends, numerous false credits were made to this account, the effect of which was to understate the amount of interest actually paid on deposits (Hale, B. of Ex., p. 50; Jones, B. of Ex., pp. 195-96; Whitmore, B. of Ex., pp. 124-26). The following is a schedule of such entries (B. of Ex., p. 126; Exhibit "pp," p. 197):

December 29, 1884	$ 813.00
April 14, 1888	2,500.00
June 9, 1888	1,500.00
November 16, 1888	2,500.00
June 28, 1889	10,000.00
September 30, 1889	7,000.00
March 19, 1890	5,000.00
May 16, 1890	1,500.00
May 19, 1890	2,000.00
May 21, 1890	1,500.00
June 3, 1890	2,500.00
September 25, 1890	5,000.00
December 27, 1890	10,000.00
April 9, 1891	800.00
May 2, 1891	7,200.00
June 20, 1891	10,000.00
September 25, 1891	14,000.00
February 2, 1892	2,103.00
May 4, 1892	5,000.00
Total	$90,916.44

None of these items were charged against the "undivided profits" account or any similar account, which they must have been, had they been honest transactions (Whitmore, B. of Ex., pp. 126-27).

Certificates of Deposit.

The manipulation of certificates of deposit was one of the most resourceful means of abstracting the funds of the Bank and misrepresenting its actual condition. In many cases certificates of deposit were issued for which the Bank received nothing but which appeared to have been presented and paid at their face value.

The following certificates of deposit were shown to have been issued to J. E. Hill, state treasurer, and paid at their face value, while in fact they were fictitious, as Mr. Hill testified he had no such transactions and received no money on account of the certificates (Hill, B. of Ex., pp. 11-15, 49-59, 65):

Certificate No. 21349, Dec. 23, 1889, for $ 50,000.00
Certificate No. 24452, Apr. 24, 1891, for 100,250.00
Certificate No. 24937, July 18, 1891, for 14,650.00

Certificate No. 24941, July 20, 1891, for	10,000.00
Certificate No. 25097, Aug. 17, 1891, for	50,000.00
Certificate No. 25636, Nov. 18, 1891, for	50,000.00
Certificate No. 25961, Dec. 22, 1891, for	38,114.75

This indicates a total loss of $263,014.75 to the Bank through these seven transactions.

In numerous other cases, deposits were actually made, certificates issued to the depositor for the correct amount, but practically all of the deposit abstracted and the books of the Bank made to show that the certificate was issued for a mere nominal amount instead of the amount actually deposited.

The details of some of such certificates aggregating $179,934.23 is given in the bill of exceptions, pages 200-210.

The aggregate of losses on account of certificates of deposit amounted to $584,107.73.

The stubs of the certificate of deposit book, as well as the other books of the Bank, indicated the certificates to have been issued at a very nominal amount so that the most casual comparison of the cancelled certificates with the stub book, the certificate register or the books of the Bank would have disclosed the discrepancy. The discovery of these discrepanices required no knowledge of bookkeeping (Whitmore, Orig. B. of Ex., pp. 974-5 and 1021-2).

A large number of the certificates of deposit were shown by the books to have been paid when in fact they were outstanding and unpaid. At the failure of the bank its books showed it to have outstanding in certificates of deposit $86,265.70, when there was actually outstanding and unpaid the sum of $517,999.49—a total discrepancy of $431,733.79 (B. of Ex., pp. 37-8, 211).

Certificates of Deposit Account.

The Bank kept four separate and distinct "certificates of deposit" accounts some of which were overdrawn all of the time from 1888 until the failure of the bank in January, 1893 (Whitmore, B. of Ex., pp. 129-30; Jones, B. of Ex., pp. 211-

13). It is impossible for a certificate of deposit account to be overdrawn if properly and honestly kept (Whitmore, B. of Ex., p. 129; Jones, B. of Ex., pp. 212-13). No charge could be made against it except for the payment of the certificate previously issued, hence the debits could never exceed the credits (Jones, B. of Ex., p. 212). The mere fact that such account was overdrawn was proof positive of an irregularity. It was unnecessary to take footings to ascertain these overdrafts. The total was shown in red ink, which of itself, indicated an overdraft (Jones, B. of Ex., p 213). The slightest inspection would have disclosed the fraud.

Relief Fund Duplication.

During the 1891 session of the legislature of Nebraska, bonds were authorized issued for $100,000.00 to aid the drouth sufferers. They were sold for a net premium of $250.00 and on April 24, 1891, the sum of $100,250.00 was credited to the open account of "Nebraska Relief Fund," all of which was checked out by the relief fund committee except approximately $3,000.00 (Ludden, B. of Ex., p. 44; Jones, B. of Ex., p. 200).

On the same day certificate No. 24452 for $100,250.00 was issued payable to J. E. Hill, treasurer. This is one of the certificates Mr. Hill testified was fictitious and represented no actual transaction.

This certificate of deposit was used to take the place of other assets of the bank aggregating an equal amount. The history of these transactions is shown at bill of exceptions, pages 200-201.

Books Out of Balance $100,000.00 for Three Years.

On December 24, 1889, the account of the "state treasurer" had a credit of $23,328.75. On the same day a credit entry of $100,000.00 appears in the same account without any corresponding debit entry. The result was to throw the books out of balance in the sum of $100,000.00 and they remained in this condition from *December 24, 1889, to December 28, 1892* (Whitmore, B. of Ex., pp. 140-42). Any Bank officer

could have discovered this fact by mere inspection at any time. It was unnecessary to add up any figures (Whitmore, B. of Ex., pp. 143-44). The books in this regard were inspected by the trial court (B. of Ex., p. 144).

The books were brought into balance by putting in notes of Mosher and Outcalt (Whitmore, B. of Ex., p. 143).

Western Manufacturing Co. Notes.

One of the principal assets of the Capital National Bank were notes of the Western Mfg. Co., signed by E. Hurlbut, Jr. This company was organized in 1884 and ceased doing any business in 1889 except to manufacture notes for the Capital National Bank. Its capital stock was all borrowed from the Bank and it lost that (Hurlbut, B. of Ex., p. 103); and after this company had failed as a manufacturing corporation it began the active work of manufacturing notes for the Capital National Bank and from July 24, 1888, until the failure of the Bank, notes of this concern aggregating $755,000.00 (B. of Ex., p. 219), were discounted by the Bank and entered as a part of its assets. At the date of the Bank's failure it still held notes of the Western Mfg. Co., aggregating $235,000 (B. of Ex., pp. 229-31), not a cent of which was paid. This sum nearly equalled the Bank's purported capital stock while the law prohibited it from loaning more than 10 per cent of its capital to any one person or corporation. This company was in reality a myth and its notes were never of any value (McDonald, receiver, B. of Ex., p. 26). The mere presence of one of these notes among the assets of the Bank was sufficient to put the directors upon inquiry.

Paid Out in Dividends.

From January, 1885, until July, 1892, the Bank paid in dividends $251,750.00, when it was never in condition to pay any dividends (B. of Ex., p. 199).

Worthless Paper at Suspension.

When the bank failed it carried the following worthless notes as part of its assets (B. of Ex., pp. 227-33):

C. W. Mosher	$ 85,281.67
R. C. Outcalt	54,146.66
Mosher & Outcalt	5,832.00
E. W. Mosher	107,085.45
Western Mfg. Co.	235,000.00
So. Stave & Lbr. Co.	5,346.15
Marsh paper	18,192.00
W. A. Sharrar (affiliated with the Marshes)	7,153.76
W. A. Barstow	8,062.02
Total	$526,299.71

(This is not all of the bad paper but merely such as was notoriously bad and which the directors knew was either bad or in excess of the legal limit.)

The Bank also had the following overdrafts at the above date (B. of Ex., p. 233):

C. W. Mosher	$ 2,927.59
Mosher & Outcalt	8,983.36
E. Hurlbut, Jr.	1,756.09
Western Mfg. Co.	1,361.79
Stark & Mosher	1,691.84
Total	$16,720.67

Up to July 1st, 1891, the Bank had sustained losses which were definitely traceable to the enormous sum of $817,650.87 (Exhibit "XX," B. of Ex., p. 234), yet in its report of July 18, 1891, attested by D. E. Thompson and C. E. Yates, the following flattering condition was disclosed (folio 1076, sheet 4, B. of Ex., pp. 346-7):

RESOURCES.

Loans and discounts	$ 898,011.57
Overdrafts, secured and unsecured	12,834.98
U. S. Bonds to secure circulation	50,000.00
Stocks, securities, claims, etc.	2,913.49
Due from approved reserve agents	51,984.76
Due from other national banks	23,946.91
Due from state banks and bankers	2,880.04
Banking house, furniture and fixtures	5,770.00
Current expenses and taxes paid	3,815.30
Premium on U. S. bonds	1,437.50
Checks and other cash items	5,662.26
Exchanges for clearing houses	4,544.50
Bills of other banks	11,145.00

Fractional paper currency, nickels and cents....	251.70
Specie	31,350.00
Legal Tender notes.....	14,445.00
Redemption fund with U. S. Treas. (5 per cent circulation)	600.00
Total	$1,121,593.01

LIABILITIES.

Capital stock		$ 300,000.00
Surplus fund		30,000.00
Undivided profits		17,304.87
National bank notes outstanding.....		45,000.00
Individual deposits subject to check	$367,258.70	
Demand certificates of deposit.....	139,199.07	
Cashiers' checks outstanding.....	3,229.16	
Due to state banks and bankers....	47,783.89—	611,897.04
Notes and bills rediscounted.....		117,391.10
Total		$1,121,593.01

Not only did this report grossly exaggerate the Bank's assets and understate its liabilities as they in fact existed for up to July 1, 1891, it had sustained losses aggregating over $800,000—but it did not even truthfully state them as shown by the Bank's books. The following is a schedule showing the discrepancies between the published statement and the books of the Bank at the close of business July 9, 1891 (compare B. of Ex., pp. 346-7, folio 1076, sheet 4, and p. 169, Exhibit "1047"):

	Amount shown by bank books.	Amount as published.	Misstatements.
Loans and discounts...	$ 801,780.97	$ 898,011.57	$ 96,230.60
Overdrafts	62,885.24	12,834.98	50,050.26
Stock and bond account	52,913.49	2,943.49	49,970.00
Bills of Exchange.....	9,332.75	None.	9,332.00
Due from all banks....	6,628.70	78,811.71	72,183.01
Real estate	56,320.60	None.	56,320.60
Deposits	496,840.91	611,897.04	215,065.13
Total	$1,058,707.77	$1,121,593.01	$ 62,585.24

Similar discrepancies existed as to the other reports offered in evidence. Mr. Whitmore made a comparison of each of

these reports with the books of the Bank and testified to the discrepancies which existed between the books and the reports (Whitmore, B. of Ex., pp. 159-177, 293-4). In no case did the books and the reports agree.

The statement of the Bank's condition as of September 30, 1892 (which was signed by E. P. Hamer), showed the condition of the Bank as follows:

"Lincoln Daily Call, Friday evening, Oct. 7, 1892.

Report of condition of Capital National Bank at Lincoln, Nebraska, in the state of Nebraska, at the close of business September 30, 1892 (B. of Ex., p. 629, Ex. A-4):

RESOURCES.

Loans and discounts		$ 757,762.79
Overdrafts secured and unsecured		3,971.48
U. S. Bonds to secure circulation		50,000.00
Stocks, securities, etc		7,551.45
Due from approved reserve agents		84,163.35
Due from other national banks		7,442.92
Due from state banks and bankers		2,355.47
Banking house, furniture and fixtures		5,770.00
Other real estate and mortgages owned		38,617.93
Current expenses and taxes paid		8,079.84
Checks and other cash items		3,359.23
Exchanges for clearing house		19,544.74
Bills of other banks		1,265.00
Fractional paper currency, nickels and cents		341.90
Specie		27,038.00
Legal tender notes		15,047.00
Redemption fund with U. S. Treasurer, 5 per cent of circulation		1,250.00
Total		$1,033,561.11

LIABILITIES.

Capital stock paid in		$ 300,000.00
Surplus fund		6,000.00
Undivided profits		11,978.00
National bank notes outstanding		45,000.00
Individual deposits subject to check	$271,958.80	
Demand certificates outstanding	138,932.44	
Cashiers' checks outstanding	1,339.99	

Due to other national banks...	96,113.01	
Due to state banks and bankers	132,269.41—	640,612.75
Notes and bills rediscounted.....		26,967.67
Total		$1,033,561.11

The statement of the Bank's condition as of December 9th, 1892 (which was signed by C. E. Yates), showed the condition of the Bank as follows:

Report of the condition of the Capital National Bank, at Lincoln, in the state of Nebraska, at the close of business December 9, 1892 (B. of Ex., p. 845, Ex. X-979):

RESOURCES.

Loans and discounts.....	$ 768,601.44
Overdrafts secured and unsecured.....	6,217.74
U. S. Bonds to secure circulation.....	50,000.00
Stocks, securities, etc.....	325.00
Due from approved reserve agents.....	107,090.01
Due from other national banks.....	17,800.33
Due from state banks and bankers.....	5,394.72
Banking house furniture and fixtures.....	5,770.00
Other real estate and mortgages owned.....	38,617.92
Current expenses and taxes paid.....	14,286.28
Checks and other cash items.....	3,698.56
Exchanges for clearing house.....	8,841.16
Bills of other banks.....	2,355.00
Fractional paper, currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes.....	17,431.00
Redemption fund with U. S. Treas. (5 per cent of circulation).....	1,350.00
Total	$1,074,867.37

LIABILITIES

Capital stock paid in.....		$ 300,000.00
Surplus funds		6,000.00
Undivided profits		21,180.75
National bank notes outstanding.....		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit.	158,545.88	
Due to other national banks...	81,574.14	
Due to state banks and bankers	47,372.89—	643,632.24
Total		$1,074,867.37

The following is a list of the official published reports introduced in evidence that were attested by the defendants:

ATTESTED BY D. E. THOMPSON.

1. December 28, 1886 (B. of Ex., p. 81).
2. August 1, 1887 (B. of Ex., pp. 82, 631).
3. December 19, 1890 (B. of Ex., p. 91).
4. July 9, 1891 (B of Ex., p. 92).

ATTESTED BY C. E. YATES.

1. December 28, 1886 (B. of Ex., p. 81).
2. December 9, 1892 (B. of Ex., p. 84).
3. December 12, 1888 (B of Ex., p. 86).
4. September 30, 1889 (B. of Ex., p. 88).
5. July 9, 1891 (B. of Ex., p. 92).
6. December 2, 1891 (B. of Ex., p. 95).

ATTESTED BY E. P. HAMER.

1. September 25, 1891 (B. of Ex., p. 94).
2. September 30, 1892 (B. of Ex., p. 629).

The last statement offered in evidence purported to give the Bank's condition as of December 9, 1892. An examination of it discloses the Bank to be in a flourishing condition.

The full extent of its insolvency could not be definitely determined until the bank came into the hands of the receiver in the following month. We present herewith a schedule showing the Bank's assets and liabilities as disclosed by its own books and the actual value of the assets and the extent of its liabilities as shown by the receiver's books. The latter items are compiled from the testimony of Mr. McDonald, receiver:

Assets of Bank on January 21st, 1893.

	As shown by Bank's Books.	As ent. on Receiver's Books.	Actual Value.
Cash	$ 28,731.79	$ 15,385.87	$ 15,385.87
Furniture, etc.	5,770.00	300.00	300.00

Stock and bonds.....	325.00	325.00	325.00
Cash items	.....	13,330.68	4,280.85
Overdrafts	.....	33,767.20	4,771.57
Bills of exchange.....	4,997.97	4,997.97	4,778.02
U. S. Bonds.....	5,000.00	5,000.00	3,250.00
Bills receivable	851,880.07	519,600.00	41,500.26
Other assets	134,452.57	145,886.44	105,902.95
Total	$1,031,157.40	$738,583.16	$180,491.52

Liabilities of the Bank on January 21st, 1893.

	As shown by its books.	Actual Amount.
Due National banks.....	$ 39,675.33	$ 47,759.56
Due State banks.....	.....	114,349.62
Individual deposits	510,142.73	392,639.64
Certificates of deposit.....	97,301.27	517,999.49
Re-discounts	68,694.72	331,359.86
Other claims	.....	56,954.21
Clearing house	965.05	.....
Capital stock	300,000.00	300,000.00
Total	$1,016,780.00	$1,761,062.38
Books overstated assets.....		850,662.88
Books understated liabilities.....		744,282.38
Total discrepancy between the Bank's books and its actual condition January 21, 1893.		$1,594,945.26
Total assets		$ 180,491.52
Total liabilities		$1,761,062.38

Does it seem possible that this condition could exist and the directors be ignorant of its condition?

By-Laws of the Bank.

Prior to the time these defendants became directors of the Bank its by-laws provided for quarterly meetings, but on January 10th, 1888, they were amended on motion of D. E. Thompson so as to provide for meetings only on the second Tuesday of January and July—the dividend declaring periods (B. of Ex., pp. 326, 339, 472).

Right to Permit Overdrafts.

Prior to the time these defendants became directors, the Bank's by-laws did not permit overdrafts (B. of Ex., p. 326),

but on January 10th, 1888, by motion of D. E. Thompson, section 17 of the by-laws were amended to *authorize overdrafts on approval of the president or cashier* (B. of Ex., p. 339). This provision was in conflict with the national banking law. It seemed to be necessary in order to make the directors' abdication complete.

In the directors' letter to the comptroller under date of February 23, 1892 (to which reference will be made later), in referring to overdrafts to which attention had been directed, they said that "the records of the Bank will show specific instruction to the officers by resolution of the directors not to allow overdrafts." This statement was untrue, as the minutes of the January, 1888, meeting show (B. of Ex., p. 339).

The defendants were elected directors on May 23, 1884, to commence May 31, 1884 (B. of Ex., p. 332). After this and before the Bank was turned over to the examiner, the directors held *fifteen regular and two special meetings—during a period of nearly nine years* (B. of Ex., pp. 334 to 344). Substantially all the business transacted at the regular meetings was to elect officers and declare dividends. As to the special meetings—all the business transacted at the first (October 15, 1886), was to authorize the president "to endorse notes and bills discount" of the bank "when it became necessary to discount same" (B. of Ex., p. 337).

The second (February 20, 1892), was called for the purpose of considering a "communication received from the comptroller regarding some matters pertaining to the Bank affairs," the minutes recite; and "a full explicit reply was made thereto" and "signed by each director." Also, at this meeting, E. P. Hamer was put upon the so-called "discount committee" in place of W. W. Holmes, who had died a year previous (B. of Ex., p. 344). This meeting was held at the Burr block instead of at the Bank (B. of Ex., p. 596).

The letter of September 8, 1891, was as follows (Exhibit "945," B. of Ex., p. 73):

"Sir: The report of an examination of your bank, made on the 19th ultimo, has been received. The following loans appear to exceed the limit prescribed by section 5200 U. S. R. S.:

"E. W. Mosher.....$46,355.98
"G. W. Small..... 56,478.20

"It appears from the report that your bank holds real estate mortgages to secure the latter loan, which were acquired May 30, 1886. Your attention is respectfully called to section 5137, U. S. R. S., which provides that: 'No such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.'

"The examiner reports that when your last report of condition was made to this office you had overdrafts amounting to $55,004.47, as shown by your books, while you only reported $12,418.97, and classed the remainder as loans and discounts.

"You are respectfully informed that your reports and published statements should show the full amount of this item as it appears on the books of your bank.

"The practice of allowing overdrafts should be avoided so far as practicable. Demand notes sould be taken in all cases for temporary loans.

"Overdue paper is reported amounting to $106,760.25, of which $14,000.00 is classed as 'bad debts,' as defined by section 5204, U. S. R. S. Such of the overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after reasonable extension. The 'bad debts,' unless satisfactorily arranged in the meantime, should be charged off prior to declaring a dividend.

"Your premium account should be charged off, as the 4½ per cent U. S. bonds have no premium value in the market.

"The examiner reports that you expect to sustain a loss of $2,000 upon the note of Donnell, Lawson and Simpson and $2,500 upon your suspended and overdue paper, which together with the $14,000.00 'bad debts' you intend to charge off before declaring a dividend.

"It is noted that your current expenses exceed your undivided profits by $4,830.87. It appears from the report that your bank has a large liability on account of

notes and bills rediscounted, which the examiner states has been occasioned by the falling off in your deposits. It is respectfully suggested that some of your loans be called in as soon as practicable.

"The examiner reports that your board of directors has held only two meetings during the past year, and there is no record of their having examined or approved of the loans and discounts.

"It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

"Respectfully yours,

"R. M. NIXON,

"*Deputy and Acting Comptroller.*"

This letter was the subject of a discussion at a meeting of the directors in September, 1891, concerning which Mr. Scott testified.

On February 16th, 1892, the comptroller wrote the following letter (Exhibit "948," B. of Ex., p. 77):

"Sir: The report of an examination of your bank, made on the 26th ultimo, has been received. The following loans appear to exceed the limit prescribed by Sec. 5200, U. S. R. S.:

"E. W. Mosher.....$50,950.28
"G. W. Small..... 51,752.53

"The examiner reports that you have some loans that have been carried along for a number of years, which he thinks should be collected as soon as practicable, and includes the above excessive loans in this class. He also thinks that Mr. Mosher's liability as an endorser is too large.

"The agreement of Messrs. R. C. Outcalt and C. W. Mosher to reduce their liabilities, and in future adjust all accounts so that overdrafts will be confined to those of a temporary nature, and also that they will close the bulk of their outside interests, and give their attention to the affairs of the bank, is received. The examiner states that owing to these outside dealings the business of the bank has suffered.

"Overdrafts are reported amounting to $60,936.78. Please inform me to what extent these have been reduced since the examination. The practice of allowing over-

drafts should be avoided so far as practicable. Overdue paper is reported amounting to $104,868.19, of which $14,500 is classed as 'bad debts,' as defined by Sec. 5204, U. S. R. S. Such of this overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension. The examiner reports that losses aggregating $30,000, including the amount of 'bad debts' reported above, were charged off during the examination.

"The examiner reports that your by-laws require the board of directors to meet only twice a year, and that they often only go through the form of declaring a dividend, and do not examine the loans and discounts. He states that you have no discount nor examining committee. It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

"It appears from the report that your bank was borrowing $137,234.16 on notes and bills rediscounted, and that it has been borrowing money continuously during the past year. The examiner states that the amount of your borrowings have been largely reduced since his previous examination, and it is suggested that all this liability be paid off, and that the implied power to borrow money should be reserved for emergencies, and not habitually used for the purpose of procuring banking capital. The necessity for borrowing appears to have arisen from the excessive loans made, and your first effort should therefore be to realize on these by reducing them to the lawful limit. Special effort should also be made to collect or renew your overdue paper.

"Please bring this communication to the attention of your board of directors for consideration and for reply over their individual signatures.

"Respectfully yours,

"E. S. LACEY, *Comptroller.*"

The last letter was answered by the directors over their own signatures (Exhibit "944," B. of Ex., pp. 63-65):

"To the Hon. Comptroller of the Currency:

"Dear Sir: Referring to your letter of the 16th to Mr. C. W. Mosher, president, we would say in regard to the item of $50,950.28, E. W. Mosher, that this amount appears on the books to be a loan to him endorsed by C. W. Mosher and secured collaterally by notes of many in-

dividuals in smaller amounts, aggregating the same amount made to E. W. Mosher.

"The facts are that this account is made up with small notes taken in a territory from which comes the best products of the state, and considered a good field for a line of loans, and E. W. Mosher was authorized to get good paper of this character for the bank, and such notes being made in the name of E. W. Mosher.

"The officers of the bank, requiring a guaranty of his discretion, took notes of E. W. Mosher, which have been endorsed by C. W. Mosher, making the notes of smaller amounts collateral, thus making fewer accounts to handle, but unfortunately losing sight of the requirements of Sec. 5200 touching limits of amount which we may simply say ought not to have been done, and the matter has now received the attention of the directors through instructions to place the whole matter in technical as well as financially proper shape as quickly as it may be done without loss.

"The J. W. Small $51,752.53. This was originally a note given by the Fairfield Exchange Bank of Fairfield, Nebraska, for $20,250.00, at the time secured by collateral notes. In course of time the loan was found to be weak, and President Mosher took additional security in shape of second mortgage on real estate, a lot of livestock, etc. Mr. Small's bank and his own affairs fell into hard lines and failed in both respects.

"The officers of the bank meanwhile had paid off first mortgages on the real estate to the amount of some $31,000, to make better the bank security. Other creditors of Small attacked the position of the bank as holding excessive security, which resulted in litigation still unsettled, but through which the claims of this bank against some 2,700 acres of land had been declared a first lien. And it seems certain that the claim will be fully realized, or at farthest only a small loss can follow. The excessive amount of the account comes of erroneously charging the amounts paid for raising liens on the real estate in same account, instead of a special account therefor.

"In regard to overdrafts. Since the examination this matter has had close attention and has been reduced to $13,537.84 at this date, and should never have been permitted, inasmuch as the records of the bank will show specific instruction to the officers by resolution of the directors not to allow overdrafts.

"Overdue paper. Instructions have been made to the officers to give both close attention and continuous efforts to correct this condition. It will be remembered, however, that the J. W. Small account constitutes a part of this amount, which will hold a considerable sum in that condition until pending litigation is concluded.

"Discount Committee. The bank has always had a discount committee, but about a year since Mr. W. W. Holmes died suddenly and left only one member. The place has now been supplied by the appointment of Mr. E. P. Hamer, the committee now being A. P. S. Stuart and E. P. Hamer.

"Re-discounts. These have been cut down since examination from $137,234.16 to $50,844.14, and will probably be reduced considerably the coming three months. This condition was not taken on for purpose of increased business, but to meet falling off in deposits, from which all western banks suffered on account of the drouth of 1890.

"It is the desire of the directors that the standing of this bank should in all respects be upon perfect footing in the department, and will at all times be pleased to have notification of any apparent neglect.

"Yours respectfully,

"C. W. MOSHER, President.
"C. E. YATES, Director.
"R. O. PHILLIPS, Director.
"D. E. THOMPSON, Director.
"A. P. S. STUART, Director.
"E. P. HAMER, Director.
"R. C. OUTCALT, Director."

On September 19th, 1892, the directors wrote another letter to the comptroller which appeared to be in answer to one dated August 31, 1892, which had been lost. The directors' letter is as follows (Exhibit "943," B. of Ex., p. 63):

"Dear Sir: In reply to your favor of August 31, 1892, would state that we fully answered you in February last as regards the Mosher & Small loans, and am now making good progress toward cutting those items down to the limit.

"As regards the real estate mortgages that is a part of the Small matter, and both will be cleaned up at the same time. The *dividend of July 1st was all right.* The expenses since then have exceeded income by reason of having paid taxes and interest on certificates of deposit

to an unexpected amount during July. The item of $8,000 losses referred to was an estimate of contingent losses and not any particular loss already incurred, but referred to some matter or process of liquidation, all items mentioned by you shall receive prompt attention.

"Yours truly,

"(Signed)

"C. W. MOSHER.
"R. C. OUTCALT, Cashier.
"D. E. THOMPSON.
"E. P. HAMER.
"A. P. S. STUART.
"R. O. PHILLIPS.
"C. E. YATES."

We invite comparison between these letters and the comparative mild admonition contained in the comptroller's letter referred to in the case of *Thomas* v. *Taylor*. In that case recovery was based squarely upon the fact that after the receipt of such letter "defendants must have proceeded upon some reasonable inquiry and have had some apparently good ground for testing the report as it stood."

Thomas v. *Taylor*.

These letters informed the directors:

1. Of loans to its own officers and others which exceeded the limit prescribed by law and were in fact violations of law.

2. That the Bank carried overdrafts in violation of law; that the Bank had overdrafts amounting to $55,004.47 as shown by its books, while it reported only $12,418.97. Here was direct and specific knowledge that the report contained a false representation in this one item of nearly $43,000.00. It would seem this was sufficient notice to put ordinarily prudent men upon inquiry.

3. That overdrafts should be avoided; that overdue paper amounting to $106,760.25 should be collected or renewed and satisfactorily secured.

4. That the Bank had $14,000.00 in bad debts which should be charged off prior to declaring a dividend.

5. That item of premium on U. S. bonds should be charged off.

6. That the Bank had $18,500.00 in bad debts which it proposed to charge off before making a dividend—but did in fact never charge off.

7. That the Bank still carried as part of its assets, notes of Donnell, Lawson & Simpson, a firm that had been insolvent and out of existence since May, 1884 (over seven years), the notes purporting to have been executed subsequent to that time.

8. That its expense account exceeded the undivided profits by $4,830.87 (yet somehow they managed to declare the next regular dividend).

9. That the Bank had large liability on account of notes and bills rediscounted.

10. That the board had only two meetings during the past year and had not examined or approved of the loans and discounts, and

Finally, that the conduct of the Bank's affairs devolved by law upon the board of directors and regular and frequent meetings are very desirale.

We ask, how could a man of ordinary intelligence fail to know the Bank's condition had he paid the least attention to the comptroller's letter? It is no wonder Mr. Thompson said the whole thing was rotten.

In the second letter the comptroller called the attention of the directors:

1. To the excessive loans of E. W. Mosher and G. W. Small.

2. That the Bank had some loans that had been carried along for a number of years,—including the above loans of Mosher and Small,—which should be collected as soon as practicable. This must have referred to the notes of Donnell, Lawson & Simpson, of the various Marsh concerns and perhaps the Western Manufacturing Company.

3. Mr. Mosher's liability as an endorser was too large.

4 That there was an agreement that Outcalt and Mosher should reduce their liability and in future confine overdrafts to those of a temporary nature. And what is more significant, it informed the directors, if indeed they needed such information, that the business of the Bank had suffered by reason of Mosher and Outcalt's conduct of its affairs. Here was specific knowledge that the Bank officers were neglecting its affairs by reason of which the Bank was suffering. Was this not sufficient to open the eyes of the directors? After this information what excuse could they give for continuing their policy of inaction?

5. Attention is again directed to overdrafts prohibited by law amounting to $60,936.78, and requesting that they should be avoided; also overdue paper amounting to $104,868.19, which must be collected or renewed with security. The slightest examination of these items would have disclosed the Bank's condition.

6. The bank examiner reported that losses aggregating $30,000.00 were charged off during the examination. This statement was absolutely untrue for no losses were charged off at this time or at any other time.

Yet in face of this information the directors declared their usual dividend on July 1st following, and in their letter to the comptroller on September 8th, 1892, informed him that "the dividend of July 1st was alright."

7. The directors were criticised because they met but twice a year and then only to go through the form of declaring dividends and did not examine loans and discounts—that they did not have a discount or examining committee. And were again expressly reminded that the conduct of the affairs of the Bank devolved upon its directors.

8. They were again reminded of the Bank's heavy rediscounts and excessive loans, yet in view of all this information the directors declared their usual semi-annual dividend on July 12th, 1892, although they were informed by the comptroller that the bank examiner had charged off $30,000.00 in

bad debts,—which if true, made it impossible to declare a dividend.

In the directors' letter to the comptroller of February, 1892, they stated that the item of "$50,950.28, E. W. Mosher" was "made up with small notes taken in territory from which comes the best products of the state" and "E. W. Mosher was authorized to get good paper of this character for the Bank."

And Mr. Thompson testified (B. of Ex., pp. 447-8), this money was sent to E. W. Mosher to loan in York county. The money was sent in large amounts and Mosher's notes taken therefor. He then made loans in smaller amounts taking notes therefor in his own name and endorsing them to the Bank. These loans weer not regarded as the primary obligations of E. W. Mosher (B. of Ex., p. 351); he was the agent of the Bank to make these loans "and the Bank was to hold the *primary paper* of the real borrowers," but when the receiver took charge the Bank had, among its assets, notes of E. W. Mosher aggregating $107,085.45. These were carried as primary obligation and the notes of the *real borrowers* to whom the money had been loaned were also carried as primary obligations and entered as assets of the Bank (Jones, B. of Ex., p. 657; Exhibit "11-A," pp. 659-666; Exhibits "12-A," "13-A," "14-A," "15-A," pp. 667 to 726).

The letter states that "the records of the Bank will show specific instructions to the officers by resolution of the board of directors not to allow overdrafts" when the facts are the reverse (Minutes of January, 1888, meeting, B. of Ex., p. 339); and that "the Bank has always had a discount committee," *when it never had one.*

They said they had cut down re-discounts from $137,234.16 to $50,844.14, but when the examiner took charge this item amounted to $331,359.86.

The directors' letter of September 19,1892, was apparently in answer to the comptroller's letter of August 31, 1892. The letter could not be found, hence we are not apprised of the nature of the inquiry. The answer, however, says, good progress is being made in cutting Mosher and Small loans down

to the limit. When the bank closed it had the following paper in excess of the lawful limit:

C. W. Mosher	$ 85,281.67
R. C. Outcalt	54,146.66
Mosher & Outcalt	5,832.00
E. W. Mosher	107,085.45
Western Manufacturing Co.	235,000.00

It says "the dividend of July 1st was alright." How was a dividend possible if, as the comptroller's letter states, the examiner charged off $30,000 in losses during this dividend period?

That the directors were not satisfied with the management of the officers is clearly shown by the letters of Mr. Hamer to the comptroller wherein he says: "The manner of conducting the Capital National Bank of Lincoln, Nebraska, *for a length of time has not been satisfactory to me.* * * * I think I can promise you there will be better management" (B. of Ex., p. 62, Exhibit "942").

The directors, Thompson and Yates, have been fulsome in their denial of knowledge of the Bank's affairs, but they have not explained why in the face of these letters they continued to violate the directions of the comptroller, and deliberately refused to do their duty or how they managed to keep themselves ignorant.

In the face of these explicit instructions of the comptroller, the directors continued to attest reports, and permit the officers of the Bank to issue and publish official reports that were utterly false and untrue.

The Case as to E. P. Hamer.

Mr. Hamer had departed this life prior to the first trial in this case, hence there is no evidence to rebut the presumption that he must have known that the statements of the Bank's condition were false.

That he knew considerable about the Bank's affairs is apparent from his personal letter to the comptroller under date of February 23, 1892, which was as follows (B. of Ex., p. 62, Exhibit "942"):

"Dear Sir: Your letter of Feb. 15-92 received and considered. The manner of conducting the Capital Nat. Bank of Lincoln, Neb., for a length of time has not been satisfactory to me. I have had a talk with C. W. Mosher and R. Outcalt, president and cashier, on the subject, and they promise that the management of the bank shall be improved. I think I can promise you there will be better management. Your letter is a move in the right direction; it indicates that we, the directors, should take a more positive position in the management, which I, for one, shall do.

"Respectfully, etc.,

"E. P. HAMER."

At the trial of these cases the testimony of Mr. Hamer, taken in another case involving practically the same issues was introduced. In that testimony he admitted that he knew of the Western Manufacturing Company paper held by the Bank (B. of Ex., p. 594); and that he was generally familiar with the Bank's affairs is shown by the following:

Q. "When these dividends were declared they were made upon the faith of what Mosher stated to be the condition of the bank, were they not?"

A. "Oh, I couldn't say it was wholly on that he made the statements, but then, as I thought, we had some knowledge of the condition of affairs" (Hamer, B. of Ex., p. 595).

Q. "Did you ever examine at any time all of the bills receivable and all the paper in the bank?"

A. "Well, I supposed so. We thought we were examining them all" (Id., p. 595).

Q. "Did you know there had been a loss through Donnell, Lawson & Sampson?"

A. "Why, I knew something of it, yes."

Q. "Now, did you think it was right, Mr. Hamer, while this small matter was tied up in litigation, involving some $50,000.00, from 1886 up to the failure of the bank, in view of this loss or tying up of the capital or money of the bank by reason of the failure of Donnell, Lawson & Simpson in the amount of $29,000.00, and in view of the losses and tying up of the funds of the bank by the failure of the Sherman County Banking Company, amounting to some twenty odd thousand dollars, and in view of the overdue paper on hand and the

amount outstanding in the hands of collecting agents, and in view of the amount of money that was tied up in this E. W. Mosher business, or that was tied up in lands taken by him, did you think the bank was justified in declaring and paying dividends?

A. "I don't know as I am banker enough to decide just what amount a bank might lose and still declare a dividend. I don't know—" (Id., p. 597).

Q. "I call your attention to two reports made to the comptroller of the currency by the Capital National Bank purporting to have been signed by you, dated September 30, 1892, and September 25, 1891, and I will ask you if you signed those?"

A. "Yes, sir."

Q. "Did you read those over before you signed them?"

A. "Yes, sir."

Q. "Did you verify them by the books of the bank?"

A. "Well, no, not entire."

Q. "Do you know whether those figures that are on here now were on there then, showing the amount of overdue paper, bad debts, and loans in excess of the limit prescribed by law?"

A. "I suppose I knew that those were in excess, and I suppose I knew it when I signed it, but my understanding of that is that it started with a smaller affair and then run up these amounts" (Hamer, B. of Ex., p. 598).

There is not in the entire record one word on behalf of Mr. Hamer to show that he did not know the condition of the Bank's affairs or that he even believed the reports to be true.

As a director it was his duty to actively and actually assist in the management of the Bank and it must be presumed that he did so and that he knew its actual condition.

In any event, if he complied with the directions of the comptroller, he must have had knowledge. After this he could not be ignorant in law. Plaintiffs were required to do no more than to show opportunity for knowledge. From this the presumption of knowledge would follow. The record, however, shows more. It proves that Mr. Hamer was intimately acquainted with the affairs of the Bank.

As to Mr. Yates and Mr. Thompson.

Mr. Yates and Mr. Thompson were present at the trial and testified on their behalf and while they denied actual knowledge of the Bank's condition, their own testimony impeaches the truthfulness of their statements. After the letters of the comptroller and their own answers thereto, it was impossible for them to be ignorant without violating the direct and specific commands of the comptroller.

Their statement that they inquired of the bank examiner, who said the bank was in flourishing condition, is no excuse. The directors and not the examiner are the ones upon whom the duty of management devolves. Besides, the statements are mere hearsay and self-serving declarations, and entitled to no consideration. Such evidence is easily fabricated.

The comptroller's letters were based on the reports of the examiner, criticising the Bank's condition and it is not to be supposed he deliberately misrepresented its condition to the directors,—the very ones, who, above all others, should be expected to know.

C. E. YATES.

In his examination in chief, Mr. Yates said he had nothing whatever to do with the affairs of the Bank and had no knowledge of its condition, but when confronted with his testimony in another case, he was compelled to confess knowledge of facts which if pursued must have brought knowledge of the Bank's condition.

He joined with the directors in their letters to the comptroller, yet denies knowledge of everything contained in those letters, although he was present at the directors' meeting in February, 1892, when the comptroller's letters and the directors' answers thereto were discussed (B. of Ex., p. 344).

If he did see the comptroller's letter or joined in the answers of the directors, how can he say he was ignorant of the Bank's affairs? How could he be and obey the directions of the comptroller?

There is not a word from Mr. Yates as to why he violated the express directions of the comptroller or his duty as a director; why he made no effort to acquaint himself with the Bank's condition or why he persistently refrained from participating in the conduct of its affairs.

There is not a word of explanation of why in the face of all these facts he signed the statement of December, 1892—the month preceding the failure. This of itself is sufficient to establish his liability.

He says he knew nothing of the Donnell, Lawson and Simpson paper or the notes of the Marsh companies, although the comptroller's letters call specific attention to them.

He says he knew nothing about York county loans made to E. W. Mosher nor the loans to J. W. Small (B. of Ex., p. 556), while the comptroller's letters make specific mention of them and the directors' reply attempts to explain them in detail.

He says he knew nothing of the loans to Mosher and Outcalt and "would have raised a row" had he known it, yet the comptroller's letters direct specific attention to these loans as being excessive (B. of Ex., p. 555).

He says he didn't know the bank had any real estate or overdrafts or re-discounts, when the comptroller's letter challenged attention and gave direction with reference to them (B. of Ex., p. 577).

He denied knowledge of any loans to E. W. Mosher, although these were also referred to in the comptroller's letters (B. of Ex., p. 579).

When confronted with his testimony in another case he admitted he knew the Bank had some bad debts which were charged off prior to 1892 (B. of Ex., pp. 577-8); that the bank examiner, Griffith, told him Mosher hadn't been attending to business very close (B. of Ex., pp. 578-80); that the undivided profit account had been wiped off (B. of Ex., p. 580); and part of the Bank's six months paper had been cancelled (B. of Ex., p. 580); and there would be no dividend declared in December, 1892 (B. of Ex., p. 580); yet with all this knowledge he signed the statement which was published December 17, 1892.

MR. THOMPSON.

The evidence against Mr. Thompson is even more convincing than in the cases of Mr. Hamer and Mr. Yates. Not only is there direct evidence of knowledge, but there is such a mass of circumstances in support of it that only one conclusion is possible. We have never doubted that Mr. Thompson knew of the Bank's condition long before it closed its doors and that when the end was in sight he assisted in making away with what few assets remained. We submit in all candor that an impartial examination of the evidence in this case will justify our contention.

Let us review some of the facts and circumstances disclosed by the record.

On September 8, 1891, the comptroller of the currency wrote a letter which we have elsewhere set out in full. This calls specific attention to the fact that notes of Donnell, Lawson & Simpson were still being carried as assets of the bank. Mr. Thompson knew when he became a stockholder and director in June, 1884, that this firm had failed and that its account was worthless, for that very matter was discussed at the first meeting of the directors after it became the Capital National Bank (B. of Ex., pp. 430, 512-3, 529). Was it not a circumstance of suspicion that seven years later this paper should still be carried as an asset of the bank, especially when the paper was dated long subsequent to the failure of that firm (B. of Ex., pp. 189-90)?

The comptroller's letter of criticism was based upon the report of the bank examiner made shortly after the official report of July 9, 1891, which had been signed by Mr. Thompson, and calls specific attention to the fact that the official report misrepresented the item of overdrafts in the sum of nearly $43,000. The comptroller's letter also called attention to other matters of serious concern to the bank, to which we have already referred.

Shortly after the receipt of this letter there was a meeting of the directors at which the comptroller's letter was discussed. At this meeting Mr. Mosher and Mr. Thompson had

a quarrel about the "letter they had got from the comptroller," and Mr. Thompson stated to Mr. Mosher "that he thought the whole thing was rotten right through and he was going to get out of it" (Scott, B. of Ex., p. 353).

Mr. Thompson did get out shortly thereafter. He says it was on November 14, 1891, but the circumstances indicate it was an earlier period. The certificate for Mr. Thompson's stock which he claims to have sold to Mosher and Outcalt was for 180 shares and evidenced by certificate No. 137. The stub of the certificate of stock book so indicates. But it appears by the stock book that certificate No. 127 was issued December 17, 1891, and there remained in the stock book following stub No. 127, but preceding stub No. 137, seven certificates which were unused and had not been detached from the stubs. There could have been no purpose in this other than to show certificate No. 137 to have been issued at a later date than it actually was (B. of Ex., pp. 731-2).

Mr. Thompson took in payment of this stock the note of Mr. Mosher and Outcalt bearing six per cent interest when the stock had been earning twelve per cent annual dividends. He says that the sole reason for selling his stock was that in coming from Chicago he saw Mosher on a sleeper with a woman whom he recognized as a woman of the town (B. of Ex., pp. 443-4, 491-2).

His episode with Mosher was the reason he insisted on getting out of the Capital National Bank (B. of Ex., pp. 491-2).

According to Mr. Thompson's own testimony his connection with the affairs of the Capital National Bank was merely perfunctory. He did not participate in the direction of its affairs and all he claims to have done was to attend some of the meetings when dividends were declared.

In the Gas Company in which Mosher and Outcalt owned about 4,000 shares and Mr. Thompson but 200 out of a total of 5,000 (B. of Ex., pp. 538, 542), Mr. Thompson retained his stock (B. of Ex., p. 491) and accumulated more as he could get it (Honeywell, B. of Ex., p. 538). In this company Mr. Thompson continued as president, Mosher as vice-president

and Outcalt as treasurer (B. of Ex., pp. 537-9). This was during the period when large amounts of money were being expended by the Gas Company in the reconstruction of its plant and Mosher and Thompson were the ones who financed the enterprise (Honeywell, B. of Ex., p. 538 *et seq.*).

In the insurance company in which Mr. Mosher owned more stock than Mr. Thompson, Mr. Mosher continued as treasurer and Mr. Thompson as president (B. of Ex., p. 491). Both of these enterprises were operated and controlled almost entirely by Mr. Mosher and Mr. Thompson and necessitated closer and more intimate relations than the affairs of the bank. If it were solely on account of Mr. Mosher's degeneracy that Thompson sold the bank stock, why did not this same fact influence his holdings in the other companies?

Furthermore, Mr. Thompson did not dispose of all his stock in the bank; he retained 10 shares,—just enough to permit him to continue as a director. And he continued as such until the Bank failed (B. of Ex., pp. 443-4). It must be apparent that so long as he continued as a director his duties required him to continue his relations with Mosher just as before. Those duties arose by reason of being a director and were not dependent upon the amount of stock. It is thus apparent that the sale of the 180 shares failed to accomplish the very purpose for which he claims it was made.

It did not affect his relation to the Bank nor relieve him of his duty as director, nor of the necessity of continuing his associations with the immoral Mosher.

Mr. Thompson's fellow directors did not know of the sale of the stock (Yates, B. of Ex., p. 572). And to all outward appearances his interest and participation in the Bank's affairs was the same as before. Why should the transaction have been kept from the knowledge of his fellow-directors?

Just a few days before the bank failed, Mr. Mosher introduced Mr. Thompson to Mr. Dobson, president of the First Bank of Ulysses, at the Capital National Bank as "one of his principal stockholders" (B. of Ex., pp. 656-7).

It is apparent that Mr. Thompson's purpose was to rid himself of something that would in all probability develop to be a liability instead of an asset. By retaining but the ten shares he reduced his liability to assessment to $1,000.00 and he thought that by thereafter refraining from signing reports he would be free from further liability, but continued to let the Bank use his name (B. of Ex., p. 444).

In payment of his bank stock he took the note of Mosher and Outcalt. He thought they were very wealthy and would have been willing, he says, to have taken their notes unsecured for several times that amount, but in this case he took Gas stock as collateral security (B. of Ex., pp. 492, 497).

He says the collateral security was unsolicited on his part, but was proffered by Mosher (B. of Ex., p. 492), (although at one time he forgot himself and said they "had to give something as security" [B. of Ex., p. 504]). We know now that the Bank was then hopelessly insolvent. We have shown that up to July 1, 1891, the Bank had sustained losses aggregating upwards of $800,000.00, and that Mosher knew its actual condition will not be questioned. Is it reasonable to suppose that knowing his own insolvency, Mosher would deprive himself of valuable assets which he could easily convert into money and voluntarily gave them to the man who had charged him with immorality, refused to associate with him and practically forced the purchase of the stock?

When after the bank's failure the Gas Company was sold, Mr. Thompson owned over $100,000.00 of its stock (B. of Ex., p. 482). How much above that he owned he would not inform us nor were we advised how he got it.

He joined in both of the directors' letters to the comptroller. And that he was conversant with the contents of those letters is shown by his own evidence. He says he knew the character of the dealings between E. W. Mosher and the Capital National Bank (B. of Ex., pp. 470-1), and explains that the Mosher notes evidence money that was loaned in York county on real estate security; that Mosher was in a sense the agent

of the bank (B. of Ex., pp. 447-8, 470-1); that these real estate mortgages were the primary obligations and the Mosher notes were taken as a convenient method of handling the business.

But the fact is that the Mosher notes were carried as assets of the bank and so were the loans which were made with this money. Here was a plain duplication of assets. The record shows that loans so made in York county, aggregating $720,-918.34 (B. of Ex., p. 726), actually entered into and became a part of the assets of the bank and were carried as such (B. of Ex., pp. 657-8 to 726); at the same time the Mosher notes were also being carried by the bank as assets.

That Mr. Thompson was actively and intimately connected with the bank's affairs is further shown by the fact that on October 21, 1892, he wrote a personal letter to the comptroller of the currency (B. of Ex., p. 599). The directors' meeting of February 20, 1892, at which the comptroller's letter was discussed, was held at the Burr block (B. of Ex., p. 596), where Mr. Thompson had his office (B. of Ex., pp. 455, 505), "a block away from the Capital National Bank."

In December following this letter (the month before the Bank failed) Mr. Thompson exchanged his gas stock collateral for deeds to real estate in York, Hamilton and Lancaster counties. Mr. Thompson testified these deeds were brought to him previously executed by Mosher and Outcalt and their wives without any knowledge beforehand on the part of Mr. Thompson that they were to be given (B. of Ex., pp. 488, 499, 500). Is it reasonable to assume that Mr. Mosher would have had all these deeds prepared and executed without some previous assurance that the exchange of securities would be acceptable? Later on, after Mosher had opportunity to sell some of this real estate, he would, without prior arrangements, bring to Mr. Thompson deeds of other lands and procure reconveyance of lands previously deeded to Mr. Thompson. They were transactions as would occur only between men whose relations were most intimate.

With these deeds came a bill of sale of all of Mr. Outcalt's personal property (which was in fact a mortgage, B. of Ex., pp. 502-8-9), at the Lancaster farm and a chattel mortgage on every particle of personal property contained in Mr. Mosher's home, described in the very minutest detail (B. of Ex., p. 733, Exhibit "1060"; B. of Ex., p. 735, Exhibit "1059").

The real estate in reality belonged to the bank and had been obtained through real estate mortgages taken for the Bank in the E. W. Mosher loan transactions (Sanford, B. of Ex., pp. 424-8).

This must have been known to the directors, for some of the real estate that was conveyed to Mr. Thompson was described and listed in the Bank's report to the comptroller under date of December, 9, 1892, as being a part of the bank's assets (B. of Ex., p. 346, folio 1096, sheet 1).

Mr. Thompson testified (B. of Ex., p. 502) that he or Mr. Mullen, his secretary, had the deeds filed for record, but the truth is that, at least as to four deeds, they were sent for record to Hamilton county by Mr. Sanford, an employee of the Capital National Bank. The recording fees were paid by Mr. Sanford and the deeds returned to him (B. of Ex., pp. 749-50).

Why should Mr. Sanford have paid the recording fees? Why were the deeds sent for record by the Bank and again returned to the Bank's employee? Does this not indicate a close relationship between the parties?

These instruments were filed January 19, 1893, just two days before the bank failed (B. of Ex., pp. 749-51).

Mr. Thompson says he was in Terre Haute, Indiana, when the bank failed, and testified at the former trial of this case, that both the bill of sale and chattel mortgage were delivered to his secretary, Mr. Mullen, and by him filed for record during Mr. Thompson's absence in Indiana and without his knowledge; that he had no knowledge of the bill of sale until he returned from Terre Haute (B. of Ex., p. 517), and was very

much displeased to learn of it when he returned (B. of Ex., pp. 518-9). But at the last trial he was confronted with his answer in a garnishee proceedings (taken about a month after the failure of the Capital National Bank), wherein he admitted that the bill of sale was delivered to him with a deed to Outcalt's farm in December, 1892 (B. of Ex., pp. 498-9), and that he agreed to withhold it from the records (B. of Ex., p. 503), and called Mr. Mullen's attention to the fact that the date had been omitted (B. of Ex., p. 519). This date was supplied before the instrument went on record, hence the instrument must have been delivered before Mr. Thompson left for Indiana.

The bank closed its doors on Saturday, January 21, 1893, at 1 o'clock P. M. The Mosher and Outcalt chattel mortgages were filed for record early on Monday morning following, by Mr. Mullen, with the request that they be kept from the public, copied into the regular register and the originals returned (B. of Ex., pp. 635-6); about 30 minutes later Mr. Dorgan filed a duplicate of the Mosher mortgage (B. of Ex., p. 636). When informed that Mr. Mullen had already filed such an instrument Mr. Dorgan remarked that he was obeying orders (B. of Ex., p. 636). Upon whose authority these instruments were filed was not disclosed by the evidence, but that both instruments had been prepared a long time previous to their filing was evident by an inspection of the instrument as was shown by the county clerk's testimony (B. of Ex., pp. 634-6, 638). The dates of the instruments had been left blank and had the appearance of having been inserted shortly before their filing.

The Mosher mortgage contained from 150 to 200 separate and distinct articles, specifically enumerated, and no doubt required considerable time in its preparation. It is very improbable that Mr. Mosher could have found time on the Sunday on which the Bank went into the hands of the bank examiner to have these mortgages prepared. And if they were prepared at a previous time, Mr. Thompson certainly knew of it, for he was still in Lincoln at 2 P. M. of the day preceding.

At the former trial in these cases Mr. Thompson testified that he left Lincoln for Terre Haute on Tuesday or Wednesday before the bank failed, or even a day or two earlier, but at this trial when again confronted with his answer in the garnishee proceedings he was forced to admit that he did not leave Lincoln until Saturday, January 21, at 2 o'clock, P. M., an hour after the bank had closed its doors never again to open (B. of Ex., pp. 476, 517).

We do not wish to burden the court with a detailed recital of the evidence, but a careful examination will leave no doubt that both of these instruments were in Mr. Thompson's possession for more than a month prior to the Bank's failure. Mr. Mullen, to whom it is claimed these instruments were delivered, was present throughout the trial, but was not put on the stand to tell when or how they came to him. This was a circumstance the trial court was justified in taking into consideration.

Mr. Thompson concedes it would have aroused his suspicion to have taken a chattel mortgage on Mr. Mosher's household goods (B. of Ex., pp. 496-7), or the bill of sale of Outcalt's chattels—if it had come to him,—for both Mosher and Outcalt were supposed to be very wealthy men (B. of Ex., p. 434). He endeavors to convey the impression that these instruments might have been delivered to Mr. Mullen but the evidence conclusively shows that the transactions were had between Mr. Thompson and Mosher in person (B. of Ex., pp. 499 to 500), including the agreement not to put on record (B. of Ex., p. 503).

At the former trial Mr. Thompson testified that the Mosher chattel mortgage came to him when it became evident the bank was going to fail (B. of Ex., p. 518) and that the bill of sale of Outcalt's horses, hay, sulkies and horse boots was taken at the same time (B. of Ex., p. 519), yet he says that a man could not be more astonished over anything than he was when he was advised of the Bank's failure (B. of Ex., pp. 441-2), although the Bank was closed before he left Lincoln. Being forced to admit he received the Outcalt bill of sale in Decem-

ber, 1892 (B. of Ex., pp. 497 to 500), he attempted to avoid its effect as a circumstance of suspicion (taking such security from a man of Outcalt's reputed wealth (B. of Ex., p. 497)), by saying this property "belonged to the farm and wouldn't be worth a rap without the farm, or one without the other" (B. of Ex., pp. 497, 528). It is not apparent how trotting bred horses (B. of Ex., p. 503), hay, sulkies, harness and horse boots, could be considered part of the land and be of no value without it. Or, why the land would be without value if separated from the chattels.

The absurdity of this statement is shown by the fact that he sold the chattels (B. of Ex., p. 529) while he retained the land for 10 or 12 years (B. of Ex., p. 501).

Shortly after his return to Lincoln (on January 26, 1893), Mr. Thompson published a letter in the *State Journal* attempting to exonorate himself from blame in connection with the Bank's failure (B. of Ex., pp. 183-5). (Strange he should find it necessary to defend himself. "The wicked flee when no man pursueth." In it he admits the chattel security was given to him with the deed to the stock farm *some weeks prior* to the Bank's failure.

As to the Mosher mortgage, he says it was given without his solicitation or knowledge beforehand, but does not say when. He says it was given to secure $2,000.00 in stock which Mr. Mosher held in trust for Mr. Thompson's daughter, Laura, and was obliged to return "or its equivalent" (B. of Ex., pp. 515-6), and so the mortgage recited (Exhibit "1060," B. of Ex., p. 735). It was conditioned that Mr. Mosher, who held this stock in trust for Mr. Thompson, should pay the dividends to Mr. Thompson's daughter until she arrived at the age of 18 and that thereupon he should return the stock or its par value of $2,000.00 to Mr. Thompson, at the latter's election; thus making Mr. Mosher a guarantor of the value of the stock. It provided that Mr. Thompson might sell the chattels and pay himself the sum of $2,000.00.

The fact is, *no such obligation was imposed upon Mr Mosher by the trust arrangement.* At the last trial the orig

inal stock certificate, with the trust agreement endorsed, was introduced in evidence (Exhibit "A-17," B. of Ex., p. 730). This conclusively shows Mosher to have been a mere naked trustee; that there was no such obligation imposed upon him and plainly indicates that the chattel mortgage was made for a fraudulent purpose.

The $2,000.00 stock was actually owned by Mr. Thompson but by means of this chattel mortgage he evidently made the Bank's receiver believe it belonged to Mosher and in that way escaped paying assessment on it—which he should have paid (B. of Ex., p. 516).

As soon as Mr. Thompson reached Terre Haute he received a telegram from Lincoln informing him of the bank's failure. He immediately started for Lincoln and on his way wired Mr. Mansfield, Mr. Mosher's father-in-law, who resided in Peoria, to meet him (B. of Ex., p. 474). Why did he think Mr. Mansfield would be interested? With no information except that the bank had failed, why did he apparently attach blame to Mr. Mosher and seek his father-in-law to assist in the matter?

He reached Lincoln early in the morning and was at once called to Mosher's home and Mr. Mosher confessed that all Mr. Thompson had heard about his criminal conduct was true and that he wanted to go to the penitentiary as quick as he could get there (B. of Ex., p. 442). At the directors' meeting of January 22, 1893, Mosher said the bank was "completely busted" (B. of Ex., p. 565).

Yet Mr. Thompson professed to have confidence in its solvency and to have advised his friends not to adjust their claims against the bank for 75 per cent.

Mr. Thompson was active in trying to help Mosher in his troubles.

After Mr. Mosher was arrested Mr. Thompson called on him in the jail in which he was confined and there received an order to pay Mrs. Mosher the dividends on certain Gas stock which had been pledged to creditors. In order to assist Mosher in keeping the dividends from garnishing creditors Mr.

Thompson secretly placed the money in a safety deposit vault and had the books of the Gas Company indicate they had been paid, when in fact Mr. Thompson actually had the money in his possession (B. of Ex., pp. 479-481). These dividends properly belonged to the pledgees of the stock (B. of Ex., pp. 525, 529).

This fund was in controversy in *F. & M. National Bank v. Mosher et al.*, 68 Neb. 724, where it was sought to be reached by garnishment against the Gas Company and Mr. Thompson. The Gas Company by Mr. Thompson contended the stock was claimed by other parties. The plaintiff alleged the claims were fictitious and fraudulent, and actually made in the interest of Mosher; and asked that the Gas Company be required to show who the real claimants were. The Gas Company did not disclose and plaintiff's request to obtain that information was objected to and sustained by the trial court—a palpable error. Plaintiff mistook its remedy by appealing to the supreme court instead of prosecuting error, and that tribunal decided that it was powerless to afford relief.

The anomaly of the situation was that the creditor was denied the fund because the stock was pledged to third parties, yet neither creditor nor pledgee got the money.

Mr. Thompson appears to have been very much elated over his success in manipulating this fund for his immoral friend Mosher. When interrogated as to where he kept the fund he said:

> "If you had been smart enough you could have gotten this on garnishment most any time. This money has lain there since July, 1895; * * * and if you folks had been as cunning about that as about other things you might have gotten that money" (B. of Ex., p. 480).

By means of this manipulation the creditors were defrauded out of upwards of $8,000.00.

Mr. Thompson points to his personal losses as evidence of his good faith, but it appears that on Jan. 6, 1893, he had on deposit $2,090.30 and on January 21, when the bank failed, he had on deposit 51c (B. of Ex., p. 730).

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As to the Gas Company's deposit, Mr. Thompson's holdings were so small that his share of the losses were trivial. Mosher and Outcalt owned fully four-fifths of the stock, while Mr. Thompson owned but one-twenty-fifth, and it is absurd to pretend that the latter had absolute control over the account when Outcalt was treasurer. Moreover, in the circumstance it would have aroused suspicion to transfer this account to a competitor bank, and it was not such an account as could be plausibly placed in a savings bank. Mr. Jones testified this account received a credit of $10,000.00 growing out of the fraudulent certificate of deposit for $100,250.00 issued in the name of J. E. Hill, treasurer (B. of Ex., p. 201). The account of the Aurora State Bank of Aurora, Nebraska (about 75 miles west of Lincoln), in which Mr. Thompson was a small stockholder, was in a similar situation. He could not have advised its officers to transfer or withdraw its funds without betraying knowledge of the conditions that prompted the act.

In the Insurance Company Mr. Thompson owned 25 per cent of the stock, and observe how this account was handled.

On the morning of January 21, 1893, the day the bank failed, the Insurance Company had on deposit with the Capital National Bank $10,182.49. Before 1 o'clock of that day three checks aggregating $9,082.65 were charged to that account (B. of Ex., p. 729). Mr. Thompson claimed at the former trial he was absent when this was done, but at the last trial, being compelled to confess his presence, he attempted to explain the transaction by showing that these checks were given to three savings banks in Lincoln to deposit on interest, and that the reason was that the savings banks were paying 5 per cent interest, and would pay the money at any time by the depositor losing his interest (B. of Ex., p. 490). But he evidently forgot that the Capital National Bank was at that very time paying 6 per cent interest on deposits on the same terms (B. of Ex., p. 540; Orig. Bill, p. 1230).

One of these checks was cashed. The other two, aggregating $6,000, were merely credited to the accounts of the payees on

the books of the bank. When Mr. Thompson returned from Terre Haute he found the $6,000 had not been withdrawn, and he says he reimbursed the payees because he thought it was the right thing to do. No doubt he did it because he knew the exposure a suit might bring, and now attempts to make virtue out of necessity. His action in checking out this account on the day the bank closed shows his intimate knowledge of the situation. He evidently left the state to avoid suspicion. The fact that the two payees did not withdraw the funds at once was a misfortune he could hardly guard against. A hint to them would have indicated knowledge of the coming crash.

That Mr. Thompson was intimately acquainted with the bank's affairs during the last year of its existence can not be doubted (R. of Ex., Exhibit "AU," pp. 599, 656-7). That he knew of the published official reports is conclusively presumed, and in fact he does not deny it.

An impartial examination of the record compels the conclusion that Mr. Thompson knew the condition of affairs and thought he was avoiding liability by refraining from attesting reports. This theory is further supported by the fact that while he was superintendent of the railroad company, and away from home a large portion of the time, he attested reports frequently, but after he severed his connection with the railroad and took charge of the Gas Company and the Insurance Company, which kept him in Lincoln, and in close association with Mosher and Outcalt, he attested none.

The case of *Stuart* v. *Hayden*, 169 U. S. 1, 18 Sup. Ct. Rep. 271, is in some respects similar to these. It was an action by Hayden as receiver of the *Capital National Bank* v. *Stuart*, a stockholder and director, to enforce his individual liability as shareholder under sections 5151 and 5234, Rev. Stat. U. S. Mr. Stuart and the defendants herein became directors of the bank at the same time (1884), so that the controversy grew out of the same bank's affairs, and involved matters within the same period covered by these actions. The appellant Stuart is the same person who, with Mr. Hamer, comprised the so-called "Finance Committee." Mr. Stuart had transferred his

stock in the bank to Gruetter and Joers in December, 1892, in exchange for real estate, and the issue was, if, notwithstanding such transfer, he was liable to assessment. The lower court decided he was, and this court affirmed the decree.

The question of knowledge of the bank's insolvency was a material factor. On this point Mr. Stuart testified that "Far from knowing at the time that the bank was insolvent, he believed it to be solvent, and able to meet its liabilities of every kind." The evidence of other witnesses, however, disclosed that he "for some time previous to the sale of his stock had been dissatisfied with the conduct of Mosher, the president of the bank" (just as Mr. Hamer in his letter of February 23, 1892, complains to the comptroller [B. of Ex., p. 62]); "that he had received an 'intimation' that the next general dividend would be passed" (just as Mr. Yates had received a similar "intimation" [B. of Ex., p. 580]). (In fact the comptroller's letter of February 16, 1892, says the examiner charged off losses aggregating $30,000 on January 26 preceding, and it would seem this was sufficient "intimation" that a dividend in July would be impossible); that he "had information that a large amount of the bank's money was 'locked up' in real estate, and invested in worthless securities" (just as the defendants here knew, as we have heretofore shown).

After reviewing the evidence this court decided that "the circuit court was justified by the evidence in finding that Stuart, with knowledge of the insolvency of the bank, or, at all events, with such knowledge as reasonably justified the belief that insolvency existed or was impending," sold and transferred his stock.

It is impossible to believe that any of the directors were ignorant of its precarious condition for nearly a year prior to its failure.

In the Stuart case, it was urged that the evidence of knowledge on his part was negatived by the fact that he and his wife each had $1,250.00 on deposit in the bank when it closed its doors, but Mr. Justice Harlan very aptly remarked that

this may be accounted for by the fact "that he did not expect the bank to fail so soon."

The same condition may have existed as to Yates and Hamer, but Mr. Thompson no doubt knew the end had come before he departed for Terre Haute.

> "Fraud is commonly deeply hid away. Often it can only be got at by inference. It is scarcely ever proved by admission, for it blows no trumpets. One can not put his finger on it and say: Lo, here it is, papable to the touch. But it is got at by following its tracks from results back to the inception of the affairs, or from the inception of the affairs forward to the results. To that end, courts are full of solicitude and look with a jealous and anxious eye. Therefore, they permit a minute search and a wide one in pursuit of fraud, for it may now and then be seen through a small crevice, and seemingly indifferent things, without sinister significance when taken separately, may, when properly dovetailed together, establish fraud."
>
> *Black* v. *Epstein*, 221 Mo. 286.

Evidence of fraud not only preponderates but is established beyond a reasonable doubt. No stronger proof would be required in a criminal action.

The trial court certainly applied the rule of liability prescribed by the Federal Statutes, and its findings are sustained by the evidence. No other conclusion was possible. It was confronted by the witnesses and best able to judge their credibility.

Indeed, on the question of knowledge the opinion of Hamer, J., is not in conflict—for it concedes, "that for a *considerable length of time before the bank was closed* by the comptroller he (Mr. Thompson) had some *knowledge* that its *financial condition was questioned.*" The court escaped the right conclusion by adopting an erroneous test of liability. An examination of the majority opinions discloses that they do not disturb the trial court's findings of fact, as such, but differ as to the legal effect of the evidence.

The opinion of Sedgewick, J., rightly concludes that it is useless to discuss the evidence "in view of the total inadequacy of the opinion (of Hamer, J.), and concurring opinion

to discuss or even state the questions of law upon which this decision depends." Having entirely misconceived the law applicable to the case, the conclusion as to the legal effect of the evidence was necessarily erroneous.

It is almost unbelievable that a national bank could maintain its existence for nearly ten years and be in such utter insolvent condition. No matter how dishonest its officers, its condition could not escape director's knowledge without the grossest of negligence and wanton recklessness. It is impossible to imagine how their conduct could be worse in this respect, and after their attention was directed to the matter and their course of duty pointed out to them we are at a loss to know what could be said in their defense.

Directors' standing in the community is depended on to bring prosperity to the bank and they ought not to be permitted to receive the benefits of that situation without living up to its responsibilities. If they may act as mere dummies, as decoys to lure confiding customers,—and if the conduct disclosed by the record does not constitute a violation of duty,—then the national bank act is a mockery and a sham.

If directors are not bound to preserve and exercise "their functions and authority" how can they "save the banks from disaster and the public who deal with them and support them from deception."

The plaintiffs in these cases have been wholly without fault and "it would be a matter of just reproach if the law were so impotent as to afford no redress."

We respectfully submit the decision of the supreme court of Nebraska ought to be reversed and the judgments of the district court affirmed.

Respectfully submitted,

JOHN JACOB THOMAS,

LIONEL C. BURR,

Counsel for Plaintiff in Error.

Seward, Nebraska, March 4, 1915.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 502. 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

ERROR TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

J. J. THOMAS,
L. C. BURR, AND
A. B. HAYES,
Attorneys for Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The short time that has elapsed since the service of voluminous briefs of defendants in error makes it impossible to review them fully. We are, therefore, compelled to limit our discussion to a few points of the new matter suggested therein.

Sufficiency of the Printed Record.

The contention that this court should not examine the evidence because all of it is not contained in the printed record is without merit. The petitions allege, in substance, (1) that the Capital National Bank was insolvent; (2) that defendants knowingly represented it to be solvent; (3) that plaintiffs saw the statements; (4) that they believed them to be true, and (5) relying upon them, deposited their money in the bank and lost it.

The trial court's findings on all these issues were for the plaintiffs in error, and the State Supreme Court's decisions conceded their correctness, except as to the sufficiency of the evidence to sustain the charge of *scienter*.

Our understanding of the rules of this court on the matter of printing is that they were designed to shorten the record and lessen the labor of the court by printing only such portions of the bill of exceptions as is necessary to a determination of the errors assigned and relied upon. Acting upon this assumption, we designated such parts only as we deemed necessary for that purpose. These designations were duly served on defendants in error, and they, with knowledge of the questions raised in our assignments of error, designated such additional parts for printing as to them seemed necessary. As a matter of fact, it does contain all the evidence that bears upon the question at issue. De-

fendants do not point out any omitted evidence but desire this court to assume such to be the case because slight portions of a very voluminous record are not printed—when they know nothing pertinent to the issues has been omitted.

In the circumstances, we believe the language of Mr. Chief Justice Fuller, in Walston *vs.* Nevin, 128 U. S., 578; 9 Sup. Ct., 192, applicable:

> "But we only require the printing of so much of the record as will enable us to act understandingly without referring to the transcript; and if, in the judgment of counsel opposing the motions, more in that respect was needed, he might have made such specific reference thereto as would have enabled counsel for the moving parties to have supplied it. As the cases stand, we have apparently been furnished with quite enough for the disposition of the question involved."

The authorities referred to by defendants in error do not support their contentions. The one nearest in point is U. S. *vs.* Cooper, 185 U. S., 495; 22 Sup. Ct., 761, which holds that a judgment will not be reversed on the ground that there is absolutely no evidence to sustain it where the *bill of exceptions* does not show that the evidence contained therein is all the evidence that was given on the trial, but that is not our case. The bill of exceptions in these cases does show affirmatively that it contains all the evidence that was given on the trial (Original bill of exceptions, pages 1889, —), and that we have printed all of the record pertaining to the point at issue is not denied.

The point is made, that there is no stipulation that the printed record contains all the evidence. But, we submit, when defendants were served with designations for printing, in which we indicated the evidence we deemed necessary for the consideration of the errors assigned, and, in response thereto, defendants designated for printing such additional parts as they deemed necessary for that purpose, that this is equivalent to a stipulation that the printed record,

as thus designated, contains all the evidence necessary to enable this court "to act understandingly without referring to the transcript." To print portions of the record not necessary to the consideration of errors assigned and relied on, would serve no purpose. It would only encumber the record and increase the labor of the court. Moreover, defendants in error are not in position to raise that question at this time. Having had opportunity to designate additional parts for printing, and having availed themselves of this opportunity, they have conceded that the court has been furnished with quite enough of the evidence for the disposition of the question involved, namely, Is the evidence sufficient to establish a *scienter?*

The rules of this court provide (Rule 10, sec. 9) that plaintiff in error may within ninety days designate for printing such parts of the record as he thinks necessary for the consideration of the errors on which he intends to rely, and the defendants in error may within ninety days thereafter designate such additional parts as he thinks material. The assignments of error disclose that a decision of these cases necessitates an examination of the evidence. The defendants knew this when they designated additional parts for printing, and the court may rest assured nothing pertinent to the issues has been omitted.

However, should our view of the situation be erroneous, having in good faith printed all that portion of the bill of exceptions which is at all pertinent to the issues and which the court would in any event examine, we ask that we may be permitted to print the remainder of the record on such terms as the court may deem just to impose, in the event the court shall desire the entire record printed. We assure the court, however, that it will be a needless expense, as no reference will ever be made to it in the disposition of these cases.

The Findings of the State Supreme Court Are Subject to Review.

On page 23 of Mr. Thompson's brief it is said:

> "Under the State constitution the concurrence of four judges is necessary in order to pronounce a decision. No point maintained in the opinion of Hamer, J., therefore, became the decision of the court, except the single one concurred in by Letton, J., * * *."
>
> "What was that concurrence?
>
> "That under the holdings of the Supreme Court of the United States, as to the measure of duty and of liability of directors under the banking laws of the United States, I think the case has not been made" (Jones Trans., pg. 55).

But how is it to be ascertained what standard of duty or test of liability he applied, or if they were in harmony with the mandate and decision of this court?

That he misconceived the decision of this court, a mere reading of the opinion will disclose. That he afterwards saw his error and tried to rectify the wrong by voting to grant a rehearing, does not remove the error from the opinion so long as the judgment of reversal is based upon it.

If we assume he concurred in the reasoning of Hamer, J., it does not aid defendants, for that opinion falls by the weight of its own obviously erroneous statements.

Defendant Thompson (Brief, pg. 26) impliedly concedes the existence of what it chooses to call "inaccuracies of expression found in the opinions of the State court," but seeks to brush them aside by saying they are pointless "unless it can be demonstrated that the basic finding of fact which controls the judgment is wrong," by which is doubtless meant that the conclusion of the controlling opinion of Letton, J., to the effect that "a case had not been made" under his view of the holding of this court in these cases, is a pure question of fact which this court cannot review.

How are we to determine whether the "basic finding of fact which controls the judgment is wrong" if we do not know by what test liability it was measured?

The truth is, that the so-called finding of fact of Letton, J., is not a finding of fact at all, but a conclusion as to the legal sufficiency of the evidence upon an assumed standard "of duty and of liability," of which we are not apprised. Surely a litigant will not be denied a Federal right merely because the State court failed or refused to make a sufficient finding of fact. As was said in Carlson *vs.* Curtiss, 234 U. S., 103; 34 Sup. Ct., 717:

> "Although the State court might have disregarded the Federal question as having been abandoned in the trial court, recognizes plaintiff in error's contention of a Federal question and by its decision necessarily overrules it, this court must necessarily deal with the Federal question * * *. While in ordinary cases we are bound by the findings of the State court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic question of fact, deprive a litigant of the benefit of a Federal right any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where, when its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record to determine whether there is evidence to support the findings of the State court, so it is our duty, in the *absence of adequate findings*, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right."

To the same effect is Southern Pacific Co. *vs.* Schuyler, 227 U. S., 601; 33 Sup. Ct., 277, wherein it was said:

> "It is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that evidence is

> before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a *mixed question of law and fact,* so that it is incumbent upon us to analyze the evidence to the extent necessary to give plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded."

So, in Creswill *vs.* Grand Lodge K. of P., 225 U. S., 246; 32 Sup. Ct., 822, it was held that where a conclusion of law as to a Federal right and the finding of fact are so *intermingled* as to cause it to be essentially necessary for the purpose of passing upon a Federal question, to analyze and dissect the facts, to the extent necessary to do so, the power exists as a necessary incident to a decision upon the claim of a denial of the Federal right.

The following cases also support our contention:

North Carolina R. R. Co. *vs.* Zachary, 232 U. S., 248; 34 Sup. Ct., 305.

Kansas City S. R. Co. *vs.* Albers Co., 223 U. S., 573; 32 Sup. Ct., 316.

Rector *vs.* City Deposit Bank Co., 200 U. S., 405, 412; 26 Sup. Ct., 289.

Washington *ex rel.* Oregon R. & N. Co. *vs.* Fairchild, 224 U. S., 510; 32 Sup. Ct., 535.

The case of Dower *vs.* Richards, 151 U. S., 658; 14 Sup. Ct., 452, does not sustain defendants' contention, but holds that this court will review a question as to the "legal effect of the evidence as bearing upon a question of Federal law" and that the decision of the State court on the effect of the evidence may be considered here. The point is one that has been established by an unvarying line of decisions in this court.

So far as the opinion of Hamer, J., is concerned, the point is not so material, for it clearly shows an entire failure to grasp the principles enunciated in the decision of this court,

and that through his erroneous interpretation and application of sec. 5239, Rev. Stat. U. S., plaintiffs have been denied a Federal right. Thus, in discussing the case as to defendant Thompson, the opinion concedes there is evidence

> "to show that before the last report was signed Thompson had notice of a letter from the Comptroller of the Currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. (This reference was to the letter of September, 1891.) That thereafter Thompson *refused to sign* any statements to the Comptroller of the Currency and took no part in the management of the bank; that * * * while it may be said that for a considerable length of time before the bank was closed by the Comptroller he had some knowledge that its financial condition was questioned, still so far as the record shows, defendant Thompson did not *personally* participate in any of the acts of which the plaintiffs complain * * *."

And he is absolved from liability because he did not *personally participate*, although the trial court specifically found that the defendants knew untrue statements were being made and published by the officers of the bank; that they knew them to contain material false representations and that they were, in fact, false and untrue; and that they knowingly permitted, assented to and allowed the same to be made and published (Jones Trans., pgs. 44-46) and the correctness of those findings is not questioned.

This clearly demonstrates that the Supreme Court applied an erroneous rule, for it exempted defendants from liability, although they knowingly permitted and assented to the making and publication of untruthful statements by the officers of the bank in direct violation of sec. 5239, *supra*.

Again, the opinion says the United States Supreme Court, in reversing these cases, held that our "petitions were insuffi-

cient to charge the defendants with a common-law liability for fraud and deceit," a statement wholly unwarranted by the facts; that our "petitions still charge the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery," a statement equally absurd, since those reports are not accessible to the public and could not form the basis of an action; that demurrers to our petitions should have been sustained, although they contain every allegation contained in the complaint of Thomas *vs.* Taylor, 224 U. S., 73; that "unless the Supreme Court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common-law liability for fraud and deceit," an assertion justified by nothing contained in the opinion and untenable as a proposition of law; and ends with the crowning error that "plaintiffs having failed to allege and prove that the defendants *personally* knew of, or *personally* participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases, they are not entitled to recover * * *."

The opinion of Letton, J., likewise discloses a misunderstanding of the decision of this court (Jones Trans., pg. 55). It assumes that this court decided that our petitions did not state a cause of action at common law for deceit and that such an action would not lie on voluntary misrepresentations.

He adheres to the former opinion of the State court that the petitions do state a common-law action (in which he is clearly right), and says he inclines to the view that the evidence would support a judgment upon such a theory of the case, but seemed to imagine there was something in the "holdings of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States" that precluded recovery, although it was expressly decided in Thomas *vs.* Taylor,

supra, that the knowing violation of the Federal statute was the equivalent of the *scienter* of the common-law action for fraud and deceit.

Judge Letton's Subsequent Reversal of Opinion.

(*a*) In this connection we desire to call attention to the statement contained in the Yates-Hamer brief, page 52, in which it is said there is nothing in the record to sustain the statement contained on page 3 of our brief, to the effect that Letton, J., having been convinced that he was wrong, voted in favor of a rehearing. We are surprised that the statement of Sedgwick, J., to that effect should be questioned (Jones Trans., pg. 93). It is certainly not to be presumed that such a statement would be made without the consent of Judge Letton, or, if so made, would be permitted to go unchallenged. But defendants err when they say "there is absolutely nothing in the record to sustain any such statement," for the record discloses (Jones Trans., pg. 65) that at the first hearing on plaintiff's motion for rehearing, "Judges Sedgwick, Letton, and Fawcett voted to allow the rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried."

Thereupon the defendants moved to set aside the order granting a rehearing because of the participation of the Chief Justice. This motion was sustained on the proposition that the withdrawal of the Chief Justice was equivalent to an adjudication of disqualification and that he could not thereafter re-enter and participate in the decision of the cases, even though his withdrawal was based upon a mistake of fact; but the claim that this motion prevailed by a vote of five to one is not sustained by the record (Jones Trans., pg. 92).

When the cases came on again for ruling on the motions for rehearing, the court again stood equally divided, the

Chief Justice not sitting, and the motions were considered lost (Jones Trans., pg. 92). Thus we suffered a reversal of our judgments when but three of the seven judges concurred in the ruling opinion at the time the cases were finally disposed of, Judges Sedgwick, Letton, Fawcett, and Chief Justice Reese having indicated their disapproval of the decision.

Disregarding the technical legal effect of this vote, it does seem that when it became apparent that a majority of the court were not in accord with the previous order of reversal, there should have been no dissent to allowing a rehearing. The plaintiffs should not have been charged with the burden of affirming the lower court's judgments by a majority vote. In the circumstance, it was the duty of all the judges to vote for a rehearing.

We had hoped defendants would not force the discussion of this matter, as it cannot affect the decision of these cases, much less operate to exalt the standing of courts of justice. However, there is one statement we cannot leave unchallenged in justice to the Chief Justice of the Supreme Court of Nebraska. It is said in Mr. Thompson's brief (pg. 58) that the setting aside of the order granting a rehearing because of the Chief Justice's participation "was sound law and ethics"; "lifted all odium from the court"; "silenced all murmurs and complaints of partiality and bias,"—a most astonishing statement.

It is well known that no judge who ever honored the bench has a higher conception of the ethics of that position than Chief Justice Reese, and it was his supersensitive regard for the honor of that position that caused his withdrawal in the first instance, a withdrawal based on a mistaken recollection of a trivial incident that had occurred about twenty years previously. His associates might well have left the determination of his qualification to sit, with his own conscience. An examination of this record will convince the court that there was positively no disqualification.

That a protest against his participation should be made in a manner other than in "a gentlemanly and personal friendly way" by a judge whose brother was counsel and a most bitter partisan in the suit, is most unfortunate. And that this judge should insist on sitting after the filing of recusation, is doubly unfortunate; especially so, when by his voice the request of an associate (whose vote had made a reversal possible and who thought he had erred) for an opportunity to re-examine the case, was denied, and thereby a judgment made to stand on a technical rule of procedure, without the moral sanction of a constitutional majority. We submit if such procedure tends to exalt the judiciary and to silence murmurs of bias and partiality.

Causes of Action Based on All Reports Introduced in Evidence.

It is insisted that the judgments in these cases are based alone on the reports of date December 28, 1886, and December 9, 1892, but the contention is unfounded.

The claim is evidently predicated on the *obiter* recital of Hamer, J. (Jones Trans., pg. 51) "that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, *which are the ones upon which this action is, in fact, predicated*, neither of them had any *personal* knowledge of their falsity * * *."

But this is no longer an open question. It was decided in the State court at the former trial, and that decision is the law of these cases.

Our petitions charge the making and publication of the two reports above referred to, which are attached as Exhibits A and B, and then allege (Jones Trans., pg. 5) that between those dates the defendants, with the fraudulent intent and purpose as aforesaid, during all of said time, made, allowed, caused, and permitted to be made at divers intervals, false statements of the condition of said bank, etc., with the in-

tent and purpose of deceiving the plaintiff, etc., and caused, acquiesced in, allowed, and permitted said false statements, etc., to be published, etc. Under these allegations there were introduced in evidence the reports referred to on page 80 of our first brief.

Addressing itself to this point, the Supreme Court of Nebraska said (74 Nebraska, 745):

> "The defendants appeared to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion."

Although the court had thus pointed out the proper procedure, if greater definiteness or certainty were desired the defendants entered upon the second trial without any efforts to procure it.

The reason for requiring the pleader to set out the facts upon which the fraud is predicated, is to apprise the defendant of the charge against him. The reports in the record now here for review, are the identical ones introduced in evidence at the former trial, so there can be no claim of surprise. Moreover, they were not documents in our possession. They were matters of record as easily accessible to defendants as to plaintiffs. Nearly nine years elapsed between the two trials. This was ample time to procure evidence of the truthfulness of the reports. But there is no contention that they were true. The untruthfulness is conceded.

In any event, the allegations of the petitions are sufficient to admit the proof in question. True, mere epithets or conclusions of fraud, without any statement of fact upon which the charge is predicated, are insufficient, but this rule requires the ultimate and not the evidenciary facts to be pleaded.

The charges here are that the bank was insolvent; that the statements represented it as being solvent and prosperous; that the statements were published; that the plaintiffs saw them; that they believed them to be true, and relying upon them deposited their money in the bank and lost it. The representation of insolvency is but one element of the fraud. It is the ultimate fact to be pleaded.

Caywood *vs.* Farrell, 51 N. E., 775, 776.
Clodfelter *vs.* Hullet, 72 Ind., 137.
Story's Eqty. Pleadings, sec. 252.
20 Cyc., 97.
Johnston *vs.* Spencer, 51 Nebr., 198.

Just as an allegation that there was a *partnership* is an averment of an ultimate fact.

Kahn *vs.* Central Smelting Co., 2 Utah, 371, 376.

Obiter Dicta Not Concurred in by Letton, J.

Disregarding the fact that the quoted statement of Hamer, J., is a mere recital and not a decision, the further fact remains that it is not concurred in by Letton, J., whose concurrence was necessary to the rendition of judgment.

This is conceded by defendants (Thompson's Brief, pp. 35 and 13). The question being one of State practice, this court will not review it.

Claim of Federal Right Not Limited to Exhibits A and B.

(*a*) The contention that plaintiffs can claim no Federal right except as such claim is based on Exhibits A and B is likewise untenable. This proposition is based upon the assumption that the petitions do not specifically charge the reports in question to have been made and published pursuant to the call of the Comptroller. But that is as true of Exhibits A and B, as of the other reports introduced in evidence, yet, this court, at the former hearing, examined the

record and found that those reports were, in fact, so made and published and concluded that our judgments were based upon them. And for that reason alone applied the test of liability prescribed by the Federal statute.

We confess we believed at the first trial that the common-law action for fraud and deceit might be maintained, although predicated upon reports of the bank's financial condition made and published pursuant to the call of the Comptroller of the Currency—in which we were sustained by the only adjudicated cases on that point at that time.

To indicate our election of this remedy and not as "the result of studied adroitness to produce a petition that would prevent removal into the Federal court," we avoided reference to the "national" character of the corporation or that the reports were made pursuant to the Federal statute. Yet, notwithstanding, this court examined the *evidence* and ascertained that the bank, of which defendants were acting as directors, was organized under the *national bank act*, and the reports upon which the judgments were based, were made and published *pursuant to the call of the Comptroller of the Currency*. It cannot consistently refuse to apply the same rule now. The record shows the reports were so made and published.

Of course, the statement that the trial court's findings are to the effect that all reports except Exhibits A and B, were unofficial and voluntary, is disproved by the record. It made no such findings. There is no distinction between the various official published statements introduced in evidence. They were all made and published pursuant to the call of the Comptroller.

IV.

Statute of Limitations.

The contention that the cause of action based on the report of December 28, 1896, is barred by limitation of time is also untenable, because, (1) the statute was not pleaded as a defense, (2) the State court did not decide the action was barred, (3) the running of the statute would not begin until the discovery of the fraud, which was not earlier than the failure of the bank, January 21, 1893. And, in any event, it is not a question this court will consider.

V.

Comptroller's Letters as Affecting Mr. Thompson's Liability.

It is said in Mr. Thompson's brief (page 7) that the earliest letter from the Comptroller is dated September 8, 1891, whereas, the latest report attested by Mr. Thompson is of July 9, 1891. This is conceded. But attention is directed to the fact that the court based liability on the attested reports, not on the ground asserted by defendant, "because he did so at his risk, since it was his duty to know or refrain from acting" (Thompson's Brief, p. 9), but because Mr. Thompson's own evidence showed he had not participated in the least in managing the affairs of the bank and was wholly ignorant of its conditions, and the court found (Jones, Trans., p. 27) that he had no actual knowledge of the truth or falsity of the attested reports, and when he attested them he *knew he had no knowledge* of their truth or falsity, but attested them recklessly and not in good faith. It was not that in spite of diligence he was ignorant of its conditions, but that he had exercised no diligence at all—had been grossly negligent and willfully delinquent. The test, it will be observed, is not if he believed the cashier

to be honest, or the statement made by him correct, but whether he had a *bona fide* belief that he himself had any actual knowledge of the bank's condition. If, as is asserted, it was impossible for him to know, he knew it, and could accordingly not honestly attest a report. To "attest" does not necessarily make a director a guarantor of the correctness of his statement. If the circumstances are such that he had any reasonable grounds for believing he actually knew the condition of the bank or the report to be true, there would be no *scienter*. Thus, where he was actually engaged in conducting the bank's affairs, but the cashier had secretly withdrawn funds or substituted forged paper so that a report made under those circumstances did not reflect the true condition of the bank, the attestation would not be knowingly false; but where there never was any participation in the management of the bank's affairs—as where he was constantly absent from its place of business, or where there were other circumstances which rendered it impossible to know—there the attestation would be knowingly false for he represents himself as having *knowledge when he knows he has not*.

The opinion of Hamer, J., is quoted:

> "The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the directors of the National Bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers" (Thompson's Brief, p. 50; Jones' Rec., p. 52).

That is precisely what the Federal statute does do, if the director's dilemma is brought about by his own recklessness and gross neglect of duty or his deliberate refusal to obey the directions of the Comptroller touching his duties in the premises.

This is not in conflict, but in complete harmony with the decision of this court in Yates *vs.* Jones National Bank, 206

U. S., 158, as was expressly recognized in Thomas *vs.* Taylor, 224 U. S., 73, where it was said, that the conditions of liability do not require proof of something more than *recklessness*—and that the necessity of showing an act to be, in effect, intentional, is met by proof showing a deliberate refusal to examine that which it is his duty to examine.

And coming to the reports which followed the Comptroller's letters and were not attested by Mr. Thompson, the court found he knew that these official reports of the bank were being made and published by the officers, agents, and servants of the bank; knew that said reports contained material false representations of the bank's financial condition and were, in fact, false and untrue, and with such knowledge *knowingly* permitted, assented to and allowed the same to be published (Jones Trans., pp. 44 to 46. See our first brief, pp. 8-9).

The correctness of this finding, as a finding of fact, is not questioned by the Supreme Court. On the contrary, it is impliedly conceded, for in the opinion of Hamer, J. (Jones Trans., pp. 52), it is admitted that there is evidence to show that "before the last report was signed Thompson had notice of a letter from the Comptroller of the Currency questioning the correctness of the former reports made to him by the directors and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. That thereafter Thompson refused to sign any statements to the Comptroller of the Currency; that * * * while it may be said that for a *considerable length of time* before the bank was closed by the Comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not *personally participate* in any of the acts of which the plaintiffs complain." The very facts thus found by the State Supreme Court to exist, definitely establish the liability of the defendants under section 5239, *supra*.

It clearly demonstrates that the court's conclusion of non-liability was predicated on the erroneous assumption that *personal participation* was necessary to entail liability under that section, when, in fact, liability is incurred equally, whether the director *violates or permits* the officers, agents or servants of the bank *to violate* the provision of its title—whether he participates in or permits and assents to such violation. This was defendants' theory of the case, as is shown in their request for special findings (Thompson's brief, p. 8), where the court is asked to find, "whether in attesting such of the official reports * * * as are shown to have been attested by him, the defendant acted fraudulently and with *actual personal knowledge* that such reports, or any of them, were, in any material respect, false and untrue."

The Supreme Court's decision does not disturb the trial court's findings of fact, but holds them to be insufficient to establish liability, so that the error is one of law, committed by the Supreme Court and not the trial court, for the findings of the latter will disclose that it applied the rule of liability established by the decision of this court in these cases.

VI.

Testimony of Walter T. Scott.

The assault on the good name and reputation of Mr. Scott deserves the severest condemnation. It exposes the desperate straits to which defendants are driven in their attempt to bolster up an unrighteous case. Mr. Scott had severed his connection with the bank some years prior to its failure to embark in an enterprise on his own account and was engaged in operating a steam laundry at the time of the failure. He had prospered. He had purchased an entire block on ground on "O" street—the principal street in the city

of Lincoln—and there had installed a steam laundry, the machinery for which cost him about five thousand dollars. Shortly before the failure he was owing the bank thirteen thousand dollars on this property, which had nearly five years to run. On the plea of needing cash, Mr. Scott was induced to give another note for ten thousand dollars, secured by a mortgage on this property, which the bank agreed to rediscount and apply the proceeds on the thirteen thousand dollar indebtedness. The mortgage was negotiated, but the proceeds not so applied, with the result, that when the bank failed the mortgage was foreclosed and Mr. Scott lost all his property. This was during the financial panic of the '90's, and Mr. Scott was never able to recoup his financial losses. The property today is worth perhaps a quarter of a million.

He was seventy years old at the date of the trial and had suffered misfortune in the loss of a leg. For some years he worked as bookkeeper at the Tabitha Home, on the outskirts of Lincoln. While here he got into a difficulty that was the sole basis of the attempted impeachment. He married an employee of that institution. This aroused the enmity of Sister Ida and her associates, and an effort was was made to annul the marriage. But Mr. Scott was vindicated by the decision of the Supreme Court. Adams *vs.* Scott (Nebr.), 141 N. W., 149. At the time of the trial he was in the employ of J. F. Bookstrom and Otto Newberg as bookkeeper in their plumbing establishment. To show their vindictiveness, the representatives of the Tabitha Home cautioned Mr. Scott's employees to watch him. We quote from the record (printed bill of exceptions, p. 641):

> "The COURT: You say you have been warned to watch him. Now since you have been watching him, what have you discovered?
>
> A. Nothing at all; he is straight."

The cross-examination of the impeaching witnesses will disclose how utterly their attempt failed.

He was sustained by Professor Fossler, Major J. D. Woods, Otto Newberg, J. F. Bookstrom, E. Hallet, R. H. Corner, Frank Rawlings, Lew Franklin—all men of unimpeachable character. Professor Fossler, for nearly a generation a professor in the University of Nebraska, had known Mr. Scott since 1873; had always looked upon him as a man of integrity, reliability, and truthfulness and had never heard him questioned or doubted by any one in any way. The same is true of the other witnesses.

It is significant that the trial judge who knew the witnesses and saw them on the stand, unhesitatingly resolved the issues in favor of Mr. Scott. It is also significant that the Supreme Court does not disturb but acquiesces in this conclusion. The opinion of Hamer, J., concedes there was evidence which tends to show that Thompson had notice of a letter from the Comptroller, "questioning the correctness of the former reports made to him by the directors and requiring the bank officers to charge off certain worthless notes or obligations held by that institution." This can refer to but one letter—that of September, 1891,—and Mr. Scott is the only witness who spoke to the point referred to in the opinion.

The testimony of *Doctor* Miller, who was also connected with the Tabitha Home, that Mr. Scott was a moral degenerate is an outrage and was totally discarded by the trial court. Any disinterested observer called upon to indicate which of the two (Mr. Scott or Miller) was a moral degenerate would not hesitate to designate the latter.

Argument Presented to State Supreme Court.

Criticism is made that we urged the lower court to hold that the remedy of the Federal statute for making false report is not exclusive because the law does not require the

"ten representations other than those contained in "the official reports made by the association to the "Comptroller of the Currency, and published in "conformity to the National Bank Act, that such "latter statements were counted upon in the amended "petition, and were, if not exclusively, *certainly* "*principally*, the grounds of the alleged false repre-"sentations covered by the proof. Under this state "of the record, irrespective of the nature and extent "of the proof required to maintain an action of "deceit at common law, the question is: 'Did the "Supreme Court of Nebraska rightfully decide that "the plaintiff was entitled to recover against the de-"fendant?' in applying the rule of liability estab-"lished in Gerner *vs.* Mosher, 56 Neb., 135.'

"It is thus clearly established that the opinion of "Justice White is predicated on the assumption that "our case, as presented by the record, was grounded "upon the false representations contained in the "published official report. Assuming this premise "to be correct, the conclusion was inevitable. For "conceding the record disclosed evidence sufficient "to sustain a verdict based on a violation of sec. "5239—that is, that the defendants knowingly "violated the provisions of the National Bank Act "in making false representations of the bank's finan-"cial condition—it could not save a reversal, for the "defendants were entitled to have that question sub-"mitted to the jury under proper instructions and "this the trial court not only refused to do, but in-"stead, gave instructions eliminating entirely the "question of knowledge and good faith.

"Had the jury been instructed that before they "could return a verdict against the defendants they "must find that defendants knowingly made the "false representations charged, there could have been "no reversal. It would then have been immaterial "whether the cases were considered as arising under "the Federal statute or the common law—the test of "liability being the same. Taylor *vs.* Thomas, 106 "N. Y. S., 538; affirmed in 108 N. Y. S., 454.

"It is immaterial upon what theory the case was "tried so long as the correct rule of liability was ap-"plied.

"A right decision will not be reversed merely be-
"cause a wrong reason has been assigned therefor.'
"*Id.*

"The entire opinion of Mr. Justice White is based
"on a single proposition—a rule of statutory con-
"struction—namely, that 'Where a statute creates
"a duty and prescribes a penalty for non-perform-
"ance, the rule prescribed in the statute is the ex-
"clusive test of liability.'

"We sought to avoid the application of this rule
"for the reason, that, while the National Bank Act
"expressly commanded the publication of the official
"report, it did not require the publication of a *true*
"report and that therefore the publication of a *false*
"report did not violate any express mandate of the
"statute (Cochran *vs.* U. S., 157 U. S., 286); that
"the making of a false report not being a violation
"of the banking act the remedy provided in sec.
"5239 for violations of that statute did not reach
"our case, and being thus left without a statutory
"remedy, we could resort to our remedy at the com-
"mon law.

"The answer to this contention was, that while the
"statute did not in express words require the publi-
"cation of a *true* report, that is what in effect was
"meant and it should be read as though the word
"'true' had been interpolated—as it were.

"It will be observed the court declines to express
"an opinion as to the liability of directors of a
"national bank, under the principles of the com-
"mon law, for acts outside of the express commands
"of the banking act and for fear the scope and ap-
"plication of the decision might be misunderstood,
"Mr. Justice White says (27 Sup. Ct., 645):

"'Of course, in what has been said we have con-
"fined ourselves to the precise question arising for
"decision, and therefore must not be understood as
"expressing an opinion as to whether and to what
"extent directors of national banks may be civilly
"liable by the principles of the common law for
"purely voluntary statements made to individuals
"or the public, embodying false representations as
"to the financial condition of the bank, by which

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 163.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 164.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 165.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 166.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

ERROR TO THE SUPREME COURT OF NEBRASKA.

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFFS IN ERROR.

J. J. THOMAS,
Attorney for Plaintiffs in Error.

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IN THE

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OCTOBER TERM, 1915.

No. 163.

GENERAL NUMBER 24240.

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No. 165.

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UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, LOUISA HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 166.

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THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, LOUISA HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF NEBRASKA.

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFFS IN ERROR.

ARGUMENT.

When these cases were argued in April last suggestions were made as to the questions before the court for review. Since the matter was not fully presented in our brief, we ask the further indulgence of the court. It is our contention that the decisive questions in the case are:

(*a*) Do our petitions state a cause of action under the Federal statute?

(*b*) Do the findings of fact of the trial court support the pleadings and judgment?

We think the following considerations support our conclusions:

(I) The State Supreme Court reviewed the cases for errors of law and did not try them *de novo*.

(II) A jury having been waived, the findings of fact of the trial court have the same force and effect in law as the verdict of a jury.

(III) The decision of the State Supreme Court does not disturb the findings of fact of the trial court.

(IV) This court upon writ of error to the State court, in an action at law, cannot re-examine questions of fact otherwise than according to the rules of the common law, and will accept the findings of fact of the trial court and review the cases solely for errors of law.

(V) If, therefore, the petitions and findings of fact of the trial court sustain the judgments the decision of the trial court must be affirmed.

As preliminary to discussion of these propositions it is necessary to review the pleadings, the findings of the trial court and the opinions of the State supreme court.

Pleadings.

The petitions allege:

1. That the defendants were directors of the Capital National Bank.

2. That as such it was their duty, actively and actually, to manage and superintend its affairs.

3. That they failed to perform this duty in matters specifically set out.

4. That they made, caused, allowed, and permitted to be made and published numerous statements of the bank's

financial condition showing it to be in a sound, solvent, and prosperous condition.

5. That it was at all times insolvent.

6. That defendants knew and it was their duty to know the bank's condition, and that by the exercise of ordinary care in the discharge of their duties they could have known its true condition, and that they *willfully, negligently,* and *recklessly* made and caused, allowed, and permitted to be made and published false statements as aforesaid.

7. That plaintiffs, relying upon such statements, deposited their money in the bank and lost it.

The answers of the defendants present five defenses:

1. A general denial.

2. That plaintiff's cause of action was founded on alleged facts, which, if true, constitute a violation of the national-bank act and necessitate the determination of a Federal question.

3. A former judgment in bar.

4. Satisfaction.

5. That if defendants neglected any duty or committed any of the wrongs complained of it gave rise to no cause of action in favor of plaintiffs, but to the bank or its receiver. (This under the Nebraska decisions is an admission of the facts charged in the complaint. See North, &c., Ass'n *vs.* Box, 57 Nebr., 302.)

There can be no doubt of the sufficiency of the petitions to state a cause of action under the Federal statute. They

include every averment contained in Thomas *vs.* Taylor, 224 U. S., 73, which was approved by this court on a record almost identical in its facts and history.

The sufficiency of our petitions has not been questioned in this court. We refer to it because a misconception on this point is the basic error of Judge Letton's opinion, as we show later.

The Findings.

Owing to requests for numerous special findings made by the defendants the findings of the trial court are somewhat extended. Most of them are uncontroverted. Thus it is not denied:

(1) That the official statements in the record were attested by the defendants and published as alleged.

(2) That they came to the knowledge of the plaintiffs and were the cause of their deposits and subsequent loss.

(3) That the statements showed the bank to be in a sound, solvent, and prosperous condition.

(4) That the bank was at all times insolvent: never, in fact, had any capital, surplus, or undivided profits, and when it ceased doing business its liabilities exceeded its assets by more than a million dollars (nearly a million and a half).

This eliminates every question except that of *scienter*. The greater portion of the testimony was necessary to prove the insolvency of the bank at the time of the making and publishing of the various statements put in evidence, and it was because this question was no longer controverted that we omitted some of the testimony from the printed record. Nothing, however, has been omitted that would have the least bearing on the question of *scienter*.

The defendants have been given an opportunity to designate for printing any further evidence that would be material to the question at issue. Their inability to do so exposes the insincerity of their contention that this court could not consider the question on its merits because of omitted testimony.

Coming now to the question of *scienter,* we shall see that the trial court clearly conceived and correctly applied the test or rule of liability announced by this court.

Yates' and Hamer's Requests for Special Findings.

By Interrogatory III (Jones Record, page 21) the court was asked to find that neither the defendants Yates nor Hamer knowingly violated or knowingly permitted any of the officers, agents, or servants of the national bank to violate any of the provisions of the national-banking act, under which said bank was operated. In response to which the court found against the defendants and in favor of the plaintiffs (*Id.*, p. 26).

By Interrogatory IV (*Id.*, p. 21) the court was asked to find that neither the defendants Yates nor Hamer knowingly participated in or assented to any violation of any of the provisions of said national-banking act by any of the officers, agents, or servants of said Capital National Bank. In response to which the court found against the defendants and in favor of the plaintiffs (*Id.*, p. 26).

By Interrogatory IX (*Id.*, p. 21) the court was asked to find that defendant Yates, in attesting the reports of December 28, 1886, and December 9, 1892, did not with actual knowledge thereof or intentionally make an untrue statement or representation of the assets or liabilities of said Capital National Bank nor of any of the items of either its assets or liabilities. In response to which the court found for the defendant as to the report of December 28, 1886, and against him as to the report of December 9, 1892 (*Id.*, p. 26).

By Interrogatory X (*Id.*, p. 21) the court was asked to find that neither the defendants Yates nor Hamer—

> "with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said bank as required by the national-banking act, which reports are shown in the testimony in this case."

In response to which the court found that they did (*Id.*, p. 26).

Mr. Thompson's Requests for Special Findings.

In response to Interrogatory No. 1 (Jones Record, page 22), the court found that the allegations of plaintiff's petition "of official misfeasance and mismanagement" were sustained by the evidence and were true (*Id.*, p. 27).

Interrogatories Nos. 2 and 3, pertaining to oral misrepresentations, were found in favor of the defendant (*Id.*, p. 27).

By Interrogatory No. 4, the court was asked (*Id.*, p. 22) whether this defendant at any time prior to its (the bank's) failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency referred to in the petition or the evidence were in any material respect false or untrue. In response to which the court found in the affirmative (*Id.*, p. 27).

In response to Interrogatory No. 5 (*Id.*, p. 23), the court found that the defendant Thompson attested only the five reports mentioned (being those made prior to September, 1891).

By Interrogatories Nos. 6 and 7 (*Id.*, p. 23), it was asked whether in attesting such official reports as are shown to have been attested by him the defendant acted in good

faith, or whether they were attested fraudulently and with actual personal knowledge that such reports, or any of them, were in material respects false and untrue? In response to this, the court found (*Id.*, p. 27) that the defendant had no actual personal knowledge of the truth or falsity of the reports attested by him, but in attesting them he relied on statements made to him by the president and cashier of the bank and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports, and that the same were *attested recklessly* and without performing his duties as a director or ascertaining the truth or falsity of such reports, before the same were attested by him, and in this respect the court found the same were not made in good faith.

Then follows a general finding on the issues for the plaintiffs and that the allegations of their petitions are true (*Id.*, p. 28).

Subsequent requests for additional special findings were made. The requests of Yates and Hamer (*Id.*, pp. 23-24) refer to statements and representations that were not made pursuant to the call of the Comptroller or any requirement of the Federal statute and need not be considered.

The additional requests of defendant Thompson are pertinent to the issues.

Interrogatory No. 1 is as follows (Jones Record, p. 24):

> "Did this defendant ever at any time personally make, compile, issue, or circulate any financial statement of the resources and liabilities of the Capital National Bank of an unofficial or voluntary character, separate and apart from the official reports which the court finds this defendant attested, of dates, respectively December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890, and July 9, 1891?"

In response to this interrogatory the court found (*Id.*, p. 43) that the defendant personally made, compiled, issued,

or circulated no statements other than those mentioned, but that he knew financial statements of the resources and liabilities of the Capital National Bank of an official as well as of an unofficial and voluntary character were being made, compiled, issued, published, and circulated by the bank, and that he knowingly permitted and assented and allowed the same to be made, compiled, issued, circulated, and published by the officers of the bank.

And so in response to Interrogatory No. 2 (*Id.*, p. 24) the court found (*Id.*, p. 44) that while the defendant Thompson did not personally direct the making and publication of the financial statements in evidence, he knew they were being made and published by the bank from time to time, and that he knowingly assented to and allowed the same to be made, issued, circulated, compiled, and published by the officers of the bank.

Findings on Court's Own Motion.

On its own motion the court found (Jones Record, page 45) that from and after September, 1891, the deceased Hamer and the defendants Yates and Thompson *had knowledge and knew* that the statements, advertisements, and representations of the bank's financial condition, both official and unofficial, were being published in the newspapers, as alleged in the amended petition, and that they *contained material false representations* of the financial condition of the bank, and *were in fact false and untrue* as in plaintiff's amended petition alleged, and that (*Id.*, p. 46), *with knowledge* of all the matters and facts aforesaid, they and each of them *knowingly permitted, assented to, and allowed* the same to be made, published, and advertised as in the amended petition alleged, ending with a general finding on the issues joined for the plaintiffs and against the defendants, and that the allegations of the plaintiffs' amended petition are true.

These findings recognize the existence of liability under the Federal statute:

(1) Where a false report is knowingly attested by a director.

(2) Where a director is knowingly ignorant of the truth or falsity of the statement, and attests it recklessly, or where he makes an attestation that carries with it an implied representation of knowledge when he is conscious he has no knowledge of the matter and the statement is in fact false and untrue.

(3) Where the injury is the result of a deliberate refusal to perform a duty enjoined by law.

(4) Where a director knowingly permits, allows, or assents to the making of false statements by the officers, agents, or servants of the bank.

Decision of the State Supreme Court.

It is conceded that the judgment of reversal must stand upon the concurrence of Letton, J. This must be so, for his concurrence was necessary to afford a constitutional majority of the court. It follows that we must go to that opinion to ascertain what it was the court decided, for the concurring opinion expressly limits and restricts its concurrence in the reversal to the precise grounds therein specified.

That the opinion discloses an erroneous conception of the law admits of no doubt. A brief analysis will suffice:

> "I concur in the view that the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law. The issues, then, are the same as when the case was presented to the Supreme Court of the United States" (Letton, J., concurring in part. Jones Record, page 55).

That the issues presented by the pleadings are the same may be conceded, but that they state only a cause of action for deceit is incorrect, for they also state a cause of action under the Federal statute:

> "A careful reading of the history of this case set out in the opinions of this court and in those of the several inferior Federal courts, before which the question was presented, shows it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national-banking acts" (*Id.*).

These decisions do not hold that the petitions charge *only* a liability at common law. They were predicated upon the theory that if damages resulted from a false statement contained in reports made by national-bank directors and published pursuant to the call of the Comptroller under the Federal statute, an injured depositor had his election of remedies: he might maintain an action at the common law in deceit or pursue his remedy under the Federal statute (whereas this court decided that the statutory remedy was exclusive). Whether the petitions stated a cause of action under the Federal statute was not determined, it being assumed the plaintiff had elected his remedy at the common law. This was true in the case of Thomas *vs.* Taylor, 224 U. S., 73, where the petition was held sufficient under either theory:

> "The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings contained no Federal question and stated merely a common-law liability" (*Id.*).

The judgment of the State court was based upon the theory that the common-law action for deceit would lie, and that the plaintiff had elected its remedy. The sufficiency of the petition under the Federal statute was not considered:

> "The Supreme Court of the United States held that a Federal question was presented, and that 'the measure of responsibility, concerning the violation by directors of express commands of the national-bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act.' Yates *vs.* Jones Nat. Bank, 206 U. S., 158, 178" (*Id.*).

What this court decided was that the official reports counted upon in the amended petition were, "if not exclusively, certainly principally, the grounds of the alleged false representations *covered by the proof*." There is no intimation that the petition did not state a cause of action under the Federal statute nor that the evidence was insufficient to sustain the judgment. The decided point was that the *proof* showed that our action was based on official reports, and that inasmuch as the statutory remedy was exclusive, the trial court's instructions to the jury were erroneous, because they directed the jury to return a verdict regardless of proof of *scienter:*

> "I agree with the former judgment of this court and that of the several inferior Federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the United States."

This is ambiguous. It does not give the writer's conception of that opinion. Does it mean that this court decided that the petitions did not state a cause of action at common law or under the Federal statute? The import is that the writer still contends that the petitions do state a cause of action at common law, but thinks this court has decided otherwise. This is borne out by the language which follows:

> "I am also inclined to the view that the evidence would support a judgment on such a theory of the case. The findings of the district court are to that

> effect. I am not satisfied they are unsustained by the evidence. The presumption is they are so sustained * * *" (*Id.*).

That is, if they are sufficient to state a cause of action for deceit, "the evidence would support a judgment on such a theory of the case." That the petitions do state a cause of action under either theory is too clear for argument.

The opinion closes with the language:

> "* * * but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion;"

(not in the opinion of Hamer, J., but in the judgment of reversal) (*Id.*).

Here, again, the opinion is ambiguous. It does not disclose the writer's conception or interpretation of 'the measure of duty and of liability' established by the decisions of this court. Viewed in its entirety, the deduction is that Judge Letton's opinion assumed that, by the decision of this court, he was bound to decide (albeit against his own opinion) that our petitions do not state a cause of action.

Not a Finding of Facts.

Certain it is that Judge Letton did not assume to try the case *de novo*. This the court could not do under the State constitution and statutes, and has never assumed to do. The opinion itself disclaims a critical examination of the evidence, and does not assume to find facts. It assumes the evidence to be sufficient to sustain the pleadings, so that if the petitions sustain the judgments the cases should have been affirmed. It does not question the sufficiency of the

findings of fact to support the petition, but concludes that a case has not been made because the petition does not state a cause of action.

Letton's Opinion Construed with the Other Opinions.

The writer of the majority opinion, Hamer, J., fell into the same error that we have noted in the opinion of Judge Letton. In his opinion he says (Jones Record, page 51) that—

> "unless the Supreme Court of the United States shall recede from their decision of these cases the petitions will be held insufficient by that court to state a common-law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank."

It was undoubtedly upon this proposition that Judge Letton concurred. He indicates clearly in his opinion that it is his conception of the previous decision of this court that our petitions do not state a cause of action, and he closes with the statement: "For that reason alone I concur in the conclusion."

All doubt on this point is dispelled by the dissenting opinion of Sedgwick, J. (Jones Record, page 61). The opening sentence of that opinion is:

> "It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the Supreme Court of the United States that the action is one of deceit at common law and for that reason cannot be maintained."

He then quotes the portion of Judge Hamer's opinion which we have just quoted and remarks (*Id.*, p. 62):

> "It seems to me wonderful that any member of this court should so completely misunderstand the opinion of that court" (referring to the Supreme Court of the United States).

Referring to Judge Letton's opinion, he says:

> "The concurring opinion falls into the same remarkable error as the first sentence shows" (*Id.*, p. 62).

The opinion continues with an able exposition of what this court did in fact hold, and shows conclusively that this court reversed these cases on account of an erroneous instruction to the jury and not on account of the insufficiency of the petitions, nor because these actions could not be maintained in the State court in their present form. He says further (*Id.*, p. 64):

> "And yet this court states as a reason for reversing this judgment that 'unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common-law liability for fraud and deceit as against the defendants, who are merely directors of the Capital National Bank.'"

No one was in better position to know upon what proposition the majority of the court based its conclusion than Judge Sedgwick, and he denominates the point on which Judge Letton concurred alone, the "capital error" upon which both the opinion and the concurring opinion are founded.

Construing the opinions thus together, we find the one controlling consideration discussed by all, is the matter of the sufficiency of our petitions, on which Hamer and Letton express themselves in the negative while Sedgwick affirms their sufficiency.

I.

THE STATE SUPREME COURT REVIEWED THE CASES FOR ERRORS OF LAW AND DID NOT ASSUME TO TRY THEM DE NOVO.

On page 3 of the brief of the defendants Yates and Hamer adverse counsel quote from chapter 18, article 2, section

640, of the Revised Statutes of Nebraska for 1913, as follows:

> "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court, reversing the same, shall proceed to render such judgment as the court below should have rendered, or remand the cause to court below for such judgment; *and the court reversing such judgment or final order, shall not issue execution in causes that are removed before them on error, on which they pronounced judgment as aforesaid, but shall send a special mandate to the court below* * * *"

(The italicized portion was omitted from adverse counsel's quotation*), and it is contended, upon the authority of this provision, that the State Supreme Court constituted itself a trial court to try the issues *de novo* and render such judgment as the court below should have rendered.

No authorities are cited in support of this proposition.

The contention is absurd. This statute has been in force since 1866 (Rev. Stat. of Nebraska, Code Civil Pro., title 16, ch. 1, sec. 594) and has never been so interpreted. No one has ever contended that the Supreme Court of the State, in reviewing an action at law, tried the case *de novo*.

Under the Revised Statutes of 1866 there were two methods of reviewing judgments and decrees. Code Civil Procedure, title 16, page 496, provided for proceedings in error in civil cases and titles 21 and 24 provided for appeals in suits in equity. The quoted provision was a part of sec. 594, title 16, which referred *exclusively* to proceedings in error. Sec. 582, title 16, provided:

> "A judgment rendered, or final order made by the district court, may be reversed, vacated or modified by the supreme court for errors appearing upon the record,"

and has so remained, unmodified (Comp. Stat. Nebraska,

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* NOTE.—All italics in brief are ours unless otherwise designated.

1911, Code Civ. Proc., sec. 582; Rev. Stat. Nebr., 1913, Code Civ. Proc., sec. 626).

Section 584, same title, provided the procedure to obtain such reversal, vacation or modification should be by—

> "petition to be entitled 'petition in error' filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of and thereupon summons in error shall issue and be served, or publication made, as in the commencement of an action."

Sec. 774 of title 24, entitled "Chancery," provided that:

> "In all actions in chancery, either party may appeal from the decree rendered or final order made by the district court, to the supreme court of this territory,"

and other portions of this title and title 21 prescribed the procedure for perfecting such appeals.

Code Civil Procedure, title 1, sec. 2, page 394, Rev. Stat. 1866, provided that—

> "The distinction between *actions at law*, and the forms of all such actions and suits heretofore existing, is abolished; and there shall be, hereafter, but one form of action, which shall be called a civil action."

On June 19, 1867, the legislature of the State passed an act amending sec. 2, title 1, and abolishing the distinction between *actions at law* and *suits in equity* and providing instead that there should be but one form of action called a "Civil Action," and repealed title 24 of the Revised Statutes of 1866, entitled "Chancery," but through inadvertence did not repeal title 21, referring to appeals.

Irwin *vs.* Calhoun, 3 Nebr., 453.

And while said section 594 was in full force and effect and under this state of the law it was decided in Irwin *vs.* Calhoun, 3 Nebr., 453, that—

> "Since the passage of the act of 1867 abolishing the distinction between *actions at law* and *suits in equity* and repealing title 24 of the Code of 1866, entitled 'Chancery,' no appeal lies to the Supreme Court. The only remedy for obtaining a review of judgments rendered in the district court, whether in actions legal or equitable, is by petition in error."*

And even while the provisions concerning appeals in equity cases were assumed to be in force, the court held in the early case of Robertson *vs.* Hall, 2 Nebr., 17, that—

> "no such proceeding as an appeal for trial *de novo,* in an action at law, from the District to the Supreme Court is known to our law."

That has remained the settled law of our State, although appeals in equity were thereafter again provided for.

In the opinion Mason, C. J., remarked that if the legislature had intended that issues of fact should be tried in the Supreme Court, they would have provided some mode for obtaining jurors (Id., p. 19). He had in mind, no doubt, article 1, section 6 of the State Constitution, which provides that "the right of trial by jury shall remain inviolate," and thus guarantees trial by jury in all cases where that right existed at common law.

After the decision in Irwin *vs.* Calhoun, *supra,* the legislature again provided a method for appeals in equity, in an act approved March 3, 1873, entitled "An act to provide for appeals in actions in equity," Gen. Stat. Nebraska, 1873, ch. 57, sec. 1022, page 716.

In 1903 the legislature passed an act that became sec. 681*a*, Code Civil Proc. Comp. Stat., 1911. It provides as follows:

> "That in all appeals from the district court to the Supreme Court *in suits in equity* * * * wherein review of some or all of the findings of fact of the dis-

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* The reference to the title "Appeals" contained on page 456 was evidently intended as title 21, page 512, instead of title 24, page 520.

> trict court is asked by the appellant, it shall be the duty of the Supreme Court to re-try the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

Prior to 1907 in law cases the plaintiff in error was required to file in the Supreme Court his petition in error and a transcript of the proceedings, whereupon summons in error issued (Comp. Stat., 1903, secs. 584 and 586, Code Civ. Proc., title XVI, entitled "Error in Civil Cases"). In equity cases on appeal the procedure was to file in the office of the clerk of the Supreme Court a certified transcript of the proceedings and have the same properly docketed in the Supreme Court (Comp. Stat. 1903, sec. 675, Code Civ. Proc., title XXI, entitled "Appeals from the District to the Supreme Court").

In 1907 (Laws of Nebr., 1907, chapter 125, p. 495), the legislature undertook to simplify the procedure necessary to perfect appellate proceedings by assimilating error proceedings and appeals. It repealed secs. 584 and 675, Code Civ. Proc. (relating, respectively, to error proceedings and appeals) and provided (sec. 1) that:

> "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court" (except in criminal cases) should be "by filing in the Supreme Court a transcript certified by the clerk of the District Court, containing the judgment, decree or final order sought to be reversed, vacated or modified," and that "the filing of such transcript shall confer jurisdiction in such cause upon the Supreme Court."

Section 4 provided that each error asserted and intended to be urged should be set out particularly in the brief and that no

petition in error or other assignment of errors should be required.

This was the procedure at the time these cases were taken up and decided in the State Supreme Court. No one has ever contended that the Supreme Court of the State retried the facts in reviewing an action at law. Throughout all the adjudicated cases the Supreme Court has recognized the distinction between reviewing actions at law for errors and trying suits in equity *de novo*, and conceded to litigants the constitutional right to have questions of fact in law cases tried by a jury.

Thus it has been held repeatedly that the Supreme Court cannot review an action at law except by proceedings in error. In the exercise of its appellate jurisdiction the Supreme Court reviews actions at law according to the rules of the common law and does not try them *de novo*.

Roode *vs.* Dunbar, 9 Nebr., 95.

State *ex Rel.* Miller *vs.* Lancaster Co., 13 Nebr., 223.

Prentice Brownstone Co. *vs.* King, 39 Nebr., 816.

State *ex Rel.* McMullen *vs.* Affholder, 44 Nebr., 497.

Campbell *vs.* Farmers & Merchants Bank, 49 Nebr., 143.

Nebr. Wesleyan Uni. *vs.* Craig, 54 Nebr., 173.

Lowe *vs.* Riley, 57 Nebr., 252.

Cary *vs.* Kearney Nat. Bank, 59 Nebr., 169.

Van Doren *vs.* Empkie Shugart Co, 2 Nebr., Unoff., 818.

We refer to a few cases to show that the scope of review, as well as the procedure, is inconsistent with any other theory. Thus:

A verdict based on conflicting evidence is conclusive.

U. P. R. R. Co. *vs.* Rassmussen, 25 Nebr., 810.

Mere preponderance of testimony against a verdict is not enough to warrant the court in disturbing it.

Jones *vs.* Edwards, 1 Nebr., 170.
Blackburn *vs.* Ostrander, 5 Nebr., 219.
Conner *vs.* Draper, 34 Nebr., 870.
Storz *vs.* Riley, 41 Nebr., 822.

A verdict upon conflicting evidence will not be disturbed except for specific errors occurring at the trial.

Douglass *vs.* Smith, 75 Nebr., 169.

Where the facts are disputed, it is solely the province of the jury to determine the same.

Ogden *vs.* W. O. W., 78 Nebr., 804.

Where verdict is founded on conflicting testimony, the Supreme Court will not enquire into the preponderance of the evidence.

Cady Lbr. Co. *vs.* Wilson Steam Boiler Co., 80 Nebr., 607.

Where conflicting testimony is fairly submitted to a jury the court has no right to interfere with their findings.

High *vs.* Merchants Bank 6 Nebr., 155.

A question raised by conflicting evidence is for the jury and not for the court of review.

Angle *vs.* Bilby, 25 Nebr., 595.

So law actions cannot be reviewed unless the complaining party has filed in the trial court a motion for new trial, specifying the errors complained of, so as to afford the court an opportunity to correct its own errors by granting a new trial.

Carmack *vs.* Erdenberger, 77 Nebr., 592 (1906).
Waxham *vs.* Fink, 86 Nebr., 180 (1910).
State *vs.* Farrington, 86 Nebr., 653 (1910).
Tait *vs.* Reed, 91 Nebr., 235 (1912).
Lowe *vs.* Keens, 90 Nebr., 565 (1912).
Hammond *vs.* Edwards, 56 Nebr., 631 (1898).

And only such errors will be examined in the Supreme Court as are there assigned and have previously been brought to the attention of the trial court by motion for new trial.

Waxham *vs.* Fink, 86 Nebr., 180.

While motions for new trial are unnecessary in appeal of equity cases.

Ogden *vs.* Garrison, 82 Nebr., 302.

And no assignments of error are required in equity cases (indeed, they would be useless), as the cases are tried *de novo* and without reference to the decision of the trial court.

Lion Bond. & Surety Co. *vs.* Capital Fire Ins. Co., 96 Nebr., 51-52.

In the absence of a motion for a new trial in a law action the only question to be considered on appeal is the sufficiency of the pleadings to sustain the judgment.

Shoff *vs.* Ash, 95 Nebr., 255 (1914).

Lau *vs.* Lindsey, 3 Nebr., Unoff., 681.

Tait *vs.* Reed, 91 Nebr., 235.

The act of 1903 (Laws 1903, Chapter 125, Comp. Stat. 1911, Code Civil Proc., Sec. 681*a*), providing for trial *de novo* of equity suits on appeal "does not disturb the conclusiveness of decisions of fact by juries or by trial judges sitting in their stead *in law cases.*"

First National Bank *vs.* Crawford, 78 Nebr., 665 (1907).

The distinction between error proceedings in actions at law and appeals in equity is well discussed in Western Cornice & Mfg. Works *vs.* Leavenworth, 52 Nebr., 418, decided in 1897, under the old law, and is followed in Bishop *vs.* Huff, 81 Nebr., 729, decided in 1908, since the adoption of the new procedure.

In the former case, at page 422, it is said:

> "It has been said of an appeal: 'The term "appeal" is, in the several States, used in very different senses, and has to a great extent, in statutes and decisions, lost its distinctive meaning, having become the generic term for all forms of rehearing, or else nearly or quite synonymous with "error" or "new trial." 2d Am. & Eng. Encyc. Law (2d ed.), 425-6. * * * "There is a clear distinction made in the Code of Civil Procedure of this State, between proceedings by petition in error and appeal. * * * In an appeal in this State the hearing in the appellate court may be said to be a trial *de novo*—a retrial of the same issues on the same record." * * *

In Bishop *vs.* Huff, *supra*, it is said:

> "A clear distinction exists in this State between an appeal in an action at law and an appeal in a suit in equity. In the latter case the appellate court does not merely review the actions of the trial court, but affords a retrial."

So often has this principle been recognized that we need only refer to the last published volume of the Nebraska Reports, volume 97.

In Haight *vs.* Omaha & C. B. St. Ry. Co., 97 Nebr., 293, decided December 4, 1914, Letton, J., said (p. 294):

> "In this state of the evidence *it was for the jury, and is not for this court,* to determine whether the plaintiff or these other witnesses were telling the truth."

Kohn *vs.* Munson, 97 Nebr., 170, decided October 30, 1914:

> "It is for the jury to find the facts, and their verdict will not be disturbed if there is evidence to support it."

De Noon *vs.* Lincoln Traction Co., 97 Nebr., 1, decided October 16, 1914, per Reese, C. J. (p. 4):

> "All questions of fact upon which reasonable minds might differ must be solved by the jury. McLean *vs.* Omaha & C. B. R. & B. Co., 72 Nebr., 450. This, we take it, is the settled law."

Calbreath *vs.* Barnford, 97 Nebr., 830, decided March 13, 1915, per Morrisey, C. J. (p. 832):

> "There is no question of law involved. * * * All disputed questions of fact having been properly submitted to the jury, and the evidence being sufficient to sustain the verdict, under the general rule governing cases of this character, we *cannot interfere with the findings of the jury.*"

Davis *vs.* Manning, 97 Nebr., 658, decided January 29, 1915, per Sedgwick, J. (p. 663):

> "As has often been decided we cannot set aside a verdict of a jury because it seems probable that the court might have arrived at a different conclusion upon the facts presented."

Wenquist *vs.* Omaha & C. B. St. Ry. Co., 97 Nebr., 554, decided January 2, 1915, per Sedgwick, J. (p. 560):

> "The questions of fact involved in this case are peculiarly within the province of the jury. *This court is not authorized to retry those questions.*"

Langdon *vs.* Withnell, 97 Nebr., 335, decided December 4, 1914, per Fawcett, J. (p. 337):

> "Had the writer been the trier of fact, his finding would have been different from that returned by the jury; but that fact alone is not sufficient to warrant us in disturbing the verdict."

It is needless to further multiply citations. Any other course would be in direct violation of the State constitution (Art. I, sec. 6): "The right of trial by jury shall remain in-

violate"—which guarantees the right of trial by jury in cases where that right existed at the common law.

Omaha Ins. Co. *vs.* Thompson, 50 Nebr., 584.
Risse *vs.* Gasch, 43 Nebr., 288.

An attempt by the legislature to deprive a citizen of this right and vest in an appellate court the right to retry questions of fact would be unconstitutional.

Flanagan *vs.* Guggenheim Smelting Co. (N. J.), 44 Atl., 762.

While all appellate proceedings in this State are now denominated "appeals," the distinction between review upon error in law cases and appeals in equity has been uniformly recognized as well since as before the adoption of the simplified procedure.

Just as the Code provision (Rev. Stat. Nebr., 1913, Code Civ. Proc., ch. 1, sec. 1), although it has abolished the distinction between actions at law and suits in equity, and provided that there shall be but one form of action called a "civil action," it did not abolish the distinction between law and equity.

Hopkins *vs.* Washington County, 56 Nebr., 596.

"A writ of error is none the less a writ of error because the statute calls it an appeal."

Flanagan *vs.* Guggenheim Smelting Co. (N. J.), 44 Atl., 762-6.

A statute which assumes to authorize the appellate court to review questions of fact upon a writ of error is unconstitutional, as the effect of this would be to deprive the trial court's judgment of its attribute of finality as to fact, and confer that authority upon the appellate court.

Ibid.

> "This attribute has characterized such judgments since the earliest age of the common law. They have been final as to fact, though not as to law."
> *Ibid.*, page 763.

In the Appeal of Long (Pa.), 19 Atl., 806, it is said that an act providing—

> "that all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding called 'appeal,' does not authorize the Supreme Court in an appellate proceeding which would formerly have been taken by certiorari to consider the evidence or the opinion of the lower court, as might have been done under a former appeal, since the distinction between the three modes of reviewing decisions is not done away with, though the same name applies to them all."

That the State Supreme Court reviewed these cases upon error is shown by its own judgment "entered of record upon the journal" on January 31, 1913 (Jones Rec., p. 48):

> "This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted to the court; upon due consideration whereof, the court *doth find error apparent in the record* of the proceedings and judgment of said district court; it is therefore considered, ordered, and adjudged that said judgment of the district court be, and the same hereby is, reversed and the action dismissed."

The portion of the judgment ordering a dismissal is predicated upon sec. 640 Civ. Code, authorizing the Supreme Court—

> "to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

Of course, where the court below could not render such judgment the Supreme Court may not.

The exercise of this power is discretionary, except where trial of an issue for which the Constitution guarantees right of jury trial is necessitated.

Porter *vs.* Sherman Co., 40 Nebr., 274.

Such judgment is rendered where, as was said in American Surety Co. *vs.* Musselman, 90 Nebr., 58, 62—

> "the record before us shows that there was no theory on which defendant can ever escape liability."

This procedure is correct where such "judgment was (is) required by the state of the pleadings" (Slocum *vs.* N. Y. Life Ins. Co., 228 (U. S.), 364; 33 Sup. Ct. Rep., 523, 528, 530) and was doubtless concurred in by Letton, J., on the theory that the petitions did not state a cause of action.

II.

A JURY HAVING BEEN WAIVED, THE FINDINGS OF FACT OF THE TRIAL COURT HAVE THE SAME FORCE AND EFFECT IN LAW AS THE VERDICT OF A JURY.

Madison National Bank *vs.* Groves (Nebr.), 154 N. W., 207.
Powers *vs.* Bohuslav, 84 Nebr., 179.
Dorsey *vs.* Wellman, 85 Nebr., 262.
Darr & Spencer *vs.* K. C. Hay Co., 85 Nebr., 665.

The same rule applies in the Federal courts.

Tyng *vs.* Grinnell, 92 U. S., 467.

III.

THE DECISION OF THE NEBRASKA SUPREME COURT DOES NOT DISTURB THE FINDINGS OF FACT OF THE TRIAL COURT.

This necessarily results as a corollary to proposition I. Sec. 582, Code Civ. Proc., Comp. Stat. Nebr., 1911, which was in force when these cases were tried, provides:

> "A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the Supreme Court for errors appearing on the record."

Motions for new trial were filed in the trial court, and errors of law relied upon for reversal were set out in the brief in the Supreme Court.

The Supreme Court of the State reversed the cases for errors of law and did not assume to try them *de novo*, as it never does in actions at law.

Judge Letton did not assume to make findings of fact. If he did, a reading of the opinion should disclose what the facts are; yet no one can read it and obtain the slightest information as to the facts.

To say "a case has not been made" is clearly not a finding of fact, for although applied to the sufficiency of the evidence to sustain the findings, it would be no more than a conclusion of law as to the legal effect of the evidence. But the opinion does not go that far: it does not question the sufficiency of the evidence to sustain the findings. Judge Letton says he is still of the opinion that our "petitions state a cause of action at common law for deceit," but thinks he is bound by the opinion of the Supreme Court of the United States to hold otherwise. He also says he is "inclined to the view that the evidence would support a judgment upon such a theory of the case"—that is, upon the theory that the petitions state a cause of action at common law—that the "find-

ings of the district court are to that effect," and that he is "not satisfied they are unsustained by the evidence. The presumption is that they are so sustained. * * *" This concedes that the evidence does sustain the findings. Indeed, his argument is based upon the assumption that it does. His conclusion that "a case has not been made" results from his erroneous conception of the decision of this court concerning the sufficiency of our petitions.

It is not even a conclusion of law, for it does not advise us by what "measure of duty and of liability" he tested the findings of fact. How is this court to ascertain if he obeyed its mandate and applied the correct measure of liability?

The view most favorable to defendants would be that he considered the findings of fact insufficient to sustain the judgments. Yet this assumption is unnecessary to reach his conclusion, for, as we have shown, the opinion is based on the proposition that the petitions do not state a cause of action. Hence, although the findings of fact were in themselves quite sufficient, this would not supply the basic defect which, it was assumed, existed in the petitions.

But granting, for the sake of argument, that the State Supreme Court decided the findings of facts were insufficient to sustain the judgments, this court will go no further than to examine those findings to determine that question. It will not weigh the evidence to ascertain if it supports the findings of ultimate fact.

As was said in Tyng *vs.* Grinnell, 92 U. S., 467:

> "A special finding by the court upon issues of fact, where parties or their attorneys have duly filed a stipulation, waiving a jury, has the same effect as a verdict and is not subject to review by this court, except as to the sufficiency of the facts found to support the judgment."

And if we were to go further still and assume that Judge Letton decided that the evidence did not sustain the findings, this would not be a finding of fact, but a conclusion of law as to the legal effect of the evidence, and this court would not

weigh the evidence to determine its preponderance, but would look to the record to see only if the evidence, with all the inferences that could justifiably be drawn from it, were sufficient to support the findings. In other words, it would re-examine the matter according to the rules of the common law.

> "The jury have no power to render a verdict wholly unsustained by legal evidence (Hammond *vs.* Jewett, 22 Nebr., 363, cited), and whether there is any such evidence to support it is a question of law reviewable in the appellate court."
>
> 2 Encyc. Pl. & Prac., 404.

A refusal to find a fact which is supported by undisputed evidence, or a finding of fact unsupported by any evidence tending to establish it, is also reviewable as a question of law.

2 Encyc. Plead. and Prac., 407.

Alexandre *vs.* Machan, 147 U. S., 72; 13 Sup. Ct. Rep., 211.

Bedlow *vs.* New York Floating Dry Dock Co., 112 N. Y., 263; 2 L. R. A., 629.

Phenix Ins. Co. *vs.* Kerr, 129 Fed., 723; 66 L. R. A., 569.

> "The power of the court to grant a new trial if, in its judgment, the jury have misinterpreted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact."
>
> Mr. Justice Brewer in Walker *vs.* New Mexico & S. P. R. Co., 165 U. S., 593, 596; 17 Sup. Ct., 421, quoted by Mr. Justice Van Devanter in Slocum *vs.* N. Y. Life Ins. Co., 228 U. S., 364; 33 Sup. Ct., 523, 529.

In Laing *vs.* Rigney, 160 U. S., 531; 16 Sup. Ct., 366, 368, Mr. Justice Shiras said:

"It is well established that exceptions to alleged findings of fact, because unsupported by the evidence, present questions of law reviewable in courts of error."

IV.

THIS COURT WILL ACCEPT THE FINDINGS OF FACT OF THE TRIAL COURT AND REVIEW THE CASES SOLELY FOR ERRORS OF LAW.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Seventh Amendment to the Constitution of the United States.

"This provision applies equally to a case tried before a jury in a State court and brought thence before a Federal court."

The Justices *vs.* Murray, 9 Wallace, 274.
Maxwell *vs.* Dow, 176 U. S., 581; 20 Sup. Ct. Rep., 448, 494, and cases there cited.

And it applies with equal force where, in a law case, a jury is waived and the issues of fact are tried by the court.

Craig *vs.* State of Missouri, 4 Peters, 410.
Republican River Bridge Co. *vs.* Kans. Pac. Ry. Co., 92 U. S., 315.

The scope of review under the Seventh Amendment is limited to "the granting of a new trial by the court where the issue was tried or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings."

Parsons *vs.* Nedford, 3 Peters, 441, 448.

As was said in Republican River Bridge Co. *vs.* Kans. Pac. Ry. Co., *supra,* on page 317:

> "In cases where the facts are submitted to a jury and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts coming from a State court that it has in a case coming from a circuit court of the United States.
>
> "This conclusiveness of the facts found extends to the finding by a State court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury."
>
> Boggs *vs.* The Merced Mining Co., 3 Wall., 304.

In Chicago, B. & Q. R. R. Co. *vs.* City of Chicago, 166 U. S., 226; 17 S. Ct. Rep., 581, the City of Chicago, by condemnation proceedings, extended its street across the right of way of the railroad company. The question of damages was tried to a jury and resulted in a verdict for $1.00, and final judgment was rendered in execution of the award by the jury. The judgment was affirmed by the Supreme Court of Illinois and came to this court on a writ of error.

The principal contention of the railroad company was that the opening of a street across its right of way and awarding compensation of $1.00 deprived it of its property without due process of law, contrary to the prohibition of the Fourteenth Amendment. The syllabus (par. 6) is as follows:

> "Where a State statute authorizing condemnation proceedings gives the property owner a right of jury trial, the Federal Supreme Court, in reviewing a judgment of the highest court of the State, affirming a judgment of condemnation, cannot, under the Seventh Amendment, re-examine any facts tried by the jury, otherwise than according to the rules of the common law. Therefore, even when the Supreme Court is of opinion that, in view of the evidence, the jury erred in finding that no property right of substantial value has been taken, it cannot, on that

ground re-examine the judgment. It can only inquire whether the trial court prescribed any rule for the guidence of the jury that was in absolute disregard of the right to compensation."

In the opinion Mr. Justice Harlan, after stating "it was for the jury to determine the facts," says (p. 587):

"Whatever may have been the power of the trial court to set aside the verdict as not awarding just compensation, or the authority of the Supreme Court of Illinois, under the constitution and laws of the State, to review the facts, can this court go behind the final judgment of the State court for the purpose of re-examining and weighing the evidence, and of determining whether upon the facts, the jury erred in not returning a verdict in favor of the railroad company for a larger sum than one dollar? This question may be considered in two aspects: First, with reference to the Seventh Amendment of the Constitution, providing that 'in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law;' second, with reference to the statute (Rev. Stat., sec. 709), which provides that the final judgment of the highest court of a State in certain named cases may be re-examined in this court upon writ of error.

"It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a State court and brought here by writ of error from the highest court of the State. One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not in express words preserve the right of trial by jury, and that, under it, facts tried by a jury could be re-examined by the courts of the United States, otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet these objections, and to deprive

> the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the Union, and leave it open for these courts to re-examine, in disregard to the rules of the common law, facts tried by juries impaneled in the State courts, in cases which, by reason of the questions involved in them, could be brought under the cognizance of the courts of the United States."

In other words, this court must accept the facts as found by the jury and cannot re-examine them otherwise than according to the rules of the common law.

It is immaterial whether the State Supreme Court reversed or affirmed the court below. If the point raised in this court is that the evidence does not support the verdict, this court will examine the record, not to determine the preponderance of the evidence, but to ascertain if there be any evidence to support the verdict, and that regardless of whether the State Supreme Court held it sufficient or not, for the State court's conclusion as to its sufficiency is a question of law reviewable in this court and not a finding of fact.

> "The verdict of the jury settles all questions of fact on a writ of error from the United States Supreme Court to a State court."
>
> Smiley *vs.* Kansas, 196 U. S., 447; 25 Sup. Ct. Rep., 289.

> "Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute as interpreted to the jury was in violation of the Federal Constitution."
>
> Missouri, K. & T. R. R. Co. *vs.* Haber, 169 U. S., 613; 18 Sup. Ct. Rep., 488-498.

> "The facts, and the conclusions to be drawn from them, are for the jury, and cannot be reviewed by

the Federal Supreme Court upon writ of error" (Syllabus, par. #4).

Standard Oil Co. *vs.* Brown, 218 U. S., 78: 30 Sup. Ct. Rep., 669.

"When a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England."

Mr. Justice Gray in Capital Traction Co. *vs.* Hof, 174 U. S., 1; 19 Sup. Ct., 580.

V.

IF, THEREFORE, THE PETITIONS AND FINDINGS OF FACT OF THE TRIAL COURT SUSTAIN THE JUDGMENTS, THE DECISIONS OF THE TRIAL COURT SHOULD BE AFFIRMED.

If our preceding contentions are correct, this must follow. The opinions of the State Supreme Court and the judgments of reversal are conclusive that that court reviewed the cases for errors of law and did not assume to retry questions of fact.

This court, therefore, accepts the facts—the ultimate conclusions of fact—as found by the trial court, and if those findings and the petitions are sufficient to sustain the judgments, then the trial court was right, and its judgments should be affirmed.

The result would not be different, if the court should conclude that the decision of the State Supreme Court was equivalent to saying that the evidence was insufficient to sustain the findings. That, as we have pointed out, would be a conclusion of law as to the legal effect of the evidence, and, as such, reviewable on writ of error.

The issue would be the same as though the cases had actually been tried to a jury, and the point raised was

whether the evidence supported the verdict. In such a case this court would not weigh the testimony to determine its preponderance, but would examine the record to ascertain if the evidence, with all inferences the jury could justifiably draw from it, were sufficient to support the verdict.

In principle the issue would be the same whether the State Supreme Court affirmed or reversed the judgment of the court below. In neither case would its judgment be a determination of a question of fact, but a decision in matter of law, reviewable here on error. The unsuccessful litigant would be entitled to a review of that question in this court if it involved a Federal right asserted below.

And, of course, the findings of fact of a trial court, in an action at law where a jury is waived, come to this court with the same quality of finality as the verdict of a jury, and can only be re-examined according to the rules of the common law.

If it be contended that a decision that "a case has not been made" is to say that the evidence does not sustain the findings or judgments, the question still remains one of law. That issue should properly be presented in the trial court by motion for a directed verdict or in arrest of judgment, and the ruling thereon would be reviewable on error.

In no aspect could it be viewed as a finding of facts, for that would require an affirmative statement of facts found. The quoted clause ("a case has not been made") is a mere negative statement.

It does not disclose what essential elements are wanting, nor yet by what rule of liability the sufficiency of the evidence was tested.

Whatever else it may be, it certainly is not a finding of facts.

To us it is inconceivable how any other view of the issues is possible.

However, should this court hold otherwise, it will be necessary to "analyze the facts in order to determine, whether that which purports to be a finding of fact is so interwoven

with the Federal question as to be in substance a decision of that question."

> Norfolk & Western Ry. Co. *vs.* Conley, 236 U. S., 605; 35 Sup. Ct., 437, and cases cited.

In this case the Circuit Court of Kanawha County (West Va.) had, by its decree, held that the rate of fare for passengers on railroads, established by the legislature, "was not confiscatory *in fact* as to plaintiff in error."

There were no special findings. Application for appeal to the State Supreme Court was disallowed; whereupon writ of error was sued out of this court.

In the opinion Mr. Justice Hughes says:

> "So far as findings are concerned, we have in the present case simply a general, or ultimate, conclusion of fact, which is set forth in the decree of the State court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter."

It is to be observed that the court below had held in its decree that the rate in question "was not *in fact* confiscatory," while there is nothing in the opinion of Letton, J., which even resembles a question of fact—much less in the judgment of reversal.

But, whatever scope the review may take, there can be but one result. The decision of the State Supreme Court is so palpably erroneous it cannot stand.

Respectfully submitted,

JOHN JACOB THOMAS,
For Plaintiffs in Error.

Jan'y, 1916.

MAR 27 1915
JAMES D. MAHER

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

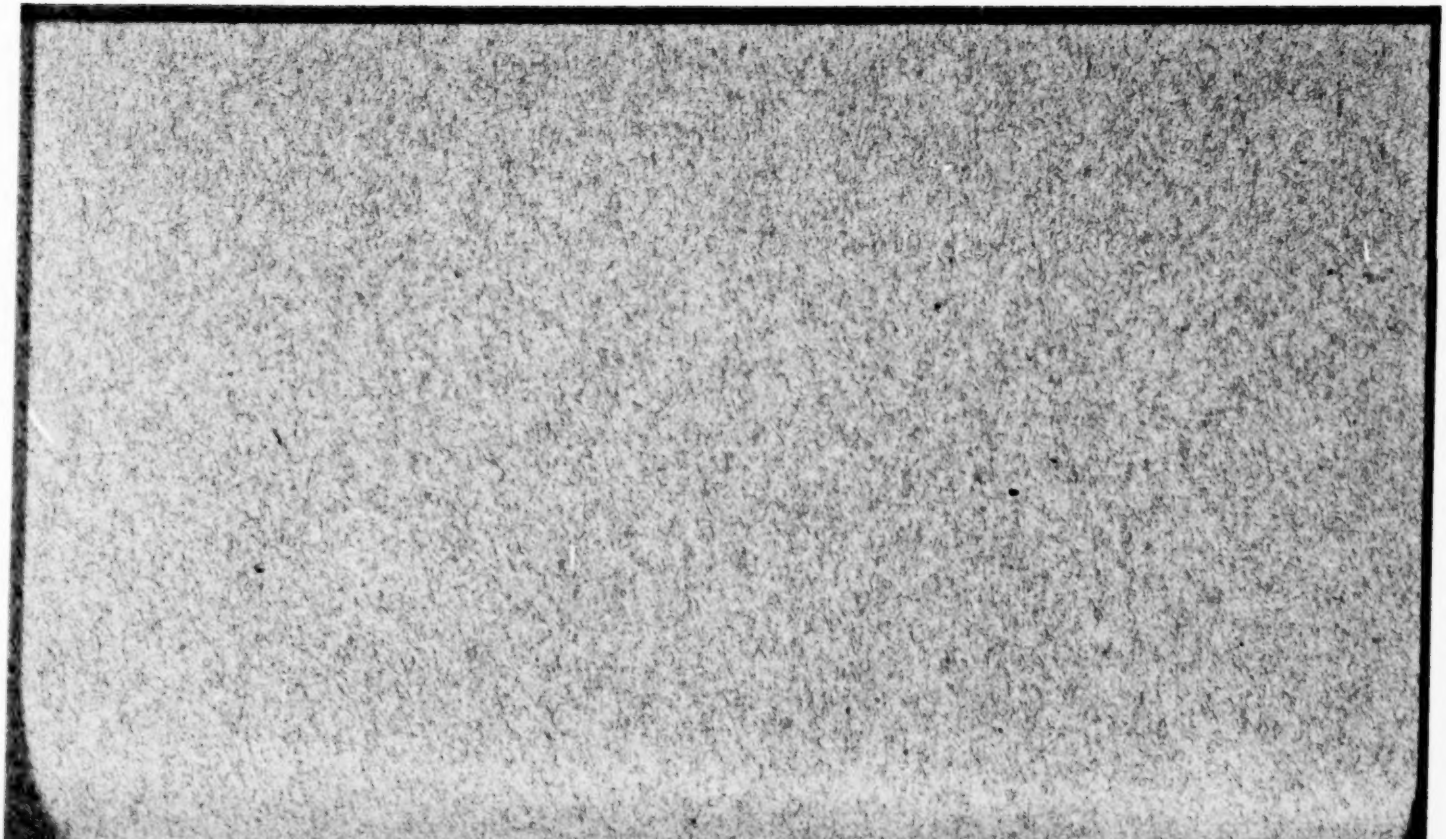
JONES NATIONAL BANK, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, ET AL.	October Term 1914 General Number [redacted]
BANK OF STAPLEHURST, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, ET AL.	October Term 1914 General Number [redacted]
UTICA BANK, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, ET AL.	October Term 1914 General Number [redacted]
THOMAS BAILEY, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, ET AL.	October Term 1914 General Number [redacted]

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR DEFENDANTS IN ERROR, YATES AND HAMER.

FRANK M. HALL and FRANK E. BISHOP.
Attorneys for Defendants in Error.

WEKESSER, The Brief Man, Lincoln, Nebraska.



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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

JONES NATIONAL BANK, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 501 General Number 24240
BANK OF STAPLEHURST, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, D. E. THOMPSON, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 502 General Number 24241
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THOMAS BAILEY, PLAINTIFF IN ERROR, vs. CHARLES E. YATES, LOUISA HAMER, *Administratrix of Estate of Ellis P. Hamer, Deceased*, DEFENDANTS IN ERROR.	October Term 1914 No. 504 General Number 24243

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR DEFENDANTS IN ERROR, YATES AND HAMER.

STATEMENT OF CASES.

The writs of error addressed to the supreme court of the state of Nebraska in these four cases, present for review the judgments and decision of the Nebraska supreme court, which on full review of the proceedings and evidence decided and adjudged that the petitions failed to allege a cause of action against the defendants, and plaintiffs failed to prove that the defendants were liable to the plaintiffs and reversed the judgments which had been rendered against the defendants in the trial court and dismissed the actions. The plaintiffs in error were plaintiffs in the trial court, and the defendants were Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, in all four cases for whom we appear and present this brief. The action is in each of the cases by plaintiff to recover against the defendants who were directors of the Capital National Bank of Lincoln, Nebraska, which failed on January 21, 1893, the amount of deposits lost by the plaintiffs in the failure of that bank. The petitions are the result of numberless amendments and additions of verbiage to the assertions of failure of duty and violation of both the common law and the provisions of the national bank act on the part of the defendants resulting, it is alleged, in the loss of deposits.

The cases were tried by the district court of Seward county, Nebraska, where the parties waived trial by jury. An immense record of evidence was taken amounting to more than two thousand pages of testimony and exhibits, upon which the trial court made various, inconsistent, and unsupported findings of fact and of law, resulting in a judgment in favor of the plaintiffs against these defendants for the amount of their deposits, interest and costs. This trial was nominally in pursuance of the mandate and decision of this court in the same cases, under the title of *Yates, et al., v. Jones National Bank*, reported in 206 U. S. at 158 and 181, which had reversed judgments of the trial and supreme court of Nebraska rendered at a former trial against these defendants for the same loss. *Jones National Bank* v. *Yates, et al.*, 74 Neb. 734.

The Nebraska supreme court in rendering the present judgments acted with the fullest liberty of consideration and authority for adjudication of the full merits of these cases upon the pleadings and the evidence as a whole, under chapter 18, article 2, section 640, of the Revised Statutes of Nebraska 1913, which provides:

> "When a judgment or final order shall be reversed, either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below have rendered or remand the cause to the court below for such judgment. * * *"

Under this statute the state supreme court exercised two distinct functions, first as a court of errors to determine whether the judgments were dependent upon errors at the trial sufficient to reverse, and second to constitute itself a trial court in order to render such judgment as the initial trial court should have rendered, rather than to return the cases to the trial court for that or any other judgment.

In its second function it proceeded to a complete and unlimited investigation of the pleadings, evidence and merits not only of the judgments but of the cases, and on the complete investigation rendered its original and independent judgment based on its own findings both of fact and of law, independent of the trial court. In its investigation of the whole record as a trial court, it expressly and manifestly followed and applied the provision of the bank act, especially sections 5239 and 5147, concerning directors' liability and their obligation under the oath according to the construction given those provisions in the former judgment of this court. The state supreme court in exercising this power to proceed as a trial court evidences the manifest purpose of observing strictly and abiding by the provisions of the act exactly as they were construed and enforced by this court in order to furnish no occasion for further mistake in the enforcement of the provisions of the national bank act in these cases and in order to terminate correctly this litigation which has lasted nearly a generation.

The plaintiffs claimed they were deceived by the false statements in the reports made and published by the executive officers of the bank and attested by some or all of the defendant directors, whereby they either made or maintained their deposits in the bank up to the time of its failure. Amendments intended to modify this claim, were made to the petitions at the trial. Considering the amendments and the new testimony as well as that given at the former trials, the Nebraska supreme court made its findings of fact and of law, which are the basis of its decision reversing the judgments and dismissing the actions. The Nebraska court in *Jones Bk. v. Yates*, 93 Neb. 121, Trans., p. 49,* said:

> "The amendments contained no material additional statements of fact, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments, plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs, made such statements, and that thereby they induced the plaintiffs to become depositors in the Capital National Bank. To the petitions thus amended, each of the defendants demurred, the demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained."

The Nebraska supreme court further said (p. 125):

> "Coming now to the consideration of the additional evidence, introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear and practically without dispute that neither defendants Yates or Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is in fact predicated, and neither of them had any personal knowledge of their falsity but signed them in good faith believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Mr. Yates or Mr. Hamer ever had any communication or conversation with the plaintiffs or any of them in regard to the condition of the Capital National Bank. It is not shown that they or either of them had any knowledge that any published

*References apply to the Jones Transcript.

statements or cards containing any information as to the condition of the bank, were ever sent to the plaintiffs or any of them by any officer or agent of the bank. It follows therefore that the evidence is insufficient to charge them or either of them with ever having knowingly made any false statements in regard to the condition of the bank or participated in sending any advertising matter, published statements or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in such transaction it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants Yates and Hamer within the rule of liability announced by the supreme court of the United States in these cases and the others, we are of opinion that the judgment as to them, must be reversed."

As to following and applying the federal statutory liability and the former decision of this court, the Nebraska court said (p. 126):

"As we view the opinion of the supreme court of the United States in *Yates* v. *Jones Bank*, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. * * * * The opinion of Justice White in the Yates case is based on a single proposition; that is: 'Where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability.' * * * At page 130, the plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover and the judgments of the district court should be reversed as to all of the defendants."

Concurring with this judgment and decision Judge Letton said (p. 131):

"The presumption is that they (the findings of the trial court), are so sustained; but I have not examined the evidence so critically as would be necessary to determine this, for the reason that under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone, I concur in the conclusion."

This brief statement of the cases is made in order chiefly to present the argument of defendants in error to dismiss this writ or affirm the judgments of the Nebraska supreme court on the grounds: (1) that this court is bound by and has no jurisdiction to review or re-examine the findings of fact of the state supreme court that these defendants did not knowingly attest or permit to be made and published false statements of the financial condition of the Capital National Bank and did not knowingly violate nor participate in the violation of any of the provisions of the national bank act. And (2) that this court cannot proceed to a review of those findings of fact nor of the evidence generally upon the printed records here presented because it shows by mere inspection that it contains only selected favorable portions of a much larger bill of exceptions and does not pretend to contain all the evidence and testimony upon which the state supreme court passed and considered in making its findings and conclusions of fact to which it applied the rule of liability established by the bank act as construed by this court in its former judgment and mandate in these same cases.

STATEMENT OF POINTS DISCUSSED.

1. The findings of the state court are not subject to review in this court.

Dower v. *Richards*, 151 U. S. 658.
Miedreich v. *Lauenstein*, 232 U. S. 236.

2. Printed bill of exceptions does not contain all of the evidence and cannot be re-examined to change the findings of fact.

Yates v. *Jones National Bank*, 206 U. S. 158.
Kans. C. Co. v. *Albers Co.*, 223 U. S. 573.
Creswell v. *Knights*, 225 U. S. 246.
So. Pac. Co. v. *Schuyler*, 227 U. S. 601.
Carlson v. *Curtiss*, 234 U. S. 103.
U. S. v. *Copper Co.*, 185 U. S. 495.
Kinney v. *U. S. Co.*, 222. U. S. 283.
Grand Trunk v. *Cummings*, 106 U. S. 283.

3. The judgment of the state supreme court upon the vote of the four judges does not deny the plaintiffs any federal right and the motion for rehearing with only three judges in its favor must fail for lack of majority of the court and is not reviewable in this court.

Shumway v. *State*, 82 Neb. 152.
Consolidated Co. v. *Norfolk*, 228 U. S. 230.
Ia. Central Co. v. *Ia.*, 160 U. S. 389.
West v. *Louisiana*, 194 U. S. 258.
King v. *West Va.*, 216 U. S. 92.
Carmichael v. *Eberle*, 177 U. S. 63.

4. The petitions do not state a cause of action against the defendants.

Yates v. *Jones National Bank*, 206 U. S. 158.

5. Section 5239 of the bank act requires a knowing violation of its provision in order to establish liability.

McDonald v. *Williams*, 174 U. S. 397.
Potter v. *Hill* 155 Mo. 232.
Utely v. *Hill*, 155 Mo. 232.
Mason v. *Moore*, 79 N. E. 932.
Spurr v. *U. S.*, 161 U. S. 728.
Rosen v. *U. S.*, 161 U. S. 29.
So. Company v. *Silva*, 125 U. S. 247.
Thomas v. *Taylor*, 224 U. S. 73.

6. The directors of a national bank are not obliged to manage but to administer its affairs and are not responsible for the acts of its officers and agents which they did not knowingly participate in or assent to.

Briggs v. *Spaulding*, 141 U. S. at 162.

7 The director does not attest the official report at his risk of its being false. He is not responsible without knowledge of its falsity.

Yates v. *Jones Bank*, 206 U. S. 179.
Briggs v. *Spaulding*, 141 U. S. 147.

8. Nebraska supreme court correctly understood and applied the rule of liability of directors derived from the national bank act to the evidence.

Yates v. *Jones Bank*, 93 Neb. 121.

POINT A—FACTS FOUND BY THE STATE COURT NOT REVIEWABLE.

The Findings of Fact as to These Defendants Not Having Knowledge of Any Falsity of the Reports and Not Participating in Any Violation of the Bank Act Are Binding Upon This Court and Not Subject to Its Review.

We think there can be no question that the findings and conclusion of the Nebraska supreme court, upon a full consideration of the extensive bill of exceptions containing all the evidence in these cases, are findings of fact, which are not subject to review or re-examination by this court. In the small compass of an opinion (Trans., p. 49), it was impracticable to set out the complicated testimony and exhibits from which the court found and concluded; that the whole evidence is insufficient to charge the defendants with personal liability for fraud and deceit; that defendants, Yates and Hamer, when they signed the two reports which are the foundation of the action, neither had personal knowledge of their falsity but signed them in good faith believing they exhibited the true condition of the bank; that they never had any communication with the plaintiffs regarding the bank; never made any false statements in regard to its condition or participated in sending any such statement to the plaintiffs and having taken no part in such transaction it cannot be said they knowingly participated in them, and there is nothing in the record sufficient to bring defendants, Yates and Hamer, withing the rule of liability announced by the United States supreme court; and that plaintiffs have failed to allege and prove that the defendants personally knew of or personally participated in the acts of officers of the bank of which they complain. These findings of act form ample and substantial basis for the judgment dismissing the actions. They cover the essential elements

on which liability must depend and from which non-liability must result. We do not think these are commingled findings of law and of fact. The court has carefully discussed the rule of law established in the former decision of these cases by this court and has laboriously and faithfully endeavored to follow and apply the provisions of the bank act to the facts found as prescribed by this court in its mandate. We have referred particularly to the opinion, but the syllabus states the conclusion of law and in substance the findings of fact as conclusively, and has very much the same force as the opinion because the syllabus is made and approved by the court. Notwithstanding the aberration of Judge Letton in his concurring opinion concerning the common law character of the cause of action stated, his vote is cast for reversal and dismissal directly upon the failure of the plaintiffs to sustain the burden of proving the knowledge of the falsity of the reports and the wrongful participation of the defendants in violation of the banking act, for in 93 Neb. 131 (Trans., p. 55), he says:

> "Under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made."

So that four out of the six judges who sat concurred in the findings of fact above emphasized, upon which they based their judgment of *no liability*. These findings we think are not subject to review here.

In *Dower* v. *Richards*, 151 U. S. 658, at 663 the state court of California had found that the lands in question were not valuable ore-bearing, at the time of the location of the townsite so far as was known, and this court said:

> "The principal ground on which the plaintiffs in error seek to reverse the judgment of the supreme court of California is that its decision in matter of fact was erroneous and contrary to the weight of evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court. In the legislation of congress from the foundation of the government a writ of error which brings up matters of law only, has always been distinguished from an appeal which, unless expressly restricted, brings up both law and fact."

At page 671:

> "This conclusiveness of the facts found, extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee where they are so held by state laws, as well as to the verdict of a jury."

This opinion contains a full discussion of this question.

In *Miedreich* v. *Lauenstein*, 232 U. S. 236, at 243 Mr. Justice Day for the court, said:

> "This court has repeatedly held that in cases coming to it from the supreme court of a state, it accepts as binding, the findings upon issues of fact duly made in that court."

POINT B—BILL OF EXCEPTIONS INADEQUATE.

The Printed Record in These Cases Does Not Present All of the Evidence Considered by the State Supreme Court But Only a Selected Portion of it From Which it Results That This Court Cannot Review or Re-examine the Evidence in Order to Test the Findings of Fact of the State Court Upon a Claimed Federal Right Under the Exceptions to the General Rule That This Court Will Review the Facts Where it is Claimed (1) That There is no Evidence to Sustain the Finding Upon the Federal Issue, or (2) That the Finding is Not Strictly One of Fact But a Mingled One of Law and Fact, or (3) That the State Court Has Refused to Find Facts Which Determine the Federal Question.

In these cases, the state supreme court was relieved from making any construction or determination of the federal question based on the rule of liability of the defendants under the national bank act. This had all been done in the construction given the act by this court in its former decision. In 206 U. S., at 177 this court said:

> "As the section thus comprehends all the express commands to do or not to do as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute, without

depriving directors of an immunity conferred upon them. That the words, 'shall knowingly violate or knowingly permit,' etc., found in the first sentence of section 5239, Rev. Stat., were intended to express the rule of conduct which the statute established, as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein as already stated, he swears, "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association and will not knowing violate or willingly permit to be violated any of the provisions of this title.' Mark the contrast between the general common law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate or willingly permit to be violated any of the provisions of this title.' In other words as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But as on the other hand the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate or willingly permit to be violated, any of the provisions of this title.' * * * (p. 179). The civil liability of national bank directors then in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self evident that the rule expressed by the statute is exclusive because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability. * * * Indeed in one aspect, the ruling below went further than this, since it was in substance decided that despite the exercise of diligence by the director if he attested an untrue report, he was civilly liable because he did so at his risk since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious but is clearly also established by previous decisions of this court pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional."

The Nebraska supreme court may not have slavishly reiterated this language in every instance in its opinion, but it

has faithfully quoted and applied it to the essential facts found from the voluminous bill of exceptions of the evidence. Indeed it has been closely followed by the concurring and even the dissenting opinions. The difference between the judges arose simply from their analysis of the facts. We submit that no essential criticism can prevail against the application of the proper rule of liability derived from the statute as construed by this court as it was applied by the Nebraska supreme court to the facts, so that no federal question on the construction, force and effect of the statute is open for review on this record.

The essential and vital point is that on the partial printed record of the evidence here presented this court will not undertake to review the findings of fact of the state supreme court as if it came under any of the exceptions to the general rule above stated. It must be conceded by the plaintiffs in error, and can be demonstrated by a glance at the testimony in the printed record of Mr. Yates, Mr. Hamer and of Mr. Thompson and others, that these defendants did not knowingly attest and publish any statement of the condition of the bank which was false or untrue, and did not participate in or assent to any such misrepresentation. There is therefore ample evidence in the printed record to sustain the findings and judgment of the state supreme court dismissing the actions. If we are wrong in advocating that the findings of the state supreme court are binding upon this court and that the federal question is so presented as to require an examination of the evidence to determine the correctness of the findings of the state court, still this court will not proceed to that examination without every word of the testimony and evidence before it, for it cannot be presumed and no one would undertake to say that ample evidence did not remain in the bill of exceptions unprinted and consequently not before the court, which would sustain the findings of the state court. In all the cases which we have been able to examine where this court has undertaken to review the testimony, the opinions show clearly that all of the evidence is properly before the court and subject to its complete examination.

In the leading case of *Kansas City Co. v. Albers Co.*, 223 U. S. 573, where the state court had found that an agreed railroad rate must prevail as against the regularly published tariff rate, this court at page 591, on a motion to dismiss, said:

> "While it is true, that upon a writ of error to a state court, we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the federal right set up by the unsuccessful party, it equally is true *that we may examine the entire record including the evidence if properly incorporated therein*, to determine whether, what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect, a decision of the latter."

And at page 594:

> "When due regard is had for the rule before indicated and so often applied in other cases, it does not admit of doubt that in the present case, *we may examine the evidence which has been properly incorporated in the record*, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the federal right set up by the garnishee."

In *Creswell v. Knights of Pythias*, 225 U. S. 246, at 261 this court said:

> "As the inquiry which we thus state, rests upon the premise that all the propositions of law applied by the court are to be taken as correct, it follows that there is no possibility of deciding there was material error unless it is to be found in the application which the court made of the principle of law which it applied to the facts *established by the evidence, all of which is in the record in connection with the findings made by the jury.* While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a federal right has been denied as the result of a finding of fact, which it is contended there was no evidence whatever to support, *and the evidence is in the record*, the resulting question of law is open for decision."

In *Southern Pacific v. Schuyler*, 227 U. S. 601, at 611 the court said:

> "And while it is conceded that ordinarily upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a

> federal right has been denied as the result of a finding of fact which is without support in the evidence, *that the evidence is before us in the record* by which that insistence may be tested, etc., * * * accepting the duty to review this question of fact, *we have examined the evidence in the record* and find that it fairly supports the conclusion of the state court, that the deceased was accepted by the plaintiff in error as a gratuitous passenger."

In *Carlson* v. *Curtiss*, 234 U. S. 103, at 106 this court said:

> "And just as this court, where its appellate jurisdiction is properly invoked, *and all the evidence is brought before it*, will, if necessary for a decision of a federal question, *examine the entire record* in order to determine whether there is evidence to support the findings of the state court, so it is our duty in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right."

It is well settled that the printed record presented to this court for review of the evidence must contain all of the evidence considered by the lower court derived from a bill of exceptions, which is properly certified and which does in fact contain all of the evidence. In *United States* v. *Copper Company*, 185 U. S. 495, the verdict in favor of the plaintiff was based on an instruction that Ross, who cut the timber, must be shown by the evidence to have been a citizen of the United States and a resident of Arizona. The plaintiff in error claimed there was no evidence to sustain either of these facts and demanded a review of the evidence. But the court (p. 497), said:

> "It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we cannot in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein, upon the assumption that the proper construction of the act of congress requires such citizenship as well as residence. When this court is asked to reverse a judgment entered upon the verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement or there must be a stipulation

of counsel declaring that the bill contains all the evidence given upon the trial, so that the record shall affirmatively show the fact. * * * However that may be, the record is in such a state that we cannot say that all the evidence given upon the trial is contained in the bill of exceptions and therefore we cannot say that there was no evidence of the residence and of the citizenship of Ross upon which the verdict of the jury might be sustained. If there were evidence that Ross was a citizen, and a *bona fide* resident, it is admitted that the verdict could not be disturbed by this court. There may have been evidence upon both propositions, sufficient to sustain the verdict."

Kinney v. *U. S. Fidelity Co.*, 222 U. S. 283.

Grand Trunk v. *Cummings*, 106 U. S. 700.

We submit that upon the partial selection of only a portion of the testimony, the plaintiffs in error have no right to invoke the jurisdiction of this court to review the findings of fact of the state supreme court and cannot obtain a review of the evidence to determine either the validity of those findings, or a finding of this court that the defendants are as a matter of fact liable under the provisions of the national bank act. The assignments of error upon which the plaintiffs rely are so indefinite and inadequate that they do not raise the question of the proper construction and application of the provisions of the national bank act. The printed record is inadequate to review at all the supreme court findings of fact or the evidence upon which they are based, and the judgments must be affirmed on those findings.

POINT C—VALIDITY OF THE JUDGMENT OF THE STATE SUPREME COURT.

No Federal Right Was Set Up by the Plaintiff and Denied by the State Supreme Court in the Claim That the State Constitutional Majority of Four Judges Did Not Vote For the Judgment Which Reversed the Judgment of the Trial Court Against the Defendants and Dismissed the Actions.

Assignments of error numbers 22 and 23, and point 8 (Trans., p. 102, brief, p. 23), which allege that the findings and judgment of the state supreme court are not concurred in

by the constitutional majority of four judges of the state supreme court, as required by the state constitution, whereby the plaintiffs have been deprived of property without due process of law, in violation of the 14th amendment to the federal constitution, and by which the state court still had jurisdiction of the judgments at the time of ruling on the motion for re-hearing when a majority of the court was not in favor of the judgment of reversal and dismissal, do not raise any federal question which was specially set up by the plaintiffs and ruled adversely to them by the state court, and consequently are not open to review now. This point is not argued but is made prominent in the statement and the court is requested to notice points aside from those argued.

The state constitution, article 6, section 2, provides:

> "The supreme court shall consist of seven judges; and a majority or all elected and qualified judges shall be necessary to constitute a quorum or pronounce a judgment.

The compiled statutes of Nebraska, 1911, chapter 19, section 37, provides:

> "A judge or justice is disqualified from acting as such except by mutual consent of parties, in any case wherein he is a party or interested, * * * or where he has been attorney for either party in the action or proceeding."

On January 31, 1913, the state court filed its opinion and rendered its judgment reversing the judgments of the trial court and dismissing these actions (Trans., pp. 48, 49.)

Yates v. *Jones National Bank*, 93 Neb. 121.

This final judgment of the state supreme court is certified under the seal of the court by its clerk as the judgment in these cases to reverse which the plaintiffs in error have sued out their writs in this court, (Trans., original, p. 251). Upon the face of the record, this judgment of the supreme court of Nebraska is the final and conclusive disposition of these cases which the plaintiffs in error recognize and admit by their error proceedings and which they have never assailed in the state court. Primarily and upon the record, that judg-

ment is conclusive upon the plaintiffs, and we think does not permit of review by this court as the record stands, both because the certified record before this court is conclusive of the judgment and proceedings of the state supreme court and because this court does not review the proceedings and manner of rendering judgment of the state supreme court according to their own constitution and statute.

One vital matter which deserves attention immediately is the claim that the concurring opinion of Letton, J., (Trans., p. 55) was only an approval of the law as declared by this court in its former judgment and was not a finding or concurrence by that judge in the findings of fact and the reversal of the judgments and dismissal of the actions so that only three judges it is claimed passed the judgment which is sought to be reviewed by these error proceedings. This claim is without foundation upon the face of the opinions and record. Judge Letton's concurring opinion will be found in 93 Neb. 130 (Trans., p. 55), at the end of which that judge says:

> "But I have not examined the evidence so critically as would be necessary to determine this (whether or not the findings of the trial court were sustained by any evidence), for the reason that *under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made.* For that reason alone I concur in the conclusion."

There can be no reasonable ground for dispute that Judge Letton intended, and expressed his intention to decide that, applying the test of liability fixed by the federal statute and the former decision of this court, to the evidence, a case had not been made in favor of the plaintiffs either as matter of law or matter of fact.

His decision and vote of concurrence in the judgment is directly upon the facts, so that beyond the possibility of dispute four judges out of the seven constituting the full court, voted for and rendered the judgment reversing the judgments of the trial court and dismissing the actions. These judgments have never been set aside, modified, or in any way affected by any subsequent proceeding in the state supreme court and

stand as matter of fact as well as matter of record, the final decision pronounced by the constitutional majority of the state supreme court.

After the judgment of the supreme court had been rendered, the plaintiffs duly filed a motion for re-hearing, which was retained by the court for a long while and on May 17, 1913, an order was entered for oral argument upon the motion for rehearing, which argument was duly held, and on January 8, 1914, the court entered an order showing on its face that Judges Barnes, Hamer and Rose voted against allowing the rehearing and Judges Letton, Sedgwick and Fawcett voted to allow a rehearing, and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried. Whereupon the order for rehearing was entered (Trans., pp. 65, 66). At the same time there was filed the following protest:

> "Hamer, Rose and Barnes, J.J. dissent from the order granting a rehearing herein and protest against the entry thereof on the journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the chief justice having been consulted by the plaintiff and having so announced when the case was on for hearing. *Shumway* v. *State*, 82 Neb. 152, 165."

It was made to appear beyond dispute (Trans., Rose affidavit, pp. 81-66, 94, 95; Staplehurst, Trans., affidavit, Bishop, p. 75), that the chief justice had stated from the bench when the cases were first presented to the court upon a motion to advance, that he had been consulted by one of the plaintiffs in these cases and expressed his opinion upon them and advised against bringing them, whereupon he withdrew from the court and left the cases to the remaining six judges, and on three or four subsequent occasions likewise withdrew, and never took any part in the trial or consideration of the cases. The defendants immediately moved to set aside the order allowing the rehearing and the order of May 17, 1913, which had ordered argument upon the motion for rehearing. Subsequently five judges of the six qualified to act in these cases voted to sustain the motion to set aside the order for rehearing (Trans.,

p. 924, and an appropriate order was entered setting aside the order granting the rehearing because the judges stood equally divided upon the motion for rehearing which worked a denial of the motion, *Shumway* v. *State*, 82 Neb. 152, 165. The original judgment of the court upon the original opinion of date January 31, 1913, stood unaffected and without modification by the approving vote of the four judges in the original instance and of the five judges to set aside the order granting a rehearing as void.

Here in the first instance it is important to note that the correctness and propriety of the proceedings upon the motion for rehearing were never challenged nor brought to the attention of the state supreme court upon any ground of denial of due process of law under the 14th amendment. It is therefore true that if the question were one appropriate for review here, it has not been specifically set up nor denied by the state supreme court as required by section 709, Rev. Stat. The first complaint against the procedure of the state court was made by plaintiffs, in their assignments of error filed coincident with their application for the present writs from this court. Even if this complaint had been made in a motion for rehearing, the federal right would not have been claimed because the state court never made any order or rendered any judgment on any such presentation of the claim of federal right adverse to that right. It is therefore manifest that within the rule as stated in *Consolidated Co.* v. *Norfolk Co.*, 228 U. S. 320, at 334, that no federal right has been presented to the state court and denied either by motion for rehearing, the assignments of error or otherwise.

There were ample grounds aside from any consideration of due process of law, for the state court sustaining the motion of the defendants to set aside the order granting the rehearing. The secret participation of the disqualified chief justice, with the other six judges was manifestly a departure from right professional ethics, was a direct violation of the statute of the state, and was a manifest disregard of fundamental ethics and of the judicial proposition that no man should sit in judgment

upon his own cause. The state supreme court splendidly vindicated its appreciation of the law and its courage to enforce it, when five out of six judges voted to hold the order passed by the disqualified vote of the chief justice null and void.

Where the state court has acted in compliance with general legal principles, has given the parties notice, opportunity to be heard, and an actual hearing according to the usual procedure of courts, no due process protected by the 14th amendment has been affected and we submit that the suggestion of error here is frivolous and so lacking in color of federal right as not to deserve consideration.

In *Iowa Central Co.* v. *Iowa*, 160 U. S. 389, it was alleged that due process was denied by a mandamus proceeding to compel the railroad company to operate a certain line without first having tried out to a jury, the right to compel the operation, but this court said, page 393:

> "It is also equally evident provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action, in no way rendered the proceeding not due process of law, within the constitutional meaning of these words. Whether the court of last resort of the state of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the constitution of the United States or upon any act of congress. * * * It was not a denial of a right, protected by the constitution of the United States to refuse a jury trial even though it were clearly erroneous to construe the laws of the state as justifying the refusal."

West v. *Louisana*, 194 U. S. 258.

King v. *West Virginia*, 216 U. S. 92, at 100.

Carmichael v. *Eberle*, 177 U. S. 63.

POINTS OF ARGUMENT.

In the re-constituted assignment of error, or the extraction of certain points of argument from the assignments of error, the plaintiffs have made their first point that the petitions stated a cause of action under the statute, or at common law.

POINT 1—THE PETITIONS.

If the Petitions State Any Cause of Action it is Based Upon the Two Official Reports of the Condition of the Bank Attached to the Petition, One For December 28, 1886, and the Other For December 9, 1892.

We think it is of no importance that the petitions are claimed to state causes of action equally under the bank act or at common law. It is true that the plaintiffs have studiously attempted to avoid any reference to the national character of the bank, that the reports attached to the petition were made to the comptroller and attested by some of the directors as directors of a national bank pursuant to the national bank act. In the early stages of the litigation this was done in order to prevent the exercise of the right to remove the cases to the federal courts by the defendants. In ordr to add another thread to their net, the plaintiffs also asserted that the defendants had made verbal statements of the condition of the bank to the plaintiffs and also sent printed slips representing the assets and liabilities of the bank, and also carried advertisements of its condition in the newspapers. It was thought by this method to establish a common law liability if none could be shown upon the two official reports. This claim is now abandoned in silence. As to the essential character of the petitions it is admitted by plaintiffs that it is an attempt to enforce liability provided under Sec. 5239, Rev. Stat., regardless of the subterfuges and evasions so laboriously repeated in the petitions. When the cases were in this court on the former writ, it was said (206 U. S., at p. 170):

> "It is not to be doubted that although the plaintiff alleged the making of false verbal and written statements, there was no attempt to establish any verbal misrepresentations. It is also certain even if it be conceded arguendo that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the comptroller of the currency and published in conformity to the National Bank Act, *that such latter statements were counted upon in the amended petition and were if not exclusively, certain principally the grounds of the alleged false representations covered by the proof.*"

It was the petition itself, the character of the action which came to judgment and was held to be within the provision of the bank act rather than an action at common law for something entirely outside of the duties, functions and obligations of a national bank and of its directors. The state court in its opinion (93 Neb. 123), referring to the former judgment of this court said:

> "It was held that plaintiffs' petitions were insufficient to charge the defendants with common law liability for fraud and deceit. * * * (p. 125) and unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank."

And in the dissenting opinion at page 134:

> "No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when these cases were formerly before the supreme court of the United States shall recede from its emphatically decided by that court and no such claim can be made in this case."

No change has been made in the petition which affects the adjudicated federal character of the cause of action attempted to be stated.

POINT 2—INTENTIONAL VIOLATION.

The Second Point For Argument That Section 5239 Does Not Contemplate an Intentional Violation, But a Violotion in Effect Intentional to Incur Liability, and That There is in Effect Intentional Violation Where One Deliberately Refuses to Examine Where it is His Duty to Examine, Furnishes Absolutely no Ground Either in Law or in Fact to Discredit the Judgment of the State Supreme Court.

The supreme court found (93 Neb., p. 125):

> "Coming now to the consideration of the additional evidence introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear and practically without dispute that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which the action is in fact predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith believing that they exhibited the true condition of the Capital National Bank."

And page 130:

> "The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the supreme court of the United States in these cases they are not entitled to recover and the judgments should be reversed as to all of the defendants."

These are the specific findings of fact from the whole evidence made by the supreme court of the state in its combined power of a review court and a trial court and completely negatives the claim that there is in effect an intentional violation of the statute by defendants, Yates and Hamer, on the ground that they refused to examine where it was their duty. No definite claim is made as to what should be examined or in what respect they failed to perform their duty as directors to examine some or all of the books, business or finances of the bank. The former opinion of this court in these cases leaves no doubt that the statute requires proof of knowledge on the part of the director of the falsity of the reports made by the

bank itself, sworn to by its president or cashier, and afterwards attested by the directors in order to fix the liability created by section 5239 of the bank act, where the provision is that:

> "If the directors shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title. * * * * then in case of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its share holders or any other person shall have sustained in consequence of such violation."

It has been adjudicated and become the law in these cases that the directors are liable only on proof that they knowingly violated some provision of the statute because the act requires *that* proof, and fixes the liability only upon *such* violation, and that they do not participate in or assent to any violation of the act without a conscious knowledge of the wrong or falsity. It was to characterize these inherent and essential elements of the statute that it was said:

> "Proof of something more than negligence is required, that is that the violation must in effect be intentional."

This court, to illustrate such holdings, cited:

McDonald v. *Williams*, 174 U. S. 397.

Potter v. *U. S.*, 155 U. S. 438, 446.

Utely v. *Hill*, 155 Mo. 232, 264.

Mason v. *Moore*, 79 N. E. (O.) 932.

In *McDonald* v. *Williams*, 174 U. S., at 406, this court said:

> "The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above. *One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge.* Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate share of the dividend? Is each share holder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a

> dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any portion of its capital, to include the case of the passive receipt of a dividend by a shareholders in the bona fide belief that the dividend was paid out of profits, while the bank was in fact solvent."

In *Spurr* v. *U. S.*, 174 U. S. 728, the conviction was for certifying a check against an inadequate account in violation of Sec. 5207, Rev. Stat. U. S.:

> "It shall be unlawful for any officer * * * of any national bank to certify any check * * * unless the person drawing the check has on deposit at the time, * * * an amount of money equal to the amount specified in such check."

The court said (p. 733):

> "The questions for determination were defendant's knowledge of the state of D's account when the checks were certified, and his intent in the certifications. * * * (p. 734) In *Felton* v. *U. S.*, 96 U. S. 699, it was said: 'Doing or omitting to do a thing knowingly and wilfully, implies not only a *knowledge of the thing*, but a determination with a bad intent to do it or to omit doing it. * * *' (p. 735) The defense was that defendant had no actual knowledge that D. had not sufficient funds in the bank to meet the checks, nor knowledge of facts putting him on inquiry; that on the contrary he believed that they had such funds; that this belief was founded on information he received from the cashier or the exchange clerk, the proper sources of information, in response to inquiries which he made in each instance, before he certified; that he honestly relied on that information and that he had the right to do so. Defendant was entitled to the full benefit of this defense and in order to that, it was vital that the meaning of 'wilful violation' as used in the act* * * should be clearly explained to the jury."

In *Rosen* v. *U. S.*, 161 U. S. 29, at 33, the indictment was for unlawfully, wilfully and knowingly depositing in the post office certain obscene paper, which:

"May not unreasonably be construed as meaning that the defendant was and must have been aware of the nature of its contents at the time he caused it to be put into the postoffice for transmission and delivery. * * * He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited. In their ordinary acceptation the words unlawfully, wilfully and knowingly, when applied to an act or thing done, import knowledge of the act or thing so done as well as an evil intent or bad purpose in doing such thing; and when used in an indictment * * * could not have been construed as applying to the mere depositing in the mail of a paper, the contents of which at the time, were wholly unknown to the person depositing it."

In *So. Company* v. *Silva*, 125 U. S. 247, at 257, the court said:

"The question is, did Silva know of their existence (plugged drill holes in a mine) at the time he sold the mine, and having such knowledge, did he falsely represent to the complainant that he knew nothing of them, thereby inducing complainant to act upon such representations. * * * There is no direct evidence going to show who drilled the holes and there is nothing in the entire record to connect Silva with them except the fact that he was the owner of the mine and was in possession of it at a time when it is most likely they were drilled. But this circumstance alone should not outweigh the positive denial of Silva in his answer and also his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish defendant's knowledge. * * * This rule is fortified by the consideration that had he known of the limited quantity of ore in and about the ore chamber, Silva would hardly have gone to the expense and labor of starting a drift from the bottom of winze No. 1, and constructing it for a certain distance, before the sale of the mine, for the purpose of reaching the supposed downward extension of the ore in and about that chamber. Knowing that the ore body terminated within a few inches of the surface of the chamber, and then in the face of that knowledge actually constructing a drift on the 82-feet level, at enormous expense, for the purpose of getting under that limited quantity of ore, would not appear a reasonable thing to do by any one, especially by such an experienced and practical miner as Silva is admitted to have been."

The claim that there is an intentional violation when one deliberately refuses to examine where it is his duty to examine, is based upon but is a distortion of some language in *Thomas* v. *Taylor*, 224 U. S. 73. In that case it was stipulated by the parties:

> "That at least thirty days prior to the 28th day of March, 1904, the comptroller of the currency had called the attention of the directors of the bank by letter *to the situation of the bank* and that *items amounting to $194,107.02 must be regarded as doubtful assets* and that *immediate steps should be taken to collect them or remove them out of the bank;* and that defendants had knowledge of such letter from the comptroller of the currency at the time that they attested the report. That of the $194,107.02 above referred to, $97,000 never has been realized."
>
> Same case, 106 N. Y. Supp. 538, 195 N. Y. 590, 89 N. E. 1113.

The letter referred to certain specied assets. The report was called for, made, and attested by the directors as to the condition of the bank on March 28, 1904, and contained all of the doubtful assets referred to. On June 27, 1904, an assessment was made on the stockholders to make good the loss of half of the doubtful assets specified. This court, in referring to the opinion of the appellate division of the New York court reported, *Thomas* v. *Taylor*, 108 N. Y. Supp. 454, in 224 U. S., p. 81, said:

> "The complaint charges plaintiffs in error, with actual knowledge. The allegation is that when plaintiffs in error attested the report 'they knew the same was not correct and was false, and said statement was thus attested by them with the intention of deceiving the public, and among others, the plaintiff" (defendant in error). And the appellate division says (p. 56): '*That the report was false and known to the defendants to be false they do not deny, nor do they attempt to explain their conduct.*' This would seem like a finding of fact of knowledge of the falsity of the report on the part of the plaintiffs in error. Indeed in distinguishing the case from the Yates case the court did so on the ground that in that case 'there had been a recovery against the directors without proof of scienter, which proof the statute requires,' and added: '*Such proof has been supplied in the present case.*'"

And at page 83:

> "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books, and to show that the report was a true copy of them, as it was alleged in their answer to be. No attempt was or is made to show why the notice from the comptroller was disregarded (we have seen it was known to plaintiffs in error prior to the attesting of the report), except that they point to the fact that $97,000 of the items mentioned by the comptroller were subsequently collected and that they should have been given time to collect the other assets. But the fact of the false representation remains, and the assessment of 100 per cent upon the stock purchased by defendant in error, which increased the cost of his stock $3,000."

Answering the contention in the Saratoga case that the report to the comptroller *was not voluntary*, but was due to the command of the bank act so that the element of volition of an action of deceit was wanting, the court said (p. 82):

> "There is in effect an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the comptroller of the currency that $194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. 'This "was a direct warning to them," as the trial court said, 'by the bank examiner and comptroller that assets to nearly twice the amount of the capital stock were considered doubtful.' They notwithstanding represented the assets to be good."

The sentence, that it is "In effect intentional * * * to refuse to examine," was in answer to the point that the report was not voluntary, and was the reflection of the fact that the directory actually knew the misrepresentation made in the report which they attested after they had received the letter of the comptroller which had named the items constituting the $194,000 of the assets of the bank which were doubtful assets and proved to be absolutely worthless. The directors of the Saratoga bank, knowingly violated, and permitted the violation of the statute which required a true report of the condition of the bank when they permitted and attested the false

report which contained the *very items* which the comptroller and his examiner had reported to the directors as worthless and commanded to be collected immediately or to be charged out of the bank. It is in the light of these undisputed facts that the violation in effect intentional must be understood to mean a refusal of directors to examine that which it is their duty to examine. There is no purpose expressed nor do we think implied in the opinion in the Saratoga case to overrule the former judgment in these cases, nor the former judgment of this court that a knowing violation must be proved by bringing home to the defendant the knowledge of the falsity of the thing he reports, that is, that his violation must in effect be intentional, and known to be untrue.

It is certainly not a disclosure of an intent to deceive to show that mere negligence, innocent ignorance, or deception of the executive officers of the bank practiced upon the directors existed whereby they were unaware of any falsity in reports which they attested. Such innocent conditions do not constitute a knowing violation of the statute or a violation in effect intentional. When the language relied upon by the plaintiffs in error is viewed in the light of the facts existing in the Saratoga case, it furnishes no reason for criticising the judgments in favor of the defendants in the present cases, and much less furnishes any ground for claiming a departure from or enlargement of the rule of liability based upon knowledge established in the former opinion of this court in the present cases.

It is worth while to notice the language, that an intended violation exists where one deliberately refuses to examine. To refuse is to pour back or to throw aside one thing by the choice of another. It involves the use of knowledge and judgment. To deliberate is to ponder intelligently, to weigh as with a scale the choice between known things. Both words involve necessarily the exercise of judgment based upon knowledge all of which existed in the case of the directors of the Saratoga bank. They knew the *condition of their bank*

and the *existence of bad assets* and deliberately refused to exclude them from the bank and from the report made to the comptroller which directly resulted in the loss.

POINT 3—DIRECTORS DO NOT MANAGE, BUT ADMINISTER THE AFFAIRS OF THE BANK.

The Directors Under the Statute, Are Required to Administer the Affairs of the Bank so Far as the Duty Devolves Upon Them and Are Not Chargeable With Knowledge by Presumption of the Falsity of a Report Attested in Good Faith and Without Knowledge of Its Falsity.

The purpose in this claim is to argue the court into finding that the defendants had knowledge of the falsity of the reports which they attested, not as a matter of fact, but by presumption or implication arising from the performance of their duty under the statute. The essential weakness of this and the preceding point is that actual knowledge of false reports or intentional violation of the statute is conceded not to exist but that such knowledge, and violation are to be imputed, presumed or inferred from argumentation rather than from fact. Some standard of duty and obligation of the director is assumed, and from that, knowledge of the falsity of a particular report is to be presumed. The whole argument is false. The directors are not obliged under the statute, at their own risk to conduct and manage the affairs and extensive transactions and finances of the bank's business. They have the right to delegate the executive functions of the bank to specified officers and are not personally liable for the violation of the act by those officers in making and swearing to a false official report unless they participated in or assented to such violation. This claim will require a notice of the statute and particular reference to the evidence.

The bank act in the Revised Statutes, Sec. 5136, provides:

> "The association shall become a body corporate and as such shall have power."
>
> "5. To elect or appoint directors and by its board of directors to appoint a president, vice-president, cashier and other officers, and define their duties, etc.

"6. To prescribe by its board of directors, by-laws * * * regulating the manner in which its general business shall be conducted, etc.

"7. To exercise by its board of directors *or duly authorized officers or agents*, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, etc., by receiving deposits, etc."

(Sec. 5147) "Each director when appointed or elected, shall take an oath that he will, so far as the duty devolves on him diligently and honestly *administer* the affairs of such association and will not knowingly violate or willingly permit to be violated any of the provisions of this title, etc."

The presumption of knowledge on the part of the directors of the falsity of the reports which they innocently attested, is too unsubstantial and trivial to deserve extended consideration in view of the liability fixed by section 5239, which must be based upon knowingly violating or knowingly permitting the violation of some provision of the act or participating in or assenting to such violation. Substantial knowledge of the falsity of the report is the essence of the liability under the statute rather than a presumption of the knowledge arising from some argument as to the assumed duty of the director. It is beyond controversy under this statute that the directors may appoint executive officers and define certain duties which they must perform. Those duties of course do not reside with the directors, but upon the delegated officers. The bank is authorized to exercise, by its board of directors or duly authorized officers or agents, all its powers,—clearly showing an intention to separate the duties belonging directly to the board from those defined as applicable to duly authorized officers and agents. The directors are bound by oath *so far as the duty devolves on them* diligently and honestly *to administer* the affairs of the bank. The plaintiffs have made much of their demand that the directors shall actively and actually manage the affairs of the bank. No such obligation under the oath and no such duty under the statute is placed upon the director. In each specific instance of a report claimed to be false in these actions, the defendants are shown to have attested the

report only after it had been made by the bank as required by the statute, and had been sworn to by either the president or cashier. There is nothing in the statute which requires the director to enter the books, the actual assets and liabilities of the bank for an examination on his own part in order to make up the official report to the comptroller. There is nowhere any requirement that he shall take the responsibility of making and swearing to the report, but he has the right to rely upon the faithful performance of the duties of the officers appointed by the board to make the report true, honest and right in the first instance, and that the oath of one such officer attached to the report bears the verity of investigation and knowledge of the truthfulness of the report directly on the part of such officers in the performance of their duty. If he is not, in the course of his duty, advised of any falsity and is not aware of any fact or circumstance which discredits the truthfulness of the report, he has not knowingly attested a false report, nor permitted, nor assented to the making of such a report. This right to rely upon the appointed officers is sustained by the statute, for section 5211 provides:

> "Every association shall make to the comptroller, not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors."

It is worthy of observation that the association must make the report, that is not a duty placed upon the director. It must be verified by the oath of the president or cashier, and then attested by the directors. It is true that there is no requirement that these duties shall be performed in the order named, but the evidence shows in these cases that this order was followed in every report attested by these defendants (B. of Ex., pp. 554, 573).

Mr. Yates said (B. of Ex., p. 573):

> "Some employee of the bank would bring one of the statements down and I would see it was signed and attested by Mosher and Outcalt and in good faith, I signed it. I had my confidence in those people and the examiner of the bank."

This confidence had legal warrant in the statute, aside from the requirement that the report must be made by the bank and verified by the oath of the president or cashier, because section 5209 provides:

> "Every president, director, cashier, etc. * * * who makes any false entry in any book, report, or statement of the association with intent in either case * * * to deceive any officer of the association or any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, etc., in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

Aside from the fact that Mosher and Outcalt were men of unimpeached standing in the community, in whom the directors had as they thought well-placed confidence and had a right to rely upon the truthfulness of the statements made representing the assets and liabilities of the bank, the statute likewise justified and permitted that confidence on the basis of the severe penalty which the violation of it, in deceiving a director into attesting a false report, would incur.

POINT 4—ATTESTING DOES NOT ASSERT ACTUAL KNOWLEDGE.

The Director by Attesting the Official Report Does Not Incur the Absolute Risk of its Being False, Nor the Liability Created by the Bank Act. The Evidence Conclusively Shows That the Directors Did Not Attest Recklessly Nor Regardless of Duty, But Believed the Reports True.

Much that has been said under point 3, is the basis for and is applicable to the argument under this point. As has been seen, the petitions were based only upon two reports which were attested only by Mr. Yates. The one of December 28, 1886, is so remote from the beginning of the deposits by the plaintiffs that it can have no possible effect as a basis for recovery. The one of December 9, 1892, is not so much complained of as other reports and no specific misrepresentation in that report is claimed as the basis of the recovery had in the trial court.

Aside from the fact that only one report is made possible ground of the action, the statute does not fix any such responsibility upon the attesting directors as is claimed here. Section 5211 of the Rev. Stat., requires the *bank* and not the directors to make the report in the first instance. There is no provision of the statute nor requirement by the comptroller that the directors should make the report, nor remake it on their own responsibility after it has been made up by the association. The statute also requires that the president or cashier must swear to the report and the comptroller required that the oath must state that the report is true. The whole and only duty fixed expressly by the statute or by the comptroller is that at least three directors shall attest by signature the report thus made and sworn to. The statute is construed to require that the report shall be true and the duty and liability of the director in attesting can be ascertained only from the obligation fixed upon directors by the statute. Primarily as we have seen, the statute requires the directors to administer the affairs of the bank, and the oath requires that the director will diligently and honestly administer the affairs of the bank, and not knowingly violate or willingly permit to be violated, any of the provisions of the act. The directors liability is based entirely upon the ground that he has knowingly violated or knowingly permitted the violation of the act, or has participated in or assented to such violation.

These related and interdependent provisions of the statute determine the character of the attestation and of the liability which may arise from a false attestation. The directors as we have shown, have the right to rely upon the executive officers performing their duty, honestly and truly as to making and swearing to the report. The directors' obligations begin with his attestation, when he must look into his own knowledge and conscious experience with the bank's assets and liabilities to determine that he fairly and truthfully believes the report to be correct, based on his own information and his reliance upon the faithful performance of the duties of the officers who have preceded him in making and verifying the report. The director is not required to act beyond the provisions of the oath, that he

must honestly act so far as the duty devolves on him. He does not attest at his own ultimate risk that the report is true. The claims of the plaintiff under this point are answered in the former opinion of this court at page 179, where it is said:

> "Indeed, in one aspect, the ruling below went further than this when it was in substance decided that despite the exercise of diligence by the director if he attested an untrue report, he was civilly liable because he did so at his risk since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious."

Enforcing the provisions of the statute just referred to it was said, that in order to make the director liable for the attestation he must knowingly violate his statutory duty, which could only be accomplished by a misrepresentation which was in effect intentional. We submit it cannot be intentional without knowledge that it was false and wrong as against the observation and experience of the director who attested.

In *Briggs* v. *Spaulding*, 141 U. S., at 147, it was said:

> "They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation * * * (p. 162). Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions and that the degree of watchfulness must be proportioned to that presumption."

Mr. Yates Honestly Believed the Reports he Attested True.

Mr. Yates testified (B. of Ex., p. 550), that he took no part in the meetings by which the Capital National Bank was organized and he became a director.

> "I was made a director while I was out on the road as I remember, and found it out on my return, sometime in 1884."

He had no knowledge of the alleged assets of the Marsh Bank, The Marsh Bros., Mosher & Company being taken into the Capital National or of the investigation of those assets by Directors Holmes and Stuart.

(B. of Ex., p. 551) Q. "Did you ever have any experience in examining or going through a set of books of a bank or any other such institution?"

A. "No, sir, I could not do it."

(B. of Ex., p. 552). He did not know President Mosher or Cashier Outcalt personally at the time he became a director, but their reputation for honesty and good character was first class.

(B. of Ex., p. 553) Q. "What was the plan or method by which you arrived at declaring dividends and upon what showing were the dividends declared?"

A. "Why, Mosher would pass a paper showing the earnings and expenses and would take out a certain amount for surplus, and the balance would be passed to dividends, and then a motion would be made what to do with it, a motion would be made declaring a dividend of a certain per cent. No dividend was ever declared without such showing of earnings and surplus."

Q. "Did you ever, at any of those meetings, have any intimation of any facts other than what was made to you by the officers of the bank as to the earnings?"

A. "No, sir."

Q. "State whether you had any belief in those reports of the condition of the bank and that net earnings were really in existence and something to pass to surplus at the time of those dividends."

A. "It was believed or else the directors would not have made it. I would not have made it, and I believed the report was true."

Q. (p. 554) "Had you anything or any intimation to discredit the statement of Mosher and Outcalt or their conduct of the business of the bank?"

A. "No, sir."

Q. "Did that confidence in their honesty and integrity exist throughout the existence of the bank?"

A. "Up to the time the bank failed? Yes, sir."

Q. "Now, during the existence of the bank, did you sign any of the reports which were made to the comptroller?"

A. "Those that were brought down and attested by Mosher and Outcalt I signed."

(B. of Ex., p. 573) A. "Why, when I was in the office, there, if Hal Young or some other employee of the bank

would bring one of the statements down I would see it was signed and attested by Mosher and Outcalt and in good faith I signed it. That is about all I know about it. I had my confidence in those people and in the examiner of the bank. I never made an investigation myself as to what the bank had in the way of assets."

(B. of Ex., p. 554) Q. "Were you ever present at a meeting that you remember, where any of those reports were discussed before they were made?"

A. "No, sir. Never. The reports I attested, were always sent to my office."

Q. "How were those reports signed or otherwise authenticated at the time they were brought to you for attestation?"

A. "Why, a notary would attach his seal to Mosher or Outcalt's signature and sometimes there would be two or three names ahead of mine. I never signed or attested a report which was not already sworn to by either Mosher or Outcalt."

Q. "What reliance, if any, did you put in the truthfulness of the statement, on account of its being sworn to by the managing officers of the bank?"

A. "Why, I had confidence in both those gentlemen, Mosher and Outcalt. Why, it made me sign it, I had confidence in them or else I would not have done it."

(B. of Ex., p. 555) Q. "Did you at any time during the existence of the bank have any intimation that any statements or items contained in any reports given to the comptroller and attested by you, were untrue in any respect?"

A. "No, sir."

(B. of Ex., p. 557) Q. "There is shown to have been handled in the bank, paper of Western Manufacturing Co., signed by E. Hurlbut. Did you know of that company?"

A. "Well, I knew of the so-called company at the penitentiary that Mr. Welsh was with, and a man by the name of Barton, but I never knew anything about it personally. It was an actual company doing business manufacturing barrels."

Q. "Did you ever have any knowledge or intimation of the existence or operation of a company known as the Western Manufacturing Company in which Hurlbut was manager?"

A. "No, sir. I knew nothing about it. I knew that one company but I didn't know who the president was. I

never knew anything about the company Mosher was president of, doing business on a capital of $25,000 borrowed from the Capital National Bank."

Q. "Did you ever know or have any intimation of paper or notes or other obligation signed by that company, by Hurlbut as general manager, or otherwise, being taken into the bank and carried as assets?"

A. "No, sir, I knew nothing about it. I never knew Mr. Hurlbut, never saw him."

(B. of Ex., p. 558.) I had on deposit when the bank failed $3,187.94. A few days before the bank failed, I put in $3,063.90, which was lost in the failure.

(B. of Ex., p. 564.) Mr. Griffith of Wahoo was the bank examiner during several years up to the time of the failure. He relieved K. K. Hayden.

Q. "What opportunity did you have to see Griffith?"

A. "He was all over the state and I used to see him quite often on trains."

Q. "State what inquiry you ever made of him and what he reported to you concerning the bank?"

A. "Why, I would ask him how the Capital Bank was, and he would answer me that it was in good shape and a fine bank. I asked him several times, and by the way I was interested in a bank down there at Wilber and he examined that bank."

Q. "What, if any, information did Griffith ever give you of any bad condition or any criticism on the condition or conduct of the bank?"

A. "Why, that the bank was a good bank, he never criticized it at all."

Mr. Yates attended the meeting of the directors with Mr. Griffith Sunday, January 22, 1893, after the bank closed its doors on Saturday.

(B. of Ex., p. 565) A. "Why, Mr. Griffith, I think, opened the ceremony you may say. He says: 'This bank is $160,000 short, and if you can make it up, you can open up on Monday, and if not, it will be closed.'"

Q. "What was said at that meeting about closing the bank or raising $160,000.?"

A. "Why, I says: 'Mr. Outcalt, how is it?' I says, talking to Dick; I wanted to know what he meant by that, if we could raise $160,000 the bank could continue to run.

—and he says: 'We can raise it.' But Mosher says: 'It's impossible.' That is that it would take more than $160,000 to lift it out, and then when Griffith made this explanation, he started off with the remark that the bank was completely busted, why everybody there was just paralyzed—very much surprised."

Q. What did you propose to do about raising the money, or were you willing to help to raise it?"

A. "I was willing to help raise it. I was always willing to put in to save the good reputation and to save the bank, and to save the city."

Q. "What was Dr. Hamer's attitude on that question?"

A. "Why, they all agreed to it."

Q. "Now what was Mosher's remark about the bank going on if the $160,000 could be raised?"

A. "He says: 'you can not do it.' By that remark we all understood it would take a great deal more than that, that the bank was looted and it was impossible."

Q. "Was there any move taken to turn the bank over to the examiner?"

A. "I suppose so. Yes, but I don't know as to that, but when we could not raise $160,000, why then the receiver or examiner was in possession."

(B. of Ex., p. 571) Q. "And you had never had any intimation of any kind that the bank was in a bad way until that Sunday?"

A. "No, sir."

Q. "You thought the bank was getting along prosperously and making money?"

A. "Yes, sir, and in safe, judicious management."

(B. of Ex., p. 577.) Oh, the directors would talk over matters and things in the bank, and charge off a certain amount of papers and say how the loans was and if they made a loss, it would be charged off.

(B. of Ex., p. 578.) I suppose they were charged off, they said they would meet with a loss. I never saw the books, I supposed they had been—we talked the matter over the way they had done in different banks I had been connected with. Of course I did not go to work and see them charged off. Why, we talked the matter over there about the Small loan and

Mosher was inclined to regret that he did not submit to the loss. He sued the man, I think it was something like $15,000, and he regretted that he had not submitted to the loss instead of putting any more money into it. Mr. Phillips knew all about the land and thought it would pay out.

(B. of Ex., p. 579) Q. "I believe you said in your examination this morning that you would have raised a row if you had known that Mosher and Outcalt were borrowing money?"

A. "What I understood by that was if I had understood that they were borrowing such large amounts of money as was reported here at the trial."

Q. "Did you know anything about the loans that were made to Ed. Mosher?"

A. "No, sir, I didn't know E. W. Mosher and didn't know the bank was loaning money through him in York and the western counties."

(B. of Ex., p. 580, referring to a meeting of the stockholders and directors held January 9 or 10, 1893.) Q. "But you knew there was no dividend to be declared for six months ending December 31, 1892?"

A. "I didn't know it until they had a meeting there—why I don't know——" (At this meeting he learned that the undivided profits account was wiped off to a certain extent and some six months paper had been cancelled, the same as banks are doing today, and that the bank failed to make a dividend at that meeting which was only ten days before it closed its doors.)

(B. of Ex., p. 583) Q. "They have asked you about the meeting where the paper of the bank was taken up piece by piece and looked over. Was that all the notes and valuable paper of the bank, or only some of it?"

A. "Only some of it, by the discount committee and the question was whether somebody was good or not, where their knowledge was not apparently sufficient."

Q. "Did you have any knowledge that the $300,000 of the capital of the bank was spent, or wasted or lost at the time of the meeting in January?"

A. "No, sir."

(B. of Ex., p. 550.) Mr. Yates paid the full one hundred per cent assessment on 113 shares to the receiver after the failure.

Dr. Hamer.

Dr. Hamer died before these actions were tried and his evidence was never taken in them. The testimony appearing in the bill of exceptions at page 590, was taken in an entirely different proceeding in the federal court before these cases were ever tried. That testimony was directed entirely to unlawful dividends, rather than the possible liability for his attesting the reports. This testimony shows (B. of Ex., p. 590), that he became a stockholder in 1884 and paid a premium for his stock as did Mr. Yates. Dr. Hamer became a member of the examining or discount committee by resolution of the board, February 20, 1892, to take the place of Mr. Holmes, deceased (B. of Ex., p. 344). He was a man advanced in years and frail in health and his testimony discloses his groping effort to perform his duty and to see that the bank was as trustworthy and its assets as good as his Quaker ideas of right would demand. He testified (B. of Ex., p. 590):

Q. "What was the process of declaring dividends?"

A. "Well, the amounts, the gross amount earned by the bank was looked up and given, and various expenses, clerk hire, rent, etc., were deducted from that, and then there was sometimes—well I think always—a remnant from the previous declaration of dividends added to that and then the remainder was—there was a dividend declared from the remainder."

(B. of Ex., p. 595) Q. "When these dividends were declared, they were made upon the faith of what Mosher stated to be the condition of the bank, were they not?"

A. "Oh, I couldn't say it was wholly on that. He made the statements, but then as I thought we had some knowledge of the condition of affairs."

Q. "Your knowledge of the condition of the bank was obtained from Mosher and Outcalt was it not, largely?"

A. "Partially, well no, I don't know as I could say it was largely."

Q. "Did you make any figures yourself as to the earnings, or did you simply take Mosher's statements?"

A. "Well, it was considerably Mosher's statement in regard to that as I have indicated. I hardly knew enough about the books to make a reckoning so as to verify this statement of his."

A. "Well, I have reckoned up expenses some and had reckoned up expenses as far as losses was concerned. I don't know that I got down to the foundation of that,—I made some reckoning."

Q. "Did you ever examine at any one time all the bills receivable and all the paper in the bank?"

A. "Well, I supposed so. We thought we were examining them all. We took up the bills receivable themselves."

Q. "Did you ever make any comparison of the books, to see whether all that was on the books was given you for examination?"

A. "No."

(B. of Ex., p. 590) A. "Why, yes, there were some bad debts, as far as I know they were stricken from the account."

A. "Well, after the decease of Mr. Holmes, I was on what was called the finance committee, and Professor Stuart and I looked over the—we examined the notes taken by the bank, the bills receivable, to see what condition they were in, what our judgment was in regard to their soundness, etc., and we had general supervision over that matter. That is, if we saw anything there that we were hardly satisfied with, we investigated it, and we usually found that there was some collateral somewhere, that frequently maybe these that we were suspecting were not just what we thought they should be, maybe they seemed perfectly safe."

(B. of Ex., p. 592) Q. "State what you did in reference to ascertaining the condition of the assets of the bank, whether you found out and investigated all that you could of the assets so as to know the real truth of the assets while you were a director?"

A. "Why, yes, as far as my limited knowledge of that kind of thing would admit, I thought I did. But I had the feeling that I did not comprehend the matter of keeping books, to look up closely. I never had any experience with that kind of bookkeeping, nor any other very much. My bookkeeping was a simple affair so far as the doctoring business was concerned."

Q. "Well, if you found any paper that you suspected or at least didn't feel satisfied about, what would you do then?"

A. "Well, it was Mosher that usually we went to for an explanation of the paper, and we would inquire in regard to the paper and as I speak of, if there wasn't

collateral there, and we didn't think it should be, why he made an explanation to me in regard to the paper and we found oftentimes some collateral that was not attached to the paper. At least he said there was collateral and I think he many times produced the collateral."

(B. of Ex., p. 593) Q. "Did you know this Western Manufacturing Company paper was in the bank?"

A. "I knew there was some, I think some signed by E. Hurlbut, Jr."

(B. of Ex., p. 594) A. "You see I didn't get commingled with that very much until after Mr. Holmes' death. I went in there frequently before his death and looked over the securities, but I didn't look it up very minutely at that time, and it was only—Mr. Holmes died in 1890 or 1891—well now if you are speaking of Hurlbut's notes before that, I wasn't so very observing of them previous to that time."

A. "Well I didn't have a very distinct recollection of this Manufacturing Company's paper. I didn't have any reckoning on that."

Q. "Do you really know whether you ever saw any of it?"

A. "Well, I don't know that I ever said positively that I did. It seems to me that I saw that paper."

Q. "Did you ever see any of them after that?"

A. "Well it seems to me so. It seems to me I saw some there. I have some recollection of it. It may have been previously to Mr. Holmes' death. As I say, I went in there and looked over the notes, etc."

(B. of Ex., p. 597.) In answer to a long question of many assumed losses, he was asked: "Did you think the bank was justified in declaring and paying dividends?"

A. "I don't know as I am banker enough to decide just what amount a bank might lose and still declare a dividend. I don't know——"

(B. of Ex., p. 598) Q. "Suppose the bank had lost $25,000 during the year and the net earnings were $25,000 would you think the bank ought to pay a dividend?"

A. "No, I don't."

Q. "Did you know there were certificates of deposit outstanding in excess of the amounts that appeared upon the books?"

A. "No, I didn't know it."

Q. "If you had known that fact would you still be in favor of declaring a dividend?"

A. "I would not be in favor of declaring a dividend if there was nothing to declare them from—no profits."

Q. "Did you know there were erasures and fictitious entries and falsifications in the certificate of deposit register?"

A. "I have heard it so said."

Q. "Did you know it prior to the failure of the bank?"

A. "No, and I had not inspected these books, or the certificates themselves, or the stubs on which erasures and discrepancies appeared prior to the failure of the bank."

A. "Why, no, I wouldn't think it was proper to declare a dividend if $30,000 of the earnings had been stolen by the officers who concealed the fact, and I would not have thought it proper to declare a dividend if I had known that there were hundreds of thousands of dollars in outstanding certificates of deposit that were not entered on the books. I signed the reports of September 30, 1892 and September 25, 1891, and read them before signing, but did not verify them with the books entire. I suppose I knew that those figures on the report showing the amounts of overdue paper, bad debts and loans in excess of the limit were on the report, and I suppose I knew it when I signed it, but my understanding of that is that it started with a small affair (partly the Small loan), and then ran up to these amounts."

Mr. R. E. Moore.

Mr. R. E. Moore testified (B. of Ex., p. 602), that about September 3, 1891, he sold his fifteen shares of stock in the Capital National Bank to Mr. Hamer.

"Now explain the circumstances and your conversation with Mr. Hamer and the sale of those shares to him."

A. "Well, Dr. Hamer came into our office one morning and it was about the time that some of the stock had sold for $1.45, and I told him some of the stock of that bank had sold for $1.45 and the doctor said it was worth it, and I asked him if he wanted to buy mine at that price. 'No,' he said he would not give that price, but he would give $1.25, and I told him he could have mine, so I sold him the stock and he paid me right then and there for it, the full amount of $1,875."

(B. of Ex., p. 604) Q. "Why did you sell your stock?"

A. "Well I sold it because I thought it was a fair price for it and I could use the money."

Q. "Notwithstanding Dr. Hamer told you at the time that other stock sold for $1.45?"

A. "Yes, sir, notwithstanding that. I wasn't a very great enthusiast for bank stock, never was, and sold it for no other reason that I know of."

This purchase only added to the liability of Doctor Hamer on his stock holding to the receiver when he had to pay the one hundred per cent assessment shown by the receiver's receipts (B. of Ex., p. 567).

We confidently assert that no one can fairly read the testimony of Mr. Yates and the fragment of that of Dr. Hamer, and say that either of them dishonestly or with any reasonable ground of apprehension attested the reports with any sort of knowledge that they were false and not true. Undoubtedly they were deceived and placed confidence in their executive officer where it was not deserved. It is easy to exercise wisdom after the event when dishonesty, fraud and corruption were disclosed by the failure of the bank. It required no special acumen or wisdom to discover the prevalence of the fraud in the books and transactions of the bank, but these directors as well as the community at large, when the bank was in apparent successful operation, were looking at the matter from an entirely different angle. They believed and had every reason to believe that the executive officers were capable, honest, worthy men, that the assets presented to them or represented as being in the bank, were actually there and that the earnings as reported at dividend periods, and the assets and liabilities represented in the reports faithfully and honestly reflected the actual condition of the bank. It was not until the meeting of January 9, 1893, ten days before the failure of the bank, that any discredit or word suggesting possible bad condition of the bank was brought to the attention of the directors, when the dividend for the six months ending December 31, 1892, was not made and Captain Phillips made some assertion of the impairment of the capital.

It is vitally important to remember that this disclosure of any discrediting circumstance, was long after Mr. Yates and Dr. Hamer attested their last reports. Mr. Yates attested last

the report of December 9, 1892, nearly a month before this meeting, and Dr. Hamer attested last September 30, 1892. There is absolutely no evidence in the record which would impute any knowledge of the falsity of either of those reports to either of these directors at the time they attested. Their positive and unqualified testimony shows that they honestly attested them with the full belief that they were correct and had been made true by the executive officers.

Mr. Yates had that confidence in the officers and in the soundness of the bank that on the 16th of January, the week of the failure, he placed in his deposit account over $3,000, every cent of which was lost in the immediate failure. Dr. Hamer, within eighteen months of the failure bought fifteen shares of the stock at $1.25, entirely on his own volition, which he held to the end, and by that means added to the assessment which he had to pay the comptroller.

Mr. Yates was made a director when he was away from home and without his knowledge. He knew nothing about the assets which were pretended to have been transferred from the Marsh companies into the Capital Bank. He never knew the account with Donald-Lawson-Simpson existed. He, like Dr. Hamer, knew there was a real Western Manufacturing Company, but did not know that a spurious company represented by Ed Hurlbut was borrowing money from the bank, or that its notes were a large part of the pretended assets, of the bank. He knew the examiner, Mr. Griffith, and repeatedly learned from him that the bank was prosperous and successful and in trustworthy hands. On no occasion did the examiner ever suggest to him that there was anything to criticize in the bank's business. His simple statement of what occurred at the meeting of the directors with the examiner on the Sunday which completed the failure, exhibits such astonishment and resentment at the necessity of raising $160,000 in order to permit the bank to run, that no one can believe that he knew the bank was ruined, and its assets worthless, or the reports that he had been attesting were false. When Mosher said, "It is impossible," and made it plain that the bank was ruined

and could not be lifted out, the paralyzing surprise and condemnation by those directors of their trusted officer and agent are not the evidences of deception on their own part. They were not men who could play any such part, but were responding to their actual state of mind.

They both said that paper of the bank was examined by the discount committee, and doubtful paper was discussed by the whole board when certain losses would be disclosed. They honestly supposed that these losses were charged off the books and had every reason to believe that it was done, but the fact disclosed that their dishonest officers reported the charging off which never took place. It was not a matter simply of pride that they stood by their ship until it went down. It was the manifest confidence in their officers and that they thought they knew the bank was in safe hands and in good condition that they remained to the last, and lost their deposits, the 100 per cent assessment on their stock, and all but their good name. It is almost pitiable to observe the aged doctor at the close of the bank's history, placed upon its discount committee, attempting in his unschooled way to examine and estimate the assets of the bank. He may have been incompetent, it may be that some younger, better prepared man should have been a director in his place, but we submit that his repeated statements of his honest efforts at investigation, at seeking through the books for the truth, and his confidence in President Mosher, who brought him all sorts of statements and collateral securities to convince him that the bank actually had all the valuable assets which its books or reports disclosed, are evidence of such an effort on his part and such deception played upon him, that we think no one can say that he dishonestly or knowingly attested the false report of September 30, 1892, or the others before it.

The questions submitted to him concerning dividends show plainly that he would not and did not vote for a dividend when he was aware that the bank did not have the funds honestly earned with which to make them. Even the Ne-

braska supreme court in its former opinion in these very cases, in 74 Neb. 746, concerning these same directors, said:

> "We do not wish to be understood to say, that all of the defendants knew that such statements were false. We are satisfied that such is not the case."

Mosher and Outcalt were defendants in these actions at the time this was said and the line of demarcation in the above sentence was between them and the present defendants.

We challenge the attention of the court to the extensive use of the opinion of Van Kirk in 106 N. Y. Supp. 538, quoted at length at page 46 of the plaintiffs' brief in the case of *Thomas v. Taylor*. This is the opinion of the trial court, which was entirely reversed and set aside by the opinion of the appellate division in 108 N. Y. Supp. 454, which was adopted by the court of appeals of New York, and is the basis of the opinion of this court in the same case. It is not a little surprising that counsel still pursue the wanderings of the New York trial court so far from the law applicable to these cases. Justice McKenna, in the opinion in Thomas case, said (p. 79):

> "The judgment was affirmed by the court of appeals, 'on opinion of Cochrane, J., in the appellate division.' We shall refer to the opinion as that of the appellate division although it was adopted by the court of appeals."

POINTS 6-7—THE SUPREME COURT UNDERSTOOD THE LAW APPLICABLE.

The State Supreme Court Has Correctly Understood and Applied the Bank Act Creating and Defining the Liability of Directors as it Was Construed by This Court and Has Not Come to a Wrong Conclusion in Applying it to the Evidence.

These two points are so related that they must be considered together. It is of vital importance that the state supreme court should correctly understand and faithfully apply the rule of liability fixed by the statute as construed by this court to the evidence in arriving at its conclusion. We submit that this has been properly done. The heading under point 6, does not correctly represent the rule as to the requirement of knowledge of the falsity of the reports as applied by the state

supreme court. Only two short sentences are quoted while the whole opinion and the manner of applying it to the evidence must be considered in order to determine what understanding the state court really had of the law as construed by this court in the former decision. The opinion (Trans., p. 49), and the syllabus which is the court's own product when fairly considered from end to end will leave no doubt that the Nebraska supreme court had but one purpose and an eye single to the accurate application of the statute as construed by this court to the facts which it found from the record.

The first point of the syllabus holds that section 5239 affords the exclusive rule to measure the right to recover damages from directors for a loss resulting from their violation of duty imposed by the act, and no higher or different standard can be imposed.

Point 2, that a statute creating liability against directors for a knowing violation of its provisions requires proof of something more than negligence and it must be shown that the violation was intentional.

Point 3, that the state courts have no authority to construe, nor apply any other rule of liability than that provided by the bank act and that the state court must follow the rule adopted by the supreme court of the United States.

Point 5, that the statutory rule of liability is exclusive, because where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed by the statute is the exclusive test of liability.

Point 6, that if it is attempted to hold a director liable as for fraud and deceit at common law for the conduct of the other officers of the bank, still it must be proved within the statute that the director had knowledge, or approved of, or participated in the fraudulent acts complained of.

In the opinion (Trans., p. 50), it is said:

> "And the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital Bank, and this is the

main foundation or basis for recovery (Trans., p. 52). As we view the opinion of the supreme court of the United States, * * * there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by Sec. 5239, Rev. Stat., and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. * * * A knowledge must be brought home to the director that he is deceiving. * * * The director is not liable for his own mistakes or blunders, or for the mistakes of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof, or participates in such fraudulent acts. * * * The rule for which plaintiffs contend (knowledge by imputation or presumption) if carried to its ultimate conclusion would make the director, *who has himself been imposed upon and deceived by its officers* and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. * * * (p. 55) Plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover and the judgments of the district court should be reversed as to all of the defendants."

Judge Letton said:

"The presumption is that they (the findings of the trial court) are so sustained, but I have not examined the evidence so critically as would be necessary to determine *this* for the reason that under the holdings of the supreme court of the United States *as to the measure of duty and of liability* of directors under the banking laws of the United States, *I think a case has not been made.* For that reason alone I concur in the conclusion."

The state supreme court was reversed on a former writ because it had held that knowledge was not necessary to liability. The act and the decision of this court, require proof of knowledge of the falsity of the attested report in order to make the director liable and that knowledge of the falsity must be such as comes about by a violation of the statute in effect intentional on the part of the attesting director. The very character and essential of that knowledge is that it shall

be personal. Knowledge on the part of someone else will not satisfy the requirement of knowingly violating the statute. The same is true of participating in or assenting to, which is particularly personal. One neither assents to nor participates in a false representation without his personal or individual conduct or action. So the Nebraska court was not wrong in saying that there was no proof that the defendants personally knew of or personally participated in the acts of the executive officers of the bank, when they with the most secret connivance and fraud, made false reports which they published. The cases in this court besides the present ones, were studied and relied upon by the Nebraska court and while the case of *Thomas* v. *Taylor* is not specifically referred to in the main opinion, it was well known by the court, was argued, and brought to its attention long before the decision was rendered. It is really in the mind of the court and specifically enough referred to in the sentence (Trans., p. 52): "Such has not been the views expressed by the supreme court of the United States in *any cases*."

No one can possibly claim that the Nebraska court did not strenuously and expressly try to follow and apply the decision of this court in these and all the other cases based upon section 5239 and the other provisions of the bank act.

On page 66 of the plaintiffs' brief it is said that Judge Letton decided against liability under the rule laid down in the opinion of Judge Hamer. This is not correct, although he might well have done so, because his language quoted above does not refer to Judge Hamer's opinion but simply and alone to the opinion of this court as the basis for his conclusion. On page 65 of the brief it is said that he afterward saw his error and voted to grant plaintiffs rehearing. This is likewise untrue. Judge Letton has never expressed on the record or otherwise, any such change of opinion, even if it could be of any effect. The only possible ground for such a statement is the gratitous remark of Judge Sedgwick (Trans., p. 93), in his opinion against the ruling denying the rehearing. There he said:

> "One of the four judges who had made that order, found matters in the record which convinced him that the order was wrong and voted for a re-hearing."

There is absolutely nothing in the record to sustain any such statement. It is not shown to have the approval of Judge Letton and ought in no way to discredit his deliberate concurring opinion.

At page 66 of plaintiffs' brief it is said, that the state supreme court did not disturb the findings of the trial court but holds that on the findings liability did not arise because they did not positively establish actual personal knowledge or participation. Heretofore we have shown that the state supreme court acted as a trial court when it rendered the final judgment. The judgment and findings of the lower court were reversed and the action dismissed on the findings made by the supreme court. The findings of the trial court cannot by any possibility be of any consequence now. They are reversed, set aside and were found to be erroneous upon many sufficient reasons which were presented to the state court, among which was the absolute failure of the evidence to sustain those findings and that they were based upon incompetent and unlawful evidence which the supreme court of the state had every right to ignore in arriving at their judgment after sustaining our objections to the evidence. It is impossible to give those findings and judgment of the primary trial court any validity or effect. Even a reversal by this court could not restore them. It is no proof that the state supreme court applied a wrong rule of law to the evidence to say that the findings of the trial court might have been admitted and still no liability follow because the state supreme court did not admit the findings. They were reversed because they were not sustained by the evidence and the evidence did not support a finding of knowledge of the falsity of any of the reports by either of the defendants. Again it is said (brief, p. 66), that "whatever view may be taken, the evidence is sufficient to sustain the findings and judgments in this court. Indeed no other result was possible under the evidence," and at page 111, "that the trial court

applied the right rule and its findings are sustained by the evidence so that no other conclusion was possible than the judgments which it rendered."

We do not regard these meager suggestions as an appeal to this court to review all the evidence and to reverse the judgments of the supreme court of the state on the theory that the evidence would not sustain any judgment except liability against the defendants, because it was claimed there was no evidence to sustain a judgment in favor of the defendants. The fact is that the defendants claim and the evidence shows that there is no foundation in it for liability against the defendants. The plaintiffs' brief from beginning to end, is a plea, not for actual knowledge of any defendant of the falsity of any report, but that knowledge should be imputed, presumed or inferred by some process of indirection so that this claim that the evidence sustains no other conclusion or possible result than liability, is baseless upon the face of the proof and record. But if this claim is a demand for an investigation of the whole record for this court to pass judgment of liability on its own investigation and determination of the evidence, then it must fail because as we have argued at points A and B in this brief, that this court is bound by the findings of fact of the state supreme court and that the printed bill of exceptions does not contain all of the evidence which prevents a review of it.

At page 67 of the plaintiffs' brief it is said that it is impossible to imagine the defendants' ignorance of the bank's perilous condition without being guilty of wanton recklessness, wilful disregard of duty or deliberate determination to be ignorant. This action in the petition is based upon the claim that the defendants attested false reports of the bank with knowledge that they were untrue within the provision of the bank act, and that the liability fixed by the act must follow such violation. The petition is not based upon any claim of recklessness, disregard of duty or voluntary ignorance of the directors. These petitions were drawn to avoid just that claim of malfeasance, mismanagement and reckless disregard

of duty, because the prior petitons had been held on that basis to state a cause of action which belonged to the receiver, any recovery in which must be ratably distributed among all the creditors of the bank (*Bailey* v. *Mosher*, 63 Fed. 488, at 491). It may not be necessary to refute these charges of reckless disregard of duty made against these defendants, but we submit that the review of the evidence which we have heretofore made will convince no one but a partisan, that these defendants purposely, wilfully or wantonly failed to do what they thought was their duty or failed to know the doings of their bank so far as it was possible for them to ascertain them in view of the fact that they had confidence in their two executive officers, who were really the most contemptible criminals in their persistent deception worked upon the directors as well as upon the citizens at large.

Beginning at page 67 of plaintiffs' brief is an array of many matters in which the executive officers of the bank committed frauds and crimes, which after too long delay, resulted in the catastrophe in which these defendants lost their property as did the plaintiffs by being deceived. We do not regard it profitable to answer these different items further than to call attention that in not one of them is it claimed that these two defendants had actual knowledge of the falsity or fraud in any one of the items. The constantly reiterated claim is that the directors ought to have known these things existed. Many of them were difficult for experts to find after failure had brought discredit upon everything the bank and its executive officers ever touched. Most of them would have required extensive search by experts in order to be found out from the books and business of the bank. None of these directors were called upon to make such examination and no suspicion of dishonesty or deception disturbed their confidence in their officers to demand any such investigation. At page 71, plaintiff's brief, it is said that the forged notes and false accounts of Donald-Lawson-Simpson was called to the attention of the directors and discussed at a meeting held early in September, 1891. This so-called meeting never existed. It is the

figment of the diseased mind of the witness Scott reflecting the suggestion of others. But reference to the bill of exceptions, page 360, shows that Scott denies that Mr. Yates was at the supposed meeting and does not mention or pretend that Dr. Hamer was among those named as present. There is absolutely no evidence to sustain the claim that either Dr. Hamer or Mr. Yates discussed or knew about the letter of September 8, 1891, either at that meeting or any other place.

On pages 74, 75, plaintiffs' brief, it is said:

> "The slightest inspection would have disclosed the fraud in the certificates of deposit account and any bank officer could have discovered this fact by mere inspection at any time." (Referring to the discrepancy of $100,000 in the individual deposit books.)

> "The mere presence of one of these notes among the assets of the bank, was sufficient to put the directors upon inquiry." (Referring to Western Manufacturing Co. notes.)

These quotations are characteristic of the whole list of these different items of fraud. It is not claimed that either Mr. Yates or Dr. Hamer was aware of any of these frauds nor that the reports which they attested were untrue by virtue of them. Imputation, presumption and indirection are the substance of this whole argument and fall far short of casting any discredit upon the findings of the state supreme court that these directors were honestly unaware of the falsification of the reports in these or any other respects, made by the executive officers of the bank.

POINT 5—THE COMPTROLLER'S LETTERS.

These Directors Never Saw Nor Knew the Existence Nor Contents of the Comptroller's Letter of September 8, 1891. They Were Not Advised of the Bad Condition of the Bank Nor of Any Falsity in the Reports in the Letter of February 16, 1892, or Otherwise, and the Letters Furnish no Basis For Liability.

Letter September 8, 1891.

There is absolutely no evidence in the record which directly or by inference shows that the defendants, Yates and Hamer,

ever knew of the existence or contents of the comptroller's letter of September 8, 1891. Plaintiffs' counsel have persistently charged knowledge of this letter to the directors, but we have repeatedly and vociferously challenged him to cite any evidence that these directors were aware of the existence or contents of this letter, and the challenge remains absolutely unanswered. The letter (B. of Ex., p. 73), was addressed to Mosher and there is no request in it that it be called to the attention of the directors or that they be required to know or do anything about it. It is a criticism of Mosher's conduct of the bank, and there is every reason, even if he had been honest, why he should not volunteer in bringing it to the attention of the directors. Since the letter called attention to his misdoings it is conclusive that he would not submit it to the attention of his directors. If these directors had been conspirators with Mosher in his misrepresentations of the financial condition of the bank in its books and reports he would not need to secrete this letter of September 8, 1891, from them, for the plan would have been concurred in and understood before and the comptroller could not have deterred any of them. But with the honorable men he had as directors he knew that to disclose the letter to them meant certain revelation of the bank's insolvency and immediate ruin. The fact that he suppressed the letter goes to prove the honesty of these directors. But laying aside argument one way or another, the record absolutely fails to disclose any ground whatever upon which to claim that these directors ever knew the letter of September 8, 1891, existed.

Plaintiffs print the letter in their brief (p. 83), and at page 88 claim eleven points of falsity, and dishonesty in the books, condition, and reports of the bank were directly called to the attention of the directors by this latter so that the case against them is equal to or stronger than the situation produced by the letter of the comptroller pointing out the bad debts of the Saratoga bank which its directors were fully aware of. Since the directors in our case never knew this letter existed, nor the nature of its contents, the parallel claimed in the Thomas

case falls of its own weight. Although the fact is that the directors were not aware of this letter, the dissenting judges in their opinion (Trans., p. 65), make the warning of this letter the basis of their disagreement with the other judges. It thus appears that at least two of the judges of the Nebraska court were deceived by these groundless claims that the directors knew of the letter of September 8. We hope to have made this point sufficiently definite that no one will ever again give credit to this baseless claim.

Mr. Yates testified (B. of Ex., p. 563):

Q. "Did you ever see or know anything about the letter of the comptroller of the currency to the bank or to Mosher of date, September 8, 1891?"

A. "No, sir, not that I remember of."

(B. of Ex., p. 571) Q. "You never remember of the directors discussing any letter from the comptroller you say?"

A. "No, sir, I never was present if they did."

Q. "Never heard about any letters from the comptroller criticising the condition of the bank in any way?"

A. "Not that I remember of."

Q. "Well, you think you would remember a thing of that kind don't you?"

A. "Oh, yes."

Q. "If there had been anything of that kind you had such a good opinion of the bank—if there had been any criticism by the comptroller it would have impressed itself upon your mind?"

A. "I should think so."

Q. "But you think nothing of that kind ever happened?"

A. "That is my impression, yes, sir."

The witness Scott (B. of Ex., p. 360), claimed to have overheard a meeting in September, 1891, where he thinks the directors were discussing the condition of the bank and possibly a letter, but disclaims any positive knowledge of the subject of discussion. He names those present and does not mention Mr. Yates or Dr. Hamer and disclaims that Mr. Yates was there. If therefore by any possibility, the letter of Septem-

ber 8, was discussed, neither of these defendants were pretended to have been present.

LETTER OF FEBRUARY 16, 1892.

The comptroller's letter of February 16, 1892 (B. of Ex., p. 77), was addressed to Mosher and its last paragraph requested him to bring it to the attention of the directors for consideration and reply over their signatures. Mosher did call this letter to the attention of the directors at a meeting reported in bill of exceptions, page 344, as being held February 20, 1892. The directors' meetings, regular and informal, were usually held at night in the office of the bank, but this meeting for reasons not known to any of the directors, was held away from the bank's office. Dr. Hamer testified (B. of Ex., p. 596):

Q. "When was it that you had this meeting for the purpose of considering the condition of the bank and answering the comptroller's letter?"

A. "Why it might have been—let's see—that is the 24th of February, 1892. Well it must have been thereabouts."

Q. "And where was that held?"

A. "Well, I believe it was the Burr Block, I don't distinctly mind whether it was the Burr Block or Richards Block, but where I was in the building would indicate to me that it must have been the Burr Block."

Q. "Why was it held away from the bank?"

A. "I don't know why."

Q. "Isn't it a fact Mr. Hamer, that you thought the bank was in rather a critical condition at that time?"

A. "No, there was not that feeling, that wasn't the reason. I don't know why. I don't remember any reason why it was there."

Q. "How long were you in session that day?"

A. "Oh, not very long."

While the report of the meeting is made by Mosher to show that Mr. Yates was present, his testimony just quoted above shows that he was not present when any letter of the comptroller was ever discussed. Mr. Yates said (B. of Ex., p. 583):

Q. "And you say you don't know anything about the directors' letters that were written to the comptroller in answer to some inquiries?"

A. "Not that I remember of, no, sir."

A. "I will say this that I wasn't present at a meeting of the directors there when they canvassed the thing over. It may be like those reports that they would bring the letter down to me and I signed it, but I wasn't present when they had the meeting."

Q. "But you wouldn't say that you didn't sign those letters to the comptroller?"

A. "Well, I din't sign it there. If they had a meeting and they brought that letter to me and said they had a meeting and wanted me to sign it, I suppose I would have signed it, but I don't have any recollection of signing that letter or of ever seeing it."

Q. "Of course, it has been so long ago that you might have forgotten about it, Mr. Yates?"

A. "Well, that might be, of course it is eighteen years ago."

Q. "It is possible that you might have been present and heard those things and have forgotten it by this time."

A. "Well, a thing of that kind, if it had come from the comptroller why I would have been alarmed and taken the matter up with my friend, Captain Phillips and we would probably have done something."

While it was not understood by the directors at the time why the meeting to consider the letter of February 16 was held across the street or a block away from the bank, nor why the letter was prepared by Mosher himself and presented to the directors for signature away from the bank, nor why Mosher included Mr. Yates' name in those present when he was not in fact present, yet it is plain that this proceeding was another phase of Mosher's deception practiced on the directors. Naturally the meeting was called at another place in order to prevent the directors calling upon him to show from the books that the letter was correct or in order to induce them to accept the letter prepared by him rather than any other source of information concerning the facts. He would enter the presence of all the directors in the minute book in order to make a proper showing to the examiner, even if Mr. Yates was not

present. Mr. Yates signed the letter away from the bank and at his own office, as he had signed many of the reports, because it bore the signature of Mosher and some of the directors. Mosher had a prior experience with the letter of September 8, 1891, and he did not propose that this letter which must be called to the attention of the directors for answer should result in any suspicion by them which might disclose the rankness of his dishonesty in his conduct of the bank. He preferred to rely on his own wits to prepare a plausible letter and upon the fact that the directors were confident of his honesty, and had no reason to discredit either his ability or fidelity, to obtain their signature to such report as he thought suitable to the comptroller.

Letter of February 16, 1892.

The letter of February 16, 1892, first calls attention to loans which exceed the legal limit of ten per cent of the capital, to E. W. Mosher and G. W. Small. The answer of the directors under date February 19, 1892 (B. of Ex., p. 63), correctly states that this was the money advanced to Ed Mosher on the security of C. W. Mosher, which was loaned upon land in York and Hamilton counties, directly for the benefit of the bank, which is explained in the first three paragraphs of the answering letter. The only fault found by the comptroller was that this loan was larger than the ten per cent limit. It may have been perfectly good, and so far as the directors knew, was a safe investment, but technically it was larger than the amount permitted by law. That is the only fault found with it. The same is true of the Small loan which was made on a note of the Fairfield bank for $20,000 secured by mortgage upon real estate. In order to protect and finally to save that security through litigation this loan ran up to $51,000. The testimony of Mr. Yates (B. of Ex., p. 578), discloses that the director Mr. Phillips was acquainted with the land and thought it ample security for the investment although Mosher had at times regretted that he had not stood the loss of the original loan rather than to continue protecting it with further investments. This loan was not criticized except on the technical

basis of its exceeding the legal limit of ten per cent. The fourth and fifth paragraphs of the answering letter explain that situation so far as the directors knew it to be.

The loans carried for a number of years are suggested to be collected as soon as practicable, but no time is fixed for collecting, and none of them are condemned as bad or even doubtful. It is a bare suggestion that Mosher's liability as an endorser is too large, and the directors are not called upon to take any specific steps with regard to it. The letter recognizes an agreement or promise of Mosher and Outcalt to reduce their liabilities and to adjust all accounts so that overdrafts will be confined to temporary matters and that they will pay less attention to business matters outside of the bank and give their attention to its business. The comptroller simply states this promise of Mosher and Outcalt, but does not require anything of the directors with regard to it. There is no claim that the soundness of the bank, or the value of its assets nor the extent of its liabilities are misrepresnted or dishonestly reported on account of these doings of Mosher and Outcalt. Overdrafts are mentioned, but in no instance are they condemned further than to say that they should be avoided as far as practicable. There is no intimation that the overdrafts are not good and collectible, nor that the directors should suspect any of them.

Overdue paper partly classed as bad debts, is directed to be renewed, with security, but none of it is condemned as worthless, nor ordered to be charged off the books of the bank nor to be collected immediately, but only after reasonable extension. All the losses that the examiner and comptroller were able to call attention to were the losses aggregating $30,000 including the bad debts mentioned, which were charged off during the examination of the bank. Here is no demand upon the directors to see that bad debts were charged off, nor to investigate any other bad debts as worthless. They are given the official assurance of the examiner and of the comptroller, that all the bad debts which should be charged off, were disposed of during the examination apparently in the presence of the

examiner with the approval of the comptroller. Surely the directors had a right to rely upon these official assurances and to believe that all the worthless or condemned paper had been charged out of the bank and that its condition was unimpeachable and its assets unimpaired.

The examiner calls attention to the meetings of the directors. While it is true that the records show only two meetings a year, it was well known to the directors that informal meetings were held much more often, and that the bank had a discount or examining committee throughout its existence consisting of Professor Stuart and Mr. Holmes, except for the short period between the death of Mr. Holmes and the appointment of Dr. Hamer at the meeting which considered this letter. The only suggestion or criticism against the directors is that they should hold more frequent meetings.

Borrowing money by re-discounting the paper of the bank, is mentioned as having been largely reduced since the previous examination and it is suggested that all this liability be paid off and the power to re-discount reserved for emergencies. Re-discounting is not illegal and it is not condemned as having endangered the solvency or good standing of this bank. The liability from re-discounting is only the contingent one of the endorser of the paper discounted and it is not intimated by this letter that the soundness of the bank or the integrity of its assets should be questioned by the directors on account of the re-discounting. It rather explains that re-discounting is made necessary by excessive loans, and it is recommended simply that the over due paper should be collected or renewed.

This letter coming with the authority of the comptroller on the information of the examiner, does not condemn any assets of the bank nor order any examination further to be made by the directors, nor advise them to suspect the dishonesty or conduct of any officers of the bank nor the soundness of its standing or condition. Mosher's letter explains these various items and especially the overdrafts and the re-discounting in detail as to amounts which the directors had every reason to suppose were honestly taken from the books of the bank

actually showing the facts stated in the letter. They were deceived into signing the letter by the same shrewd methods which Mosher had employed in the attestation of the reports, but it is manifest that they honestly believed the answering letter to be true and that their bank was sound and solvent, and that the reports they attested were true. The directors were not called upon to make any independent investigation of the condition of the bank, the honesty of its officers, nor of any particular asset or liability. They were not requested either personally or by the service of an expert to make an independent investigation or examination of their bank or any of its assets or liabilities. They were assured that the actual bad debts were already charged off, that the over due paper was largely reduced and that the re-discounts have been largely reduced since the last examination. Instead of the letter demanding suspicion or giving warning of actual bad assets or of a critical condition of the bank, it assured the directors that the right things were being done to correct the matters subject in any way to criticism, and that the bank was solvent and sound so far as these directors were required either to know or to find out by investigation, and that its executive officers were not subject to distrust or discredit either with the examiner or the comptroller.

At this point a slight comparison of these two letters will disclose that upon every point on which it is claimed the directors were warned of the falsity of the accounts and of the reports and of the bad condition of the bank appears only in the letter of September 8, 1891, which they never knew existed and not in that of February 16, 1892. It was in the letter of September 8, 1891, that the comptroller pointed out that the overdrafts were misrepresented in the last report where they were entered at slightly over $12,000 when the books showed them to be over $55,000 and were misclassified as loans and discounts, and demanded that the reports and published statements should show the full amounts actually appearing on the books. The directors never saw this warning and such misrepresentation in the official report was nowhere mentioned

in the letter of February 16, 1892, nor anywhere else, that came to the attention of the directors.

The letter of September 8, demanded that bad debts of which $14,000 appeared in a report, should be charged off prior to declaring a dividend. The directors never saw this, and the letter of February 16, makes no such demand, but advises the directors that $30,000 of bad debts were charged off in the presence of the examiner which was in no way intimated to affect the possibility or presence of funds with which to make a dividend at the following dividend period.

The letter of September 8, showed that the examiner knew that the bank expected to sustain $2,000 loss upon the note of Donald-Lawson-Simpson, and $2,500 on suspended and over due paper. The letter of February 16, nowhere mentions nor in any way refers to the notes or account of Donald-Lawson-Simpson, nor to a pending loss on over due paper. The directors therefore had no warning nor knowledge of the existence of the notes or account of that defunct firm.

In the letter of September 8, the comptroller advised that current expenses exceeded the bank's undivided profits by $1,830.87. The letter of February 16, nowhere suggests that undivided profits were exhausted either by current expenses nor otherwise. There is no claim nor suggestion in the latter letter that current expenses exceeded the earnings or undivided profits or otherwise intimated that net earnings or undivided profits were impaired in any way.

These specific items of misrepresentation in the reports and books of the bank never came to the attention or knowledge of the directors, and they are not chargeable with them either by imputation, presumption or by the fact that the letter was received and suppressed by Mosher whose conduct of the business of the bank was the direct subject of the comptroller's criticism. It certainly can do plaintiffs' counsel no service to claim these items from the letter of September 8, were called to the attention of the directors, nor to base his claim of similarity between the comptroller's letter and warning to the

directors of the Saratoga bank, to the matters called to the attention of the directors here by the letter of February 16, 1892. The comptroller, on the advice of the examiner, warned the Saratoga directors that $194,000 of specific assets of the bank were bad debts which must be collected immediately or charged out of the bank. The directors had these federal officers' word for it, at least that those assets were worthless and the failure of the bank shortly afterwards proved half of them worthless, although the directors shortly after the warning attested the report which contained all of them. The contrast in our cases is striking. The letter of February 16, did not advise the directors that any of their assets were bad nor that they must be immediately collected, nor that any amount other than that reported as charged off during the examination should still further be charged off. There is nothing in the letter which our directors saw which discredits the financial solvency of the bank nor the honesty of its executive officers, nor the correctness of the prior reports. We submit that the claimed parallel of the letters in the two different cases is not only a divergence, but is absolutely without foundation in fact.

Letter of September 19, 1892.

The directors signed another letter to the comptroller dated September 19, 1892, although the date is lacking in the bill of exceptions, page 63. This letter is entirely unexplained in the evidence except in the letter of Mr. Thompson (B. of Ex., p. 599), where it is shown that the letter was signed by the various directors upon being presented to them for that purpose not in any meeting or even at the bank and seems to have been overlooked by the comptroller who on October 18, 1892, called upon Mr. Thompson for a reply which had already been made. The comptroller's letter of August 31, 1892, which was answered by the directors' letter of September 19, 1892, nowhere appears in the evidence so that its demands are only known through the answer of the directors. It refers to their answer of February 19, 1892, as having explained most of the matters now mentioned by the comptroller. The only matter

which the plaintiffs make any point of is that the answering letter said, "*the dividend of July 1, was all right.*" No doubt Mosher made this answer and procured signatures of the directors upon presentation wherever he could find them, depending upon their confidence in his integrity. The basis for the dividend of July 1, which the directors say was all right is shown in the minutes of the directors' meeting (B. of Ex., p. 344), where it is recited in Mosher's own hand over his own signature, "Upon the report of the president that there had been earned net in previous six months $14,026.81, it was moved and seconded that a dividend of 4 per cent be declared and $2,000 added to surplus account." It was upon the positive report of the president of the bank as to its net earnings that the dividend was declared without any knowledge of any director that the earnings were falsely reported or that the bank did not have the earnings with which to make the dividend. It is urgently claimed that the dividend could not be made because the letter of February 16, 1892, showed that $30,000 had been charged off during the examination made January 26, 1892, which fell within the six months dividend period for which the dividend was made on July 12, 1892. But this does not at all follow. The $30,000 of bad debts charged off, must have been in the bank for some time and were not profit yielding. It was from other assets than the worthless ones charged off that the earnings to make a dividend must have accrued. Simply because $30,000 of bad debts of long standing had been charged off during the examination is no proof that the other assets of the bank had not earned the amount reported by the president, out of which, as net earnings, the dividend was declared. The directors also knew that on making the prior dividend of January 12, 1892, $2,000 had been run to surplus and $1,128 to undivided profits, all of which was available if it was so desired, to make the dividend of July 12, 1892, which the directors were made (in their letter of September 19, 1892) to say was all right.

At page 92, plaintiffs' brief, it is claimed that on the failure of the bank, more than four months after the letter of Sep-

tember 19, 1892, excessive loans ran high with regard to C. W. Mosher, R. C. Outcalt, their joint account, E. W. Mosher, and the Western Manufacturing Company, as if to show that that letter was known to be false by the directors at the time they signed it, where it was stated that the loans of Mosher and Small were being reduced. With C. W. Mosher in charge of the books it might readily be that E. W. Mosher's and Small's accounts were shown to be reduced at the time of the letter and were increased to the amount shown in the four intervening months to the failure. Indeed, it is not claimed that the Small loan appears at the failure and E. W. Mosher's account could readily have been increased in those four months from $50,000 or less, up to $107,000, claimed at the failure. It is specifically important to note that the comptroller had not mentioned as excessive loans, those of C. W. Mosher, Outcalt, nor their joint account, nor to the Western Manufacturing Company, so that the mention of those accounts above the limit at the failure in no way discredits the honesty of the directors in signing the letter of September 19, 1892.

Dr. Hamer's Letter to the Comptroller.

Dr. Hamer personally wrote a letter to the comptroller under date February 23, 1892, in answer to the letter of February 16, 1892, which all of the directors had seen and answered over their signature. This letter of Dr. Hamer's is vigorously used as the basis of actual knowledge of the falsity of the reports and the bad condition of the bank in plaintiffs' brief, page 93. The letter must be considered in the light of his testimony which explains what he means in saying that the manner of conducting the business for some time had not been satisfactory to him; that Mosher and Outcalt had promised improved management, and that the directors should take a more positive position in the management. Standing alone these statements might lend some color to a claim that Dr. Hamer was aware of mismanagement, but his testimony shows nothing to condemn him with any suspicion of dishonesty or untruthfulness in the business or reports of the bank, nor to discredit his belief in its solvency or soundness.

He testified concerning the letter (B. of Ex., p. 591):

A. "Well, I went to the bank and I had a talk with the officers, chiefly with Mosher and I criticized him somewhat for not attending to it more closely and I indicated that there was too much other matters, collateral matters that he was attending to, and he said that he was now clear of the manufactory—I think I spoke of the penitentiary more particularly, the business at the penitentiary, and he said that he was out of that and indicated to me that there was but little outside of the banking business that he was connected with, and said that the banking was his business and that he was wanting to follow that up properly and that these outside affairs he would indicate he was about through with, was the substance of it."

Q. He had already sold out the penitentiary contract to Mr. Dorgan, had he not?"

A. "He said so, yes. That is my understanding."

(B. of Ex., p. 592) Q. "In what respect hadn't it (the manner of conducting the bank) been satisfactory?"

A. "Well, there was loans. Now the loan to Ed. Mosher, I didn't think that was the proper way to do and I think there was others that had got money in a similar manner. My theory was to get the matter concentrated here and not send money out west and let them put it into somebody else's hands to loan. That was what I objected to, that kind of thing. As I say, I had a talk with them and I probably promised more at the close of that because I was in favor of making a very thorough investigation. I always felt rather delicate about looking up the bank's books because I knew I didn't know very much about them."

Q. "Your idea was, it wasn't good banking to send a lot of money out into York county to be invested there at the discretion of someone else?"

A. "Why, yes, I didn't think that was proper."

(B. of Ex., p. 593) Q. "How long before you wrote this letter had this method of making loans been going on?"

A. "Well, I don't know how long they had been doing that?"

(B. of Ex., p. 594) Q. "Now in this letter to the comptroller you say: 'Your letter is a move in the right direction. It indicates that the directors should take a more positive position in the management, which I for one shall do.' Now in what respect had you failed to take a positive position prior to that?"

A. "Well, there was these matters of circulating the money out in the country and his attention was not concentrated as I thought upon the bank sufficiently."

It is claimed that he knew of the loss of $29,000 in the account of D. L. & S., but he testified (B. of Ex., p. 597):

Q. "Did you know that there had been a loss through D. L. & S.?"

A. "Why, I knew some of it, yes, sir."

Q. "What did you know of it?"

A. "Well, I din't know anything definite of that particularly."

On the same page, in a long question, that loss is among other assumed losses in reference to making dividends. But because Dr. Hamer answered that long question with many assumed items in it, is no evidence that he was aware of the losses assumed in that question when he definitely states that he did not know anything about any losses in that account particularly.

Dr. Hamer's testimony concerning the substance of his letter of February 23, 1892, makes it as manifest as his former testimony did, that even in the matter of the letter he had the same confidence in the integrity of his officers and the solvency of his bank in writing the letter as he did in attesting the reports. His frankness with the comptroller and his diligence in trying to influence Mosher and Outcalt to give their attention wholly to the bank, negatives any possibility of his knowing the falsity of any report he had attested or of the insolvency of the bank, or of any dishonesty or rascality on the part of those men. The charge, first, that he knew, and the next minute, that he ought to have known the ill-fated condition of the bank, finds no encouragement in this personal letter. It is manifest that the substance of his complaint was that Mosher and Outcalt should give more exclusive attention to the business of the bank in order that the business might be increased by concentrating the business locally where it could be under their immediate attention and judgment, and not in any way to save it from insolvency or ruin.

Mr. Yates With Regard to the Letters.

We have heretofore quoted the testimony of Mr. Yates quite fully touching the letters as well as other matters. All of the claims against him, beginning with page 95, plaintiffs' brief, are answered by that testimony and what we have said heretofore. At page 96 it is said that he was advised of the loans to Mosher and Outcalt by the comptroller's letter. A glance at the letter will show that it does not mention any excessive loan to C. W. Mosher nor to Outcalt. Referring to loans to Mosher and Outcalt and his raising a row if he had known it, he said:

> "What I understood by that was if I had knowledge that they were borrowing such large amounts of money as are reported here at the trial, I would have raised a row" (p. 579, B. of Ex.).

As to the specific references to his testimony in another case, we repeat what has been said before that the claim that he knew about six months paper being cancelled and that there would be no dividend for the period ending December, 1892, has been shown to be information which he found for the first time at the meeting of the stockholders and directors on January 9, 1893, nearly a month after he had attested his last report of December 9, 1892.

We are confident that the judgments should be affirmed because:

1. The state supreme court has correctly understood and properly enforced the rule of liability of directors provided in and based upon the national bank act.

2. The findings and judgment of the state supreme court that these directors did not knowingly attest a false report of the bank's condition nor participate in nor assent to such reports, are conclusively in accord with the evidence, and no finding of liability could be sustained by the evidence.

3. The letter of February 16, 1892, which is the only letter from the comptroller ever seen or known by these directors, did not warn them of any falsity or dishonesty in the reports

or the books of the bank, nor advise them of any bad condition endangering the soundness of the bank which they should investigate or correct.

4. These directors, in entire good faith in the truthfulness of the reports and with confidence in the soundness of the bank based on their personal observation and knowledge of its business and executive officers, attested the reports sued on, and performed their whole duty so far as it devolved upon them, without actual knowledge of any falsity and without incurring the liability of the bank act for knowing violation. They were deceived to their own loss, but are not liable as by presumption or imputation of knowledge.

5 The findings of fact of the state supreme court are not open to re-examination of the record presented on this writ.

Respectfully submitted,

FRANK M. HALL,

FRNK E. BISHOP,

Attorneys for Defendants Yates and Hamer.

March 20, 1915.

Office Supreme Court, U. S.
FILED
MAR 29 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 501 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX, ETC.

No. 502 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DAVID E. THOMPSON, DEFENDANT IN ERROR.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson, Defendant in Error.

ELPOD BROS., OMAHA

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 501

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX, ETC.

No. 502

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISA HAMER, ADMINISTRATRIX, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DAVID E. THOMPSON, DEFENDANT IN ERROR.

I.

Statement of the Cases.

Plaintiffs each had credit balances on deposit in the Capital National Bank of Lincoln, Nebraska, on its suspension, January 23, 1893. They sued for damages sustained by the loss of those deposits through the bank failure, on the ground that they were deceived by false reports made by

defendants, by which they were induced to make the deposits. They first sued the directors in the district court of Lancaster County, Nebraska, from which defendants removed the suits into the U. S. Circuit Court, on the ground that a federal question was involved, and where, upon demurrer, it was held that the petitions did not state any cause of action. Final judgment upon demurrer was entered in one of the cases, and, upon a writ of error, that judgment was affirmed in the Circuit Court of Appeals of the 8th Circuit, on the ground that the petition stated merely a cause of action "for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors," which was adjudged to be an asset of the bank "belonging equally to all the creditors in proportion to their respective claims," and which "cannot be appropriated in whole or in part by a single creditor to the exclusive use of his own claim." (*Bailey v. Mosher*, 63 Fed. 488-491.)

The cases in which final judgments had been withheld, pending the ruling of the Circuit Court of Appeals, were thereupon dismissed, and the plaintiffs brought the present suits, in February, 1895, in Seward County, Nebraska. The present suits were also removed to the federal court, and were by SHIRAS, D. J., remanded to the state court. (*Bailey v. Mosher*, 74 Fed. 15.) Plaintiffs then amended their petitions in the state court, whereupon there was a second removal, and the cases were this time retained by SHIRAS, D. J., (*Bailey v. Mosher*, 95 Fed. 223) who rendered judgment in favor of defendants upon a demurrer to the petition; and this judgment was, in turn, reversed by the Circuit Court of Appeals, on the sole ground that the first removal petition had by the order remanding the case, become *functus officio*, and that the second petition was too long delayed (*Jones v. Mosher*, 107 Fed. 501.) The existence of the federal right and the controlling force of the federal statute have since been authoritatively determined.

In May, 1902, the cases went to trial to a jury in Seward County, Nebraska, where defendants suffered adverse judgments, through error of the trial court in denying effect to a governing federal statute. The Supreme Court of Nebraska also committed error in denying the application of the federal statute, and affirmed the judgments entered by the trial court. (*Yates v. Jones National Bank*, 74 Neb. 734.) In so ruling, however, the State Supreme Court felt itself bound by its former ruling upon the controlling question in *Gerner v. Mosher*, 58 Neb. 135; and on affirming the judgments did itself the justice to say: "We do not wish to be understood to say that all the defendants *knew* that such statements were false. We are satisfied that such is not the case. But * * * the fact that they made and published them without knowledge of their falsity is no defense." (*Yates v. Jones National Bank*, 74 Neb. 746.) The judgments were then reviewed in this court, where the unanimous opinion by the present Mr. CHIEF JUSTICE definitely determined the controlling force of the federal statute and the non-liability thereunder of all directors who had not *knowingly* made or *knowingly* permitted falsifications in the reports of the bank to the Comptroller of the Currency, which had been published, and which were the basis of the complaints. (*Yates v. Jones National Bank*, 206 U. S. 158-181; *Yates v. Bank of Staplehurst, Utica Bank, and Bailey*, 206 U. S. 181-185.)

When the cases, pursuant to the mandates of this court, ultimately reached the trial court again, the parties stipulated to waive a jury and to have the cases heard and determined by the court. Judgments aggregating $68,622.15, were rendered in favor of plaintiffs May 8, 1911. The aggregate of the two judgments to which Mr. Thompson was party was $42,799.78. The Supreme Court of Nebraska reversed these judgments on the sole ground, as we understand, that there was not sufficient evidence in the record to sustain them. There was no proof that defendants made any oral representations, or that they made any

written representations other than to attest some official reports. The judgments had no support, therefore, on non-federal grounds. In respect to the official reports attested by *Mr. Thompson*, there was no proof that he *knowingly* made or *knowingly permitted* the making of a false report, as is necessary under Sec. 5239 Rev. Stat. U. S.; and for want of proof of a *scienter* required by that statute, the judgments of the trial court were reversed. (*Jones National Bank v. Yates*, 93 Neb. 121-131.)

Defendants are only charged, specifically, by the petitions of plaintiffs, with having made and published two false reports to the Comptroller of the Currency. One paragraph charges that on the *9th day of December, 1892*, defendants "made, caused, allowed and permitted a false statement of the condition of said bank and its resources and liabilities, which statement is hereto attached and marked 'Exhibit A.'" Another paragraph alleges that on the *28th day of December, 1886*, the defendants "made caused, allowed and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked 'Exhibit B.'" In the same connection it was averred that these statements were published in newspapers. Exhibit A does not bear the attestation or name of Mr. Thompson. It purports to be a report of the Capital National Bank at the close of business December 9, 1892. Exhibit B purports to be a report of the Capital National Bank at the close of business December 28, 1886, and bears the name of D. E. Thompson as one of three attesting directors.

There is no allegation in the petition that the Capital National Bank was a national banking association, or that the acts, or any of the acts complained of, were done by defendants as directors of a national banking association. There is no allegation that either of the exhibits referred to was a report made to the Comptroller, or that it was published as such pursuant to the National Banking Act. The name or title of the Comptroller of the Currency does

not appear in either exhibit. The absence of such averments, and the failure to claim any right under any federal statute, were the result of studied adroitness to produce a petition that would prevent removal into the federal court of the district, where plaintiffs would face an adverse precedent, and which was regarded as an unfavorable forum. In advocacy plaintiffs' counsel have repeatedly counted on the elimination of all references to the National Banking Act. Viewed in this aspect it is obvious that, on the pleadings, plaintiffs can claim no federal rights unless such claim may be based on Exhibits A and B in their petitions. In connection with this explanation we now quote in full the paragraph of the petition of the *Jones National Bank* which immediately follows the averments touching Exhibits A and B:

"This plaintiff avers that on and between July 23rd, 1884, and January 21st, 1893, the defendants, with the fraudulent intent and purpose as aforesaid, during all of said time, made, allowed, caused and permitted to be made at divers intervals, false statements of the condition of said bank as to its resources and liabilities, with the intent and purpose of deceiving the plaintiff and others, as aforesaid, and caused, acquiesced in, allowed and permitted said false statements, and each of them, severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, and sent and caused to be sent to and received by plaintiff said false statements aforesaid, through the U. S. Mails, and otherwise, and which were received by plaintiff." (Printed Record, *Jones National Bank Case*, pp. 4, 5.)

The trial judge's findings assert that these averments were intended to relate to unofficial and voluntary acts, by which advertisements and statements of an unofficial character were employed to solicit business. They certainly charge no fault with any official statement to the Comptroller of the Currency, which was published under command of the federal statute, and they fail to specify any

such statement, or set forth its terms. By the accepted rules of pleading, averments charging fraud in written representations are defective in substance unless they set forth the specific terms of the writing. There is no substantive averment of false official written reports found in the petition, on which a judgment in favor of plaintiffs could rest, or on which plaintiffs have standing to be heard in this court, outside of the two statements embraced in Exhibits A and B of the petitions. The report of December 28, 1880, Exhibit B, which purports to bear the attestation of Mr. Thompson, was too remote, in point of time, to operate as an inducement for deposits made in the bank in 1893. While this is a necessary legal inference, the plaintiff's officers testified unequivocally to the same effect. Any cause of action based upon the statement of December 28, 1880, had, also, been long barred by the four years' limitation of the Nebraska Statute. The report of December 9, 1892, does not purport to have been attested by Mr. Thompson, and the proofs are that he had no connection with it in any manner.

In certain particulars error is assigned upon the phraseology of the opinion of the State Supreme Court. Assignments 3, 4, 11 and 19 complain of the omission of the qualifying phrase "in effect" in the Court's reference to the holding of this court, that "something more than negligence is required, and it must be shown that the violation was (in effect) intentional." But this omission or inaccuracy is without significance, since the court was not approving or passing upon any rule or charge by which the trial court or jury was to be guided in finding the facts. The cases were, by stipulation, tried to the court without a jury. In a trial so had the only ultimate question presented to the reviewing court is: Was the judgment rendered correct, upon the pleadings and the evidence competent to be considered? And, in any event, it is clear that the judgments of reversal, now under review, were not rested upon any such narrow refinement, but solely

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upon the fact that the evidence, upon the view of the law most favorable to plaintiffs, did not prove a *scienter*.

Assignments of error 12, 13 and 16 (and also 14, which is not directed against *Mr. Thompson*) present the claim that certain letters from the Comptroller furnish conclusive evidence that defendants knowingly permitted the making of false official reports to the Comptroller. The significance of the Comptroller's letters referred to, in the light of the oral testimony, are by no means what is claimed by plaintiffs in error. But in this aspect the separate case of *Mr. Thompson* divides from the cases of the other defendants. In calling attention to this divergence we do not question the merits of the defense made by the other defendants. No analysis or discussion of the Comptroller's letters is called for from *Mr. Thompson, because they do not bear upon his separate case.* This is proved by the following undisputed facts:

The *earliest* letter from the Comptroller is dated at *Washington, September 8, 1891.* The *latest* report attested by Mr. Thompson is of date *July 9, 1891.* The *latter* date was two months prior to the Comptroller's *first* letter, of September 8, 1891, which called attention to an intervening report of August 19, 1891, that Mr. Thompson had not attested. Obviously the letter written at Washington on September 8, could not operate as a vehicle to carry knowledge home to Mr. Thompson at Lincoln, Nebraska, at the prior date of July 9, the last occasion on which he ever attested a bank report. The same consideration excludes application of the subsequent letters to the case of Mr. Thompson. We shall later show, by record references, that *Mr. Thompson* did not participate in any subsequent report and that his nonparticipation is established, incontrovertibly, and without dispute or contradiction.

Pursuant to a provision of the Nebraska Code, Mr. Thompson made several requests of the trial court for special findings, among which was No. 5, as follows:

"Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency, other than the five several reports dated respectively December 28, 1886, August 1, 1887, October 2, 1890, December 19, 1890, and July 9, 1891?" (Printed Record, *Jones National Bank Case*, p. 23.)

The foregoing request was answered by the trial court as follows:

"Respecting the fifth request, the court finds that the defendant Thompson attested only five reports mentioned in said request." (Printed Record, *Jones National Bank Case*, p. 27.)

Mr. Thompson's 6th and 7th requests for special findings were as follows:

"6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith?

"7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently, and with actual personal knowledge that such reports, or any one of them, were, in any material respect, false and untrue?" (Printed Record, *Jones National Bank Case*, p. 23.)

The trial court answered these two interrogatories as follows:

"Respecting the sixth and seventh requests of the defendant the court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, attested by him, *but in attesting such reports the court finds that the defendant relied upon the statements made to him by the president and cashier of the bank*, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity

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of such reports, and that the same were attested recklessly *and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him*, and, in this respect, the court finds the same were not made in good faith." (Printed Record, p. 27.)

That the last quoted finding, as a basis of liability on the official reports, was wholly insufficient, was conceded by the trial court. The doctrine that a director is civilly liable, if he attested an untrue report "because he did so at his risk, since it was his duty to know, or to refrain from acting," was expressly repudiated in the opinion reversing the previous judgments in these identical cases (*Yates v. Jones National Bank*, 206 U. S. 179, 180,) in which it was said, "That this imposed a higher standard of conduct than was required by the statute, is obvious."

Two ultimate facts are established by the finding: (1) Mr. Thompson's innocence of the falsehood, and (2) a justifiable ground for the attestation, in the circumstance that "in attesting such report the court finds that the defendant relied upon the statements made to him by the president and cashier of the bank." The only thing here found against Mr. Thompson is that he relied on the statements of the managing officers of the bank "without performing his duties as a director *to ascertain the truth or falsity of such reports before the same were attested by him*." It was "in this respect," only, that the court found against his good faith. He had, according to the finding, gone for information on this precise subject, to the president and cashier, and had relied on their statements. He is found guilty of no intentional falsehood, and the attempt to *impute* falsehood is not rested on any admissible ground, consistent with the provisions of the National Banking Act. So the proposition found and stated by the court was the exploded theory that the director, despite his diligence in making inquiry touching the correctness of the report, from a source which he regarded creditable, and upon which he

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in fact relied, should be held liable if the report turned out, ultimately, to be false, because he acted at his peril and it was his duty to know or refrain from acting. If Mr. Thompson had undertaken the tedious task of checking the accounts of the bank, he would, under this exploded theory, be civilly liable if he failed to discover frauds concealed by false entries. But it was undisputed that Mr. Thompson had no knowledge of bookkeeping or accounting, and that it would have been an impossibility for him to have derived any information from an examination of the accounts. He took the only course available to him, of making inquiries of those who had knowledge of the bank's affairs superior to his own; and he trusted the verity of their statements.

The trial court recognized the force of the above suggestions, and announced, as a conclusion of law, that plaintiff was entitled to recover "under the principles of the common law, *exclusive* of the requirements of the national banking act." (Printed Record, *Jones National Bank Case*, No. 501, pp. 28, 44.) This exclusion of the federal statute seemed to be a repetition of the identical error that had reversed the former judgments. Thereupon Mr. Thompson in order to draw from the court an expression of the theory on which he was held liable, presented for special findings or conclusions of law the following, among other interrogatories:

"3. Is the liability of this defendant for deceit or false representations under the principles of the common law, as determined by the court, founded or based upon the defendant's attestation of the official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, of dates respectively, December 28, 1886, August 1, 1887, October 2, 1890, December 10, 1890, and July 9, 1891, or any one or more thereof?

"4. What are the particular written false representations made by this defendant, which form the basis or foundation for the legal conclusion that this defendant is liable for deceit or false representations *under the principles*

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of the common law." (Printed Record, *Jones National Bank Case*, pp. 24, 25.)

To the foregoing the trial court made the following answers:

"Respecting the *third* interrogatory, the court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit under the principles of the common law, *is not founded upon the attestation of the official reports referred to in the third interrogatory;* but *that such statements are corroborative of the unofficial and voluntary statements made by the bank*, as set forth in the answers to the first and second additional interrogatories, and that such liability is founded upon the truth of the allegations of plaintiffs' amended petition, and embodied in the general findings of the court.

"In answer to the *fourth* interrogatory the court bases or founds its legal conclusion, as to defendant David E. Thompson's liability, *upon the statements, representations and advertisements setting forth the financial condition of the bank which were published in the newspapers, and such as were sent by the bank to the plaintiff in the form of cards and slips, and purporting and assuming to have been made, compiled, issued, published and circulated under the authority and direction of the directors of the Capital National Bank*, and in the name of the defendant David E. Thompson, *with the other directors*, and that such statements, representations and advertisements were false, and known to be so by the defendant, and were relied upon by the plaintiffs to their damage." (Printed Record, *Jones National Bank Case*, p. 44.)

We have previously quoted the special finding that Mr. Thompson *did not know* that the official reports which he attested were false, and that he attested them on information that they were true, and on which he relied, obtained from the president and cashier, who had knowledge superior to his own. The trial court thus definitely placed responsibility on *voluntary unofficial* statements alleged to have been sent to plaintiffs, or inserted in newspaper advertis-

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ing, for the solicitation of business. There was not, in the voluminous record, a scintilla of evidence connecting *Mr. Thompson*, in any particular, with any writings of the character specified. So far as the evidence was concerned, the recital which seeks to fasten liability on *Mr. Thompson*, upon a ground independent of the federal statute, was pure fiction. The attestation of four or five reports, made after first making inquiry touching their correctness, and without knowledge of their falsity, as the court found, was the only connection shown by the proofs of Mr. Thompson with any matter charged against him by the pleading.

Touching the charges of oral or verbal misrepresentations, Mr. Thompson made requests for special findings to which the trial court responded as follows:

"In respect to the second and third requests of the defendant David E. Thompson, the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing or responsibility of said bank to the plaintiff, and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank." (Printed Record, *Jones National Bank Case*, p. 27.)

In No. 9 of the errors assigned, complaint is made that the State Supreme Court decided that section 5239, Rev. Stat. U. S., precluded maintenance of an action for deceit based on voluntary acts of directors outside of duties enjoined by the National Banking Act. This assignment is unavailing for three reasons: (1) The decision of the State Court upon a cause of action not arising under a federal statute is not subject to review by this court, (2) there was no evidence to sustain any cause of action upon a non-federal ground, and (3) the judgment of the State Supreme Court is not rested on the assigned ground, either wholly or partially.

Other assignments present the complaint that the State Supreme Court decided that the petitions of plaintiffs in

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error did not state a cause of action; but the judgments were not rested, in whole or in part, on such ground.

The immateriality of all of the assignments of error and the complaints based upon particular expressions found in the opinion of HAMER, J., become apparent, when it is observed that the sole ground upon which LETTON, J., concurred in the judgments of reversal, was that a case had not been made by sufficient evidence, under the rule of liability established by the decision of this court. It was on this ground, *alone*, that the judgments of reversal had the concurrence of a constitutional majority of the judges of the State Supreme Court. This consideration eliminates every consideration, other than the sufficiency of the record to warrant the conclusion announced on the insufficiency of the evidence to establish a *scienter*. References to the opinions of the judges of the State Supreme Court, conclusivly establishing this point, are made under an appropriate head in the argument.

II.

A single creditor cannot maintain an action against the directors of a corporation for recovery of damages for neglect or mismanagement, whereby the corporation sustains losses and becomes insolvent. Such cause of action is for a wrong done to the corporation and the whole body of the corporate creditors, and can only be maintained by the corporation or its receiver.

The petitions, or complaints, of plaintiffs in error are loaded, excessively, with surplusage and irrelevant averments. Included in the surplusage, are averments that it was the duty of defendants as directors to actually and actively manage the business of the bank; that defendants neglected the duties of active administration, by reason of which large loans were made to insolvent persons upon inadequate or no security; and that insolvency "resulted

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from the careless and negligent manner in which the defendants, acting as such directors and officers, managed and superintended the bank and its said business." (Printed Record, *Jones National Bank Case*, No. 501, p. 3). It is also alleged (Printed Record, Case No. 501, p. 7) that "on the 21st day of January, 1893, said bank suspended and went into the hands of a *receiver*."

The brief of plaintiffs in error contain repeated suggestions that defendants were neglectful of their official duties. Both averments and arguments addressed to this charge are pointless. The representative or fiducial duty of the director is to the corporate body only, and not to the individual creditor. A breach of that duty is a wrong to the corporation only, and incidentally to the whole body of its creditors, and is not a personal wrong to the individual creditor. The remedy is a suit in equity by a receiver for an accounting, and for a ratable distribution of any recovery, *first*, to all the creditors, and *second*, to all the shareholders. (*Hornor v. Henning*, 93 U. S. 228.)

Here individual creditors sue in their own behalf, only, and must rely upon a wrong that is personal to the individual plaintiff, and not common to all the creditors. That the bank was being liquidated through a receivership, is alleged in the petitions. Allegations and proofs of mere neglect to discharge an official duty to the *corporation*, to personally manage and conduct its affairs so as to avoid pecuniary losses to the *corporation*, do not reach or affect the cause of action of an individual creditor. They do not support the personal claim of an individual creditor, based upon a charge that he was deceived by false representations. The claim based upon allegations of deceit is purely personal to the individual plaintiff. It can only be sustained by proof that false and deceitful statements reached him personally, and influenced his individual transactions. Proof of mere failure of the director to act in an administrative capacity, does not sustain a charge that the director made deceitful statements to the

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plaintiffs. This point is, therefore, presented briefly in order to eliminate the immaterial issue.

The identical issue was adjudicated by the Circuit Court of Appeals of the Eighth Circuit in the suit of *Thomas Bailey*, one of the present plaintiffs in error, against the present defendants in error, on the identical claim here in question. *Bailey v. Mosher*, 93 Fed. 401. CALDWELL, C. J., expressing the unanimous opinion of the court in that case, said:

"The petition shows that the bank of which the defendants are officers and directors is insolvent, and has passed into the hands of a receiver appointed by the comptroller of the currency under the national banking act. The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank, belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim. It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. Rev. St. U. S. Sec. 5234; Kennedy v. Gibson, 8 Wall. 498; Bank v. Colby, 21 Wall. 609; Hornor v. Henning, 93 U. S. 228; Stephens v. Overstoltz, 43 Fed. 771; Bank v. Peters, 44 Fed. 13. The law will not allow one creditor to appropriate the whole liability of the directors to his own benefit. It is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue. Smith v. Hurd, 12 Metc. (Mass.) 371; Howe v. Barney, 45 Fed. 668. The same rule applies to the creditors of a corporation."

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When the present suits were previously before the Supreme Court of Nebraska, defendants argued that the ruling of the Circuit Court of Appeals in *Bailey v. Mosher*, above quoted, should be applied to the present petitions; and this argument was answered in its opinion in *Yates v. Jones National Bank*, 74 Neb. 739, as follows:

"One of the principal contentions of the defendants, reduced to its simplest form, is as follows: (1) Damages resulting to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers only in an action brought by the bank, or for the benefit of all the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank and are recoverable only in an action brought by the bank, or for the benefit of all the stockholders and creditors. The major premise is so nearly a self-evident proposition that it requires no elaboration. It is recognized in *Bailey v. Mosher*, *supra*, and in the cases there cited. But we are not disposed to accept the minor premise. It is true the petitions show misfeasance and mismanagement on the part of the defendants as officers of the bank, and that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegations may be contained in the petition they also contain sufficient to constitute a common law action for *deceit*."

To avoid the conclusive force of the former judgment as a bar to the prosecution of the present suits, it was necessary to construe the present petitions as presenting only causes of action for *deceit*, and to exclude as *surplusage* all of the averments charging *mere neglect* and *misfeasance*. The Supreme Court of Nebraska approved of the doctrine maintained by Judge CALDWELL in *Bailey's*

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Case as being "so nearly a self-evident proposition that it requires no elaboration."

In *Yates v. Bailey*, 200 U. S. 181-185, this court approved of the interpretation placed upon the present pleadings in *Yates v. Jones National Bank*, 74 Neb. 739. Otherwise the action of Bailey must have been concluded by the former judgment pronounced in the Circuit Court of Appeals for the Eighth Circuit.

Apart from the cited cases, connected with the present suits, the rule is well-nigh universal that an individual creditor cannot recover for a wrong done to the corporation through the neglect or misfeasance of a director. (*Hornor v. Henning*, 93 U. S. 228; *United States Fidelity & G. Co. v. Corning St. Sav. Bank*, 154 Iowa 588, 134 N. W. 857-860, and authorities cited in the opinion.)

The doctrine that one creditor of a corporation cannot recover and appropriate to his separate use, in an action in his own name, the proceeds of a cause of action for an injury or wrong done to the corporate body, has been repeatedly recognized and applied to cases arising under the National Banking Act. The scheme of liquidation adopted by that act is intended to secure an equal and ratable distribution among all of the creditors of a failed bank, and requires such suit to be prosecuted by the bank while it remains in operation, or by its receiver in event of its suspension. (*Conkey v. Halsey*, 44 N. J. L. 463, 464; *Kennedy v. Gibson*, 8 Wall. 506; *Cockerell v. Cooper*, 86 Fed. 13; *Davis v. Elmira Savings Bank*, 161 U. S. 284; *National Bank v. Colby*, 21 Wall. 609, 613, 614; *Bailey v. Mosher*, 93 Fed. 491.)

The application of this doctrine eliminates, as surplusage, all averments and proofs of neglect and misfeasance, as independent grounds for maintenance of the present suits, and renders their exploitation in the briefs and arguments of plaintiffs in error altogether purposeless and pointless.

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III.

The decision of the state Supreme Court rests, exclusively, on a finding of fact, that the evidence in the record is not sufficient to show that defendants knowingly made or knowingly permitted the making and publishing of false official reports. Upon that issue plaintiffs had the burden of proof; and upon a finding of pure fact depends the applicability of Sec. 5239 U. S. Rev. Stat. and the federal right now asserted thereunder.

When the cases were reviewed here on the previous writs of error, the present MR. CHIEF JUSTICE, expressing the unanimous opinion of the court, said:

"It thus becomes obvious that the national bank act imposes upon directors duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof. Although the statutory provisions subsequent to the act of 1863 relating to making and publishing of such reports do not, as did the act of 1863, expressly require that the report, when made, should contain a 'true' statement of the condition of the association, yet, by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited.

"Considering the text of the national bank act, as now embodied in the Revised Statutes, including Sec. 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. By the first sentence of the section mentioned a forfeiture of the charter is entailed 'if the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title.' And the last sentence ordains the rule by which civil liability is to be determined.

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by providing that 'every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

"As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute, without depriving directors of an immunity conferred upon them. That the words 'shall knowingly violate or knowingly permit' etc., found in the first sentence of Sec. 5239 Rev. Stat. were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears 'that he will, *so far as the duty devolves on him*, diligently and honestly administer the affairs of such association, and not knowingly violate or willingly permit to be violated, any of the provisions of this title.' Mark the contract between the general common law duty to 'diligently and honestly administer the affairs of the association, and the distinct emphasis embodied in the promise not to 'knowingly violate or willingly permit to be violated, any of the provisions of this title.' In other words, as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But, as on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.'" *Oates v. Jones National Bank*, 206 U. S. 158, l. c. 176-178.)

The exposition in the opinion of the doctrine that the rule of the federal statute is supreme and exclusive, concludes as follows:

"The frustration of the public policy embodied in the national bank system by the crippling of the usefulness of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the national bank act, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one, is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate." (Yates v. Jones National Bank, 206 U. S. 158, 1 c. 176-178.)

Explaining in what particulars, and how far, the state court, in the proceedings under review, departed from the rule of the federal statute, the opinion states:

"The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability. The doctrine, as we have seen, upon which the court below rested its judgment, was that directors of a national bank who merely negligently participated in or assented to the making and publishing of an untrue official report of the condition of the bank were civilly liable to anyone deceived, to his injury, by such report. Indeed, in one aspect, the ruling below went further than this, since it was, in substance, decided that, despite the exercise of diligence by the director, if he assented an untrue report he was civilly liable, because he did so at his risk, since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court pointing out that where by law a responsibility is made to arise from the

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violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional. *McDonald v. Williams*, 174 U. S. 397; *Potter v. United States*, 155 U. S. 438, 446, and cases cited. See also *Utley v. Hill*, 155 Mo. 232, and cases cited." *(Yates vs. Jones National Bank*, 206 U. S. 158, l. c. 176, 180.)

The judgments of the Supreme Court of the State were accordingly reversed and the causes "remanded for further proceedings not inconsistent with this opinion." The expositions of the statute above quoted were thus made instructions to the Supreme Court of the State to be followed in the further proceedings to be had pursuant to the mandate of this court. The court below, in the further proceedings, endeavored to obey these authoritative directions which determined the law of the cases.

The theory presented by the plaintiffs in error and adopted by the district judge who subsequently heard the the cases, without a jury, in the district court of Seward County, Nebraska was, obviously, a perversion and circumvention of the directions of this court. In the case of Ambassador Thompson, whose letter we hold, the record presented to the State Supreme Court exhibited an absolute and total failure of any evidence to show that he knowingly made or knowingly permitted the making and publication of false official reports to the Comptroller of the Currency of the condition of the Capital National Bank. That charge, which was the sole ground of liability under the federal statute, and upon which alone the jurisdiction of this court depends, was wholly unsupported. The judgment of reversal was inevitable, and was forced upon the state supreme court by the failure of proof of an essential and indispensable element of the cause of action. The opinion of this court threw the burden of proving a *scienter* on plaintiffs, and that burden, as we shall conclusively show, was not sustained by plaintiffs. Had the State Supreme Court so far disregarded the man-

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ate from this court as to affirm the judgments of the district court of Seward County, on a record wholly wanting in proof of a *scienter*, a second reversal by this court on writs of error sued out by defendants would have been required to enforce obedience to its previous judgment and mandate.

It is true the court below was divided. The associates of the Chief Justice in the State Supreme Court ruled that he had been guilty of usurpation in participating in the proceedings to award a rehearing, after he had publicly announced that he had been counseled by one of the plaintiffs and had previously withdrawn, leaving the disposition of the case to his associates; and the incident is brought into the record in this court. But the present writs of error only present for review the merits of the ultimate judgments rendered below, and this aspect of the record will be neither edifying nor useful upon this hearing.

One aspect of the argument presented by plaintiffs in error in the State Supreme Court is set out in the opinion of Hyatt, J., *Jones National Bank v. Yates*, 93 Neb. 127, [Original Record, *Jones National Bank Case*, No. 501, pp. 52–53] as follows:

"The opinion of Justice White in *Yates v. Jones National Bank, supra*, is based on a single proposition; that is: 'Where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability.' In the argument on behalf of the appellees (the plaintiffs in error here) it is said: 'We sought to avoid the application of this rule for the reason that, while the national bank act expressly commanded the publication of the official report, it did not require the publication of a *true* report, and that therefore the publication of a *false* report did not violate any express mandate of the statute.' * * * The argument was that the making of a *false* report was not a violation of the United States bank act, and that the remedy provided by section 5239 for violations of the statute did not

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reach the case, and therefore the contention was that there was no statutory remedy for making a *false* report, and that the plaintiffs below could resort to this remedy at common law."

In other words, it was argued below that the decision of this court that the rule of the federal statute governed was erroneous and should be disregarded, and that the lower court ought to adhere to the error which led to reversal of its former judgments.

Lyon, C. J., of the state court, concurred in the judgment of reversal, but filed a separate opinion in which he expressed his personal approval of the argument *that the statute did not control*, and stated that he yielded only to the superior power of this court. His opinion states:

"I agree with the former judgment of this court, and that of the several inferior tribunals before which the question was presented that the petitions state a cause of action at common law for deceit, *but think this court is wrong by the opinion of the Supreme Court of the United States.* * * * Under the holding of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason, alone, I concur in the conclusion." *(Jones National Bank v. Yates*, 93 Neb. 131; Printed Record, Case No. 201, p. 55.)

The reason assigned by Judge Letton for concurring in the reversal is certainly valid. There is not the slightest doubt that the court below reversed the judgments because of the total want of proof of a *scienter*, which is clearly an element of the cause of action by the federal statute. Under the state constitution the concurrence of four judges is necessary in order to pronounce a decision. Yet none sustained in the opinion of Hamer, J., therefore became the *decision* of the court, except the single point sustained by Letton, J., that under the measure of

liability defined by the Supreme Court of the United States "a case has not been made" against defendants by the evidence. It was upon this sole ground that Judge LETTON concurred in the judgment of reversal, and to the point the opinion by HAMER, J., addressed the following:

"Coming now to the consideration of the additional evidence introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones on which this action is in fact predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer had any communication or conversation with the plaintiffs or any of them, in regard to the condition of the Capital National Bank. It is not shown that they or either or them had any knowledge that any published statements or cards containing any information as to the condition of the bank were ever sent to the plaintiffs, or any of them by any officer or agent of the bank.

"It follows, therefore, that the evidence is insufficient to charge them, or either of them, *with ever having knowingly* made any false statement in regard to the condition of the bank, or participated in sending any advertising manner, published statements, or any of the things mentioned in the plaintiffs' petition, to them or any of them; and having taken no part in said transactions, it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants Yates and Hamer within the rule of liability announced by the Supreme Court of the United States, in these cases and others, we are of opinion that the judgment as to them must be reversed.

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"As to the defendant David L. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the Comptroller of the Currency questioning the correctness of former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution; that thereafter Thompson refused to sign any statements to the Comptroller of the Currency, and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent. While it may be said that for a considerable length of time before the bank was closed by the Comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain, and they do not claim that he ever had any conversation with or made any statements whatever to the plaintiffs or any of them." *Jones National Bank v. Yates*, 95 Neb. 125, 126, Printed Record, *Jones National Bank* Case No. 301, pp. 51, 52.*

Concluding the opinion with a general restatement of the reasons for entering judgments of reversal, HAMER, J., said:

"The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the Supreme Court of the United States in these cases, they are not entitled to recover, and the judgments

*NOTE: The summary of the ultimate facts shown by the evidence including the case of Ambassador Thompson contained in the quoted opinion of the lower court, is not, in all respects, entirely faithful to the record. It does not do Mr. Thompson's case, on the record, full justice, as we shall later show; but it is, nevertheless, a finding of the insufficiency of the evidence.

of the district court should be reversed as to all the defendants." (*James National Bank v. Yates*, 93 Neb. 130, Printed Record, No. 501, p. 55.)

That the opinion of HAMER, J., and the concurring opinion of LETTON, J., evidence a purpose to apply the law as settled by the judgment of this court, and to obey the directions embodied in its mandate, is obvious. By the decision of this court the liability of the defendants in error, under section 5239 of the Revised Statutes, depends wholly upon whether the defendants were shown to have *knowingly* made or *knowingly permitted* the making and publication of the false official reports of which complaint is made. On this decisive issue of fact the State Supreme Court found specifically in favor of defendants, and that the issue tendered by plaintiffs that defendants *knowingly made and knowingly permitted* the making and publishing of false official reports, was not sustained by the proofs.

The conclusion of the State Supreme Court on this controlling and decisive issue of fact, and its finding that the charge of knowingly making and knowingly participating in the false official reports complained of is without support in the evidence, is, in itself and without reference to the merits of other issues and contentions, a complete foundation and justification of the judgments of reversal. If this finding is correct it disposes of the present writs of error. Refinements and captious criticisms of inaccuracies of expressions found in the opinions of the state court are all pointless, unless it be demonstrated that the basic finding of fact which controls the judgment is wrong. The record thus presents, at the threshold, the inquiry: Should this court review the finding of the lower court on that issue of fact?

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IV.

On error to a state court of last resort this court regards the findings of fact of the state court as binding upon it. This court, therefore, refuses to review issues of fact determined by the State Court; and whatever was a question of fact in the State Court is a question of fact on a writ of error from this Court to the State Court.

The rule stated in the head-note is settled by numerous well considered judgments. Since it has long been regarded as elementary, we cite only a few of the more recent cases. (*Dower v. Richards*, 151 U. S. 658; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, l. c. 97, 98; *Rankin v. Emigh*, 218 U. S. 27, l. c. 32; *Kerrford v. Farmers & M. Bank*, 218 U. S. 281, l. c. 288; *Mendrich v. Lancaster*, 232 U. S. 230, l. c. 243.)

In *Dower v. Richards*, 151 U. S. 658, 663, it was said by Mr. Justice GRAY:

"The principal ground on which plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision, in matter of fact, was erroneous, and contrary to the weight of evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court."

In *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, Mr. Justice DAY expressed the limitations of the scope of inquiry by this court in the review of the judgments of the highest courts of the state, as follows:

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities and privileges of federal origin, specially set up in the state court, denied by the rulings and judgment of that court. U. S. Rev. St. §709, U. S. Comp. Stat. 1901, p. 575. Nor does this court sit to review the find-

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ing of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of federal law, within the jurisdiction conferred upon this court. *Quinby v. Boyd*, 128 U. S. 489; *Egan v. Hart*, 165 U. S. 188; *Dozier v. Richards*, 151 U. S. 658; *Thayer v. Spratt*, 189 U. S. 340. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review to questions of a federal nature which we deem to be properly made in this record, and essential to the decision of the case."

In *Rankin v. Enright*, 218 U. S. 27, 32, the present Mr. CHIEF JUSTICE said:

"It is true that there are other assignments of alleged error, but we put them at once out of view, as they in substance but assert that the court below erred in affirming the judgment of the trial court because certain of the facts found were not sustained by the evidence—contentions which are not open to inquiry, as it is elementary that, on error to a state court of last resort in a case of this character, the findings of fact of the state court are binding on us."

Bickford v. Farmers & M. Bank, 218 U. S. 281, involved the validity of title to real estate conveyed to a national bank in violation of a statutory regulation. One contention in this court was that the title failed for want of acceptance by the bank of the conveyance. In holding that this court was concluded on the issue of fact by the finding of the state court, Mr. Justice HUGHES said:

"The Supreme Court of Missouri held upon the evidence that it was accepted, and this court, on a question of that character, does not review the findings of fact which have been made in the state court. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Egan v. Hart*, 165 U. S. 188; *Clippen Min. Co. v. Eli Min. & Land Co.*, 194 U. S. 220."

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In *Meidrich v. Lauenstein*, 232 U. S. 236, l. c. 243, Mr. Justice DAY said:

"This court has repeatedly held that in cases coming to it from the Supreme Court of a state, it accepts as binding the findings upon issues of fact duly made in that court."

It is, of course, conceded that cases in which the finding is not strictly one of fact, but is, in itself, a legal conclusion on the federal right claimed, cases where there is a complete failure of evidence to support a conclusion announced upon a federal question, and cases where the facts on which the application of the federal right depends have not been determined, do not come within the purview of the rule just stated. In cases of these excepted classes it is the conceded duty of this court "to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted federal rights." (*Carlson v. Washington*, 234 U. S. 103, l. c. 106; *Meidrich v. Lauenstein*, 232 U. S. 236, and cases cited.)

It is submitted that the records under review come clearly within the general rule that the findings of fact of the state court are conclusive, and that the records exclude the application of any of the recognized exceptions to that rule. Throughout this litigation the plaintiffs in error have persistently denied the application of the federal statute. It was the defendants, only, who introduced into the litigation by their answers the claim that section 5230 U. S. Rev. Stat. fixed the rule of liability. The opinion of the state court, as already shown, discloses that plaintiffs in error sought to avoid the controlling force of the federal statute under the specious plea "that, while the national bank act expressly commanded the publication of the official report, it did not require the publication of a *true* report, and that therefore the publication of a *false* report did not violate any express mandate of the statute"—a point adjudicated adversely to the conten-

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tion when the cases were previously before this court. When the assertion of a federal right is first made in an application for a rehearing, which is overruled without any opinion or finding, it is questioned whether there is a foundation for review in this court.

But laying aside the sufficiency of the foundation claim of federal right by plaintiffs in error, the facts found by the State Supreme Court are conclusive here for the following reasons: Here the applicability of the federal right asserted depends wholly on the presentation of sufficient competent proof to establish that the defendants knowingly made or knowingly participated in making and publishing the false official reports of which complaint is made. Guilty knowledge—*scienter*—is by the statute an essential element. So much is settled by the prior judgment of this court. That fact, on which recovery under the federal statute depends, has been found against plaintiffs in error. The state court found no sufficient evidence in the record to warrant or sustain a finding that defendants knowingly made or participated in such false reports. There was no denial by the state court that *knowingly* making false reports would be actionable under the federal statute. The finding was strictly one of fact. Upon the fact so found the federal statute gave immunity from personal liability to the directors. The statute was rightly applied to the facts, as found, according to the specific commands of the opinion and mandate of this court.

This, therefore, is not a case where the purported finding of fact is a decision of law upon the federal right asserted. The only process by which this court can make the application of the statute warrant a reversal and entry of judgment in favor of the plaintiffs, is to review and reverse the finding of the State Supreme Court on an issue strictly of fact. The case does not fall within any of the exceptions to the rule that the determination of such an issue by the state court is conclusive.

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The records now before the court present no question of whether the correct rule of liability, under the federal statute, was applied in rulings at the trial and in the charge of the court. By stipulation the parties waived a jury and tried the cases to the court. In a case so tried the only inquiries in the State Supreme Court were, whether, upon the evidence, competent to be considered, the trial court rightly found the facts, and correctly applied the statutory rule for determining liability. Determination of the issue of pure facts, whether the evidence sufficiently maintained the charge that the defendants had *knowingly* made the false reports, was the one essential condition of entering a judgment either of affirmance or reversal. The law had been settled on the writ of error in this court, so that it only remained to apply it to the ultimate facts established by the proofs. It was a pure fact issue that was decided. This court is concluded by the finding of the state court that a *scienter* was not proved. Upon that ascertained fact the federal statute grants immunity to the defendants, and compels the affirmance of the judgment of the Nebraska Supreme Court.

There is, as it seems to us, a further consideration that ought to be controlling. The issue of fraud presented by the several petitions of plaintiffs in error, involving, under the statute, the element of *scienter*, cannot be resolved in favor of the parties holding the burden of proof, *as a question of law*. Mr. Thompson testified, circumstantially, to his confiding belief at all times in the soundness and stability of the bank, and to his full belief in the verity of the four or five reports attested by him in the course of the several years that he was a director; that he never attested a report without first making inquiry as to its correctness and receiving assurances from the officers of the bank who had information superior to his own, that it was correct, nor until after it had first been sworn to by the president or cashier; and that he had never at any time participated in the active management of the bank.

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but had at all times implicit faith in both president and cashier to whom the directors had delegated the management. He never attested a report in disregard of any criticism, request or warning of the Comptroller, or any bank examiner, or other agent of the Comptroller. His justification, and his refutation of the charges made by plaintiffs, was full and complete. On such a record, what is the appropriate forum to determine the issue of *scienter*, assuming for argument's sake (what is not admitted to be true) that there may be some conflict in the evidence? It cannot be urged, in reason, upon this record, that the proofs are not sufficient to sustain a finding on the issue of *scienter* in favor of Mr. Thompson. The nature of that issue as one of *fact* cannot be changed. It remains to be determined as such, before the application of the statute can control the judgment, in favor of either plaintiffs or defendants. A reversal by this court would necessarily involve a review of the issue of pure fact, the drawing of inferences from the evidence variant from those drawn from the same evidence by the state court, and substituting for that of the state court its own conclusions of fact drawn from conflicting evidence sufficient to support a finding either way.

The rule of this court, in such a situation, seems to be that the finding of the state court on an issue that determines whether the federal right asserted is applicable, will not in any case be disturbed if there is sufficient evidence in the record to sustain it. *(German Savings & Loan Society v. Dormitzer*, 192 U. S. 125, l. c. 128, 129).

In the case last cited, Mr. Justice HOLMES clearly distinguished between the cases where a review of evidence by this court involves an inquiry into the *preponderance* of the evidence, and those in which there is *an entire want of evidence* to sustain a finding on which the applicability of a federal right depends. In the opinion it is said:

"It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal *without evidence impeaching it*, such an evasion of the constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question, he had sold out his property and business in Kansas, and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and there, therefore, was ground for the court to find that at that moment he changed his domicile to Spokane. * * * There was evidence warranting the finding, and that being so, we take the facts as they were found." *(German Savings & Loan Soc. v. Dormitzer*, 192 U. S. 125, 128.)

It is also settled that whatever was a question of fact in the *state court* is a question of fact on a writ of error from *this court* to the state court. *(Eastern Building & Loan Assn. v. Ebaugh*, 185 U. S. 114, l. c. 121, per Mr. Justice McKENNA; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, l. c. 622, 623, per Mr. CHIEF JUSTICE WAITE.

The conclusion is unavoidable that the issue of *scienter*, on which the applicability of the asserted federal right depends, was an issue of fact in the state court, and that it remains such on the writ of error from this court. On the facts found by the State Supreme Court, the statute compelled the judgments of reversal, and they should, therefore, be affirmed.

Among the errors assigned in this court (Printed Record, Case No. 501, *Jones National Bank v. Yates*, pp. 100, 102) are the following:

"7. The court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's

judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes United States.

"8. The court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said bank to make and publish such false statements, or with participating in or consenting thereto.

"18. The court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under section 5239 Revised Statutes of the United States, *and as such are supported by the evidence.*"

The quoted assignments present naked issues of fact, recognized to have been determined, as such, by the State Supreme Court. Such assignments present no questions that are reviewable on the present writs of error. While other assignments seek to introduce federal questions, and to complicate the issue, it seems obvious that the question of fact is decisive and controlling. The applicability of the statute, and its operation to make proof of a *scienter* an essential precedent condition of recovery, having been previously determined, it was unavoidable that a finding on whether the proofs sustained that issue must control the final judgment. Having been purely an issue of fact in the state court, it remains an issue of fact here, and as such is not subject to review.

V.

The petitions of plaintiffs tendered no issue upon any written reports other than those set forth in Exhibits A and B of December 28, 1886, and December 9, 1892, the latter of which was not participated in by Mr. Thompson.

We have shown, in Chapter III, *ante*, that the judgments of the State Supreme Court are not rested on either

one of the suggestions found in the opinion of HAMER, J., (1) that the petitions are insufficient, or, (2) that the only specific charges of false statements relate to the reports of December 9, 1892, and December 28, 1886. Upon these points there was not a concurrence of a majority of the court. The only ground for the judgments in which LEFFER, J., concurred (and his concurrence was necessary to the rendition of judgments), was, that the *evidence* was insufficient to satisfy the rule of *liability* as determined by the authoritative judgment of the United States Supreme Court.

The points suggested, while not available to plaintiffs in error, were meritorious; and if judgments had gone upon those considerations they should not, for that reason, have been subject to reversal on the present writs of error. In Nebraska the Supreme Court retains the power, upon a second appeal, to reconsider the rule by which it formerly entered a judgment of reversal. (*Hastings v. Foxworthy*, 45 Neb. 676; *Eccles v. Walker*, 75 Neb. 722-727.) By appropriate objections to the competency of all reports offered, except those set forth in the petitions, defendants saved the points, and presented them upon the second appeal.

The Nebraska Supreme Court, very early in its existence, announced the rule that, in an action for false representations, it is necessary to set forth in the petition the precise representations which constitute the fraud, and that a mere averment that false and fraudulent representations were made was insufficient. That rule of pleading has since been consistently adhered to in a long line of well considered opinions, announced at frequent intervals. (*Arnold v. Baker*, 6 Neb. 135; *Aultman v. Steiman*, 8 Neb. 113; *Clark v. Dayton*, 6 Neb. 201; *Tepoel v. Saunders County Natl. Bank*, 24 Neb. 817; *Staley v. Housel*, 35 Neb. 164; *Crosby v. Ritchey*, 47 Neb. 924; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137;

Thomas v. Thomas, 33 Neb. 373; *First Nat. Bank v. Grosshans*, 61 Neb. 579.)

The rule is not peculiar to Nebraska, but is of general acceptation. (*Parker v. Armstrong*, 55 Mich. 176; *Franklin Ins. Co. v. Jenkins*, 3 Wend. 130, 135; *Railroad Co. v. Douglas County*, 18 Kans. 178, and cases cited.)

The same principle is applied in other actions of tort, as well as in cases of deceit. When damages are claimed from the publication of defamatory words, the precise words of the publication must be set forth. Complaints which merely state the *import* of the words of the publication are defective in substance. The words published are the final test of their own import, and their omission from the complaint is fatal. (See 13 Enc. Pl. & Pr. 47.)

An allegation that a tabulation of figures embodying the several items of resources and liabilities, which reached plaintiffs, was exaggerated, without specifying a single item, cannot be said to embody either the terms or substance of a false representation. It is the statement of a mere naked conclusion, and not of any fact, and tenders no issue in an action of deceit. On principle and authority this proposition seems to be clearly established. Had the point that the evidence was insufficient been ruled against Mr. Thompson, the State Supreme Court could not justly have refused to rule on the point of pleading. And, since the later statement was not attested by Mr. Thompson, and the limitation had long since run on the statement of December 28, 1886, the point, if favorably ruled, would have determined the judgment in his favor.

We have stated the point thus briefly, because, in our opinion, the contention of plaintiff is not raised on the record, and cannot control the judgments upon the present review. In any event, the point is meritorious. At the same time, the rule of pleading in question, it is submitted, is a matter of local procedure, on which the decision of the State Court would be final.

VI.

Proof of a scienter is indispensable to maintenance of the present suits.

A national bank director is not liable in an action of tort for the wrongful acts of his fellow directors, either by the common law or by Sec. 5239 U. S. Rev. Stat.

Directors of national banks are not charged, by law, with knowledge of what the books and papers of the bank show, and are not obliged to act on the presumption of the rascality of the officers and agents of the bank.

The power to conduct the banking business may, under the statute, be delegated by the directors to administrative officers and agents. The director's obligation of administrative duties assumed by his oath, is so qualified by the words "so far as the duty devolves on him," as to harmonize with the express power to delegate administrative duties.

Thomas v. Taylor, 224 U. S. 73, affirms the rule of liability previously announced in the present suits; and, where it differs in facts from these cases, has no bearing on the separate case of defendant David E. Thompson.

A short review of the governing rule of liability, and of the contentions of plaintiffs in error, will make it plain that the evidence against Mr. Thompson is fatally deficient. The considerations which we present below will also demonstrate that the contention that *Thomas v. Taylor*, 224 U. S. 73, is a departure, in substance, or a modification of *Yates v. Jones National Bank*, is utterly destitute of merit. The present suits are for deceit, and the burden is on plaintiffs to prove the particular falsehoods against the director charged with liability. These are not actions for mere neglect, nor for misfeasance, nor for mismanagement of the bank. It is conceded that actions of the latter classes could not be maintained by plaintiffs. Consideration is here limited to proofs showing that the plaintiffs were deceived by acts of the defendants. No

supposed inattention or general neglect of duty, by which the bank or all of its creditors may have suffered a common misfortune, goes to the issue. Mr. Thompson is not called on to try immaterial collateral issues. The wrongs here charged are personal to plaintiffs and are not shared in common, by the association and all of its creditors. We are to inquire whether Mr. Thompson *knowingly made*, or *knowingly permitted* false official reports to be made, within the rule of the federal statute. This involves, at the outset, a consideration of the terms employed by the statute which creates and defines the liability.

According to the Century Dictionary, the adverb *knowingly* means: "In a knowing manner; intentionally; designedly; as, he would not *knowingly* offend." The applicable definitions of the corresponding participial adjective *knowing*, according to the same authority are: "Conscious; intentional." The illustrative example of this use of the term which follows the quoted definition is: "He that remains in the grace of God sins not by any deliberate, consultive, *knowing* act. *Jer. Taylor*, Works (ed. 1835) i, 770."

The present Mr. CHIEF JUSTICE in condemning and exploding the doctrine that a director who merely attested an untrue statement is civilly liable "because he did so at his risk, since it was his duty to know or refrain from acting," said:

"That this imposed a higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court, pointing out that where, by law, a responsibility is made to arise from the violation of a statute *knowingly*, proof of something more than negligence is required; that is, that the violation must in effect be *intentional*." (*Yates v. Jones National Bank*, 206 U. S. 179, 180.)

The precise and technical accuracy of the quoted exposition of the significance of the term *knowingly* in section

5239 U. S. Rev. Stat., is proved by the accepted definitions, and by the references, in the opinion, to the previous decisions of this court. It contains no inaccuracies to be ironed out or refined away. On the previous hearing the sense and controlling force of the statute were elaborately presented by briefs, and were the sole points presented in the separate brief of Mr. Thompson. A refining process to destroy the definition of the rule of liability then announced, and to nullify judgments rendered in conformity thereto, and in obedience to the mandates of this court, should not be indulged upon the present hearing. The law of the case, as settled in the previous well considered and unanimous opinion, must control the disposition of the cases upon a second review.

The proofs show that Mr. Thompson's intentions and efforts were, always, to render *true* reports, and that he was at no time involved in guilty participation in any *false* report. Like the man who "remains in the grace of God," he "sinned not by any *knowing* act." On this state of the proofs he cannot be held to civil liability under the opinion previously delivered by this court in these same cases.

In *McDonald v. Williams*, 174 U. S. 397, which arose out of the same bank failure here involved, and is cited in the previous opinion of this court to sustain the construction there placed on Sec. 5239 Rev. Stat., the court said:

"The *permitting* to be withdrawn cannot be found upon the simple receipt of a dividend under the facts stated above. One is not usually said to *permit* an act which he is wholly ignorant of, nor would he be said to *consent* to an act of the commission of which he had no *knowledge*."

McDonald's Case, quoted above, was based on section 5204 U. S. Rev. Stat. forbidding withdrawal, in dividends or otherwise, of any part of the capital of a national bank. The word "knowingly" was not in the section, but the

construction held was based on the presence of the word "permit."

In *Potter v. United States*, 155 U. S. 438, also cited approvingly in the previous opinion in the present cases, upon the meaning of the word "knowingly," the court said:

"In *Felton v. United States*, 96 U. S. 699, 702, it was said: 'Doing or omitting to do a thing *knowingly* and *wilfully*, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word "wilfully," says Chief Justice Shaw, "in the ordinary sense in which it is used in a statute, means not merely "voluntarily," but with a bad purpose.' *Com. v. Kneeland*, 20 Pick. 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' 1 Bishop, Crim. Law, Sec. 428."

In *Utley v. Hill*, 155 Mo. 232, also cited approvingly in the previous opinion of this court in these cases, which involved the civil liabilities of a state bank of Missouri, the court said:

"The word *knowledge* here employed must be taken in its common acceptation; that is, in the plain or ordinary meaning and usual sense of the word. * * * It ought to be so construed that no man who is innocent can be punished or endangered * * *. So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webst. Dict. defines *knowledge*: '(1) The certain perception of truth; belief which amounts to, or results in, moral certainty; indubitable apprehension.' '(5) Information, intelligence; as, to have knowledge of a fact.' The *knowledge* which the law requires that a *director* shall have had, means a *guilty knowledge*, not an innocent, *bona fide* ignorance, arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. *If this had not been the intention the liability would have been made absolute and unqualified, instead of dependent upon knowledge.*"

Mason v. Moore, 73 Ohio State 275, cited incidentally in the previous opinion of this court in the present cases, holds upon the authority of *Briggs v. Spaulding*, that directors of a national bank are not charged, as a matter of law, with knowledge of its affairs, or what its books and papers show; and that such knowledge cannot be imputed to the directors, but must be proved like other essential facts.

Briggs v. Spaulding, 141 U. S. 132-174, cited incidentally in the previous opinion of this court in these cases, was a case in which this court considered the individual liability of national bank directors for neglect of duty, where recovery was sought in behalf of the corporation. In the opinion by Mr. Chief Justice FULLER it was said:

"Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption.

"'I know of no law,' said *Vice-Chancellor* McCoun, in *Scott v. Depeyster*, 1 Edw. Ch. 541, 6 L. ed. 239, 'which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued; but, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable.'

"Nor is knowledge of what the books and papers would have shown to be *imputed*. In *Wakeman v. Dalley*, 51 N. Y. 32, Judge EARL, observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors:

'He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.'

"And so Sir George Jessel, in *Hallmark's Case*, L. R. 9 Ch. Div. 332: 'It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *Ex parte Brown*, which shows that it is the duty of a director to look at the entries in any of the

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books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case.'"

Briggs v. Spaulding also holds that corporate directors, or trustees, are not liable for the wrongful acts of their fellow directors, or co-trustees.

It was upon a consideration of the foregoing authorities that this court determined the use of the term *knowingly*, in section 5239 U. S. Rev. Stat., makes guilty knowledge and, in effect, an *intentional* violation of the statute, an indispensable prerequisite of the directors' liability. But references to the same effect may be greatly extended.

An Ohio statute made it an offense for the owner of a house to *knowingly permit* (the identical terms of section 5239) it to be used for an unlawful purpose. It was held that *knowingly permitting* such use was not shown by evidence that a lessor, having knowledge of the illegal use of leased premises, failed to terminate the tenancy. *Crofton v. State*, 25 Ohio St. 249.

In *State v. Stafford*, 67 Me. 125, it was held that the terms *knowingly permit* imply permission or consent, as well as knowledge.

Rev. Stat. Sec. 328 (U. S. Comp. Stat. 1901, p. 2127) forfeits personal property owned by a person who has *knowingly permitted* or suffered his premises to be used for purposes of ingress or egress to or from an illicit distillery. It was held that it is a prerequisite to such forfeiture that the person should have *known* that the ingress or egress over his premises was to or from a distillery. *Gregory v. United States*, 10 Fed. Cas. 1195, 1198.

"In their ordinary acceptation the words 'unlawfully, wilfully and *knowingly*,' when applied to an act or thing done, import *knowledge* of the act or thing so done, as well as evil intent or bad purpose in doing such thing."

Per Mr. Justice HARLAN in *Rosen v. United States*, 161 U. S. 33, followed in *Price v. United States*, 165 U. S. 311.

In a statute making it a misdemeanor to *knowingly* vote, not being at the time a qualified elector, the term *knowingly* was held to mean *knowledge* of a state of facts which would disqualify the voter. *McGuire v. State*, 26 Tenn. (7 Humph.) 54, 55.

"We are of opinion that the words 'knowing it to be false' import a willful misrepresentation, with *actual knowledge* of its falsity, and not merely such constructive knowledge as can be imputed from the presumption that the officer signing the report knew the law and comprehended the precise import of the language used, when construed with reference to statutory provisions." *Pier v. Hammore*, 86 N. Y. 102.

"To charge the officer with the severe penalty imposed for signing a false report, *knowing* it to be false, some fact or circumstance must be shown indicating that it was made in bad faith, wilfully, or for some fraudulent purpose, and not ignorantly or inadvertently; and this is a question of *fact* which must be passed upon before liability can be adjudged." *Pier v. Hammore*, 86 N. Y. 103; followed in *Bonnell v. Griswold*, 89 N. Y. 125, and applied to a defendant who, like Mr. Thompson, "relied on representations of the other parties having knowledge superior to his."

The proofs do not necessitate the application of the extreme rule held by most of the cases, in order to justify the judgments in favor of Mr. Thompson. There is an entire absence of proof that when Mr. Thompson attested any one of the four or five reports, which were the only ones with which he was connected in the course of the many years he served as director, he had knowledge of any fact or circumstance that would arouse his suspicion, or notify him that any report which he attested was false or fraudulent. It is settled that without knowledge of some

sort, at the time of the attestation, that the report was false, he cannot be held liable for *knowingly* attesting, or *knowingly permitting* the making and publication of a false report. "Their conduct is to be judged, not by the event, but by the circumstances under which they acted." Per Mr. Chief Justice FULLER, in *Briggs v. Spaulding*, 141 U. S. 155.

Without presuming to reargue the question that was settled on the previous review of these cases, we think it pertinent to recall some provisions of the National Banking Act, as an aid to the disposition of some minor contentions of plaintiffs in error.

Among other specific powers conferred by Sec. 5136 Rev. Stat. on national banks, are the following:

"*Fifth.* To elect or appoint directors, and by *its board of directors* to appoint a *president, vice-president, cashier,* and *other officers, define* their duties, require bonds of them and fix the penalty thereof, dismiss such officers, or any of them at pleasure, and appoint others to fill their places.

"*Sixth.* To prescribe by its board of directors, by-laws, not inconsistent with law, regulating the manner in which its stock shall be transferred, *its general business conducted, and the privileges granted to it by law exercised and enjoyed.*

"*Seventh.* To exercise by its board of directors, *or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

While the section referred to makes action by the directors necessary to adoption of by-laws and selection of officers, it is too clear for disputation that it gives to the directors the alternative either of personal administration,

or of administration by officers and agents of their selection. Personal administration by the directors is not obligatory. The functions of administration were, in the case of the Capital National Bank, lawfully delegated to the president and the cashier. It was competent, under the statute, for the directors to delegate to those officers, as was done, full power of administration necessary "to carry on the business of banking." On this point there is not room for construction.

The National Banking Act did not require the director to assume, by his oath of office, the burden of personally administering the association. The burden assumed by the official oath of the director was so qualified as to permit of his delegating all of the administrative duties, as expressly authorized by the quoted provisions.

So much of Sec. 5147 Rev. Stat. prescribing the official oath, as is material to the point under consideration, is as follows:

"Sec. 5147. Each director, when appointed or elected, shall take an oath that he will, *so far as the duty devolves on him*, diligently and honestly administer the affairs of such association, and will not *knowingly violate* or *willingly permit to be violated*, any of the provisions of this title. * * * *"

The obligation of administration is limited and qualified, by the words "so far as the duty devolves on him," so as to harmonize with the express power to delegate the administration, conferred by Section 5136. When the director chooses to exercise the function of administration, he is, of course, held by the statute and by his oath to the standards of *diligence* and *honesty*. There are certain functions, like participation in by-laws and selection of officers, which he cannot delegate, and as to these he is held to the same standards. But delegation of the *general conduct of the business of banking* to the president and cashier, is consistent with both the grant of powers by Section

5136 and the oath of office prescribed by Section 5147. In so far as such administrative duties are thus lawfully delegated, the burden of administration assumed by the official oath has no application, since they do not then *devolve on him*, and, therefore, do not come within the terms of his oath. There seems here no room for construction. Saving a reasonable and fair interpretation of the words of the oath, this general suggestion is true to the statute and is unavoidable, except by a perversion of its terms or a judicial usurpation of legislative prerogatives. This theory of the statute, within certain limitations not well defined, was recognized by Mr. Chief Justice FULLER in *Briggs v. Spaulding*, 141 U. S. 132-174.

The maintenance of the judgment in favor of Mr. Thompson does not call for any re-examination or revision of the holding in *Briggs v. Spaulding*, since it was there held that the director is not charged, by law, with knowledge of what the books and papers of the bank would show, is not obliged to act on the "presumption of rascality" of the administrative officers and agents of the bank, and is not liable for the wrongful acts of his fellow directors, in which he did not participate. It is enough for the purposes of *Mr. Thompson's case* that these conclusions are necessarily drawn from the plain and unambiguous terms of the governing statute. It is obvious, upon these considerations, that the mere attestation of the report does not prove the director's knowledge of its falsity. Such knowledge, which is indispensable to the maintenance of these suits, cannot be *derived* from the director's *presumed* knowledge of the books and records, nor *imputed* to him, as a matter of law, either from such source, or from his holding the office of director. Affirmative proof of some sort that false statements were *knowingly* made by the individual director is essential to plaintiff's case.

Sec. 5239 U. S. Rev. Stat. defining the liabilities of national bank directors, is as follows:

"If the directors of any national banking association shall *knowingly violate*, or *knowingly permit* any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. *Such violation* shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. *And in cases of such violation* every *director who participated in* or *assented to the same*, shall be held liable, in *his* personal and individual capacity, for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of *such violation*."

The italics are employed by us, in quoting this statute, to show that in each provision there is a reference back to the terms *knowingly violate* or *knowingly permit* contained in the first sentence of the section. It is only in case of *such violation*, that is, one *knowingly* done or *knowingly permitted* by the director, that he is made liable in damages; and even then it is only the director *who participated in or assented to the same* who is made liable *in his personal* capacity for damages sustained in consequence of *such violation*.

This punishment is imposed only for personal delinquency. The statute requires proof of *participation* in, or *assent* to, a violation of the statute, *knowingly* committed, or *knowingly permitted*. Its terms definitely exclude the theory that an innocent director can be held for the wrongful acts of his fellow directors. The liability is as distinctly personal to the wrongdoer, as is the obligation of the director's oath to the individual who swears to it.

The general rule, that a director is not liable for the tort of a fellow director, which is in harmony with the statute

under consideration, and with the holding in *Briggs v. Spaulding*, 141 U. S. 132-174, was well stated and applied by the Nebraska Supreme Court in *Gerner v. Mosher*, 58 Neb. 144. In that case a verdict was directed in favor of Mr. Thompson for want of proof of participation in a report, which was the foundation of an action of deceit. In approving the direction of a verdict for want of proof of participation, the court said:

"The plaintiff seeks to avoid the effect of failure of proof in this respect by the argument that the four directors *not joining* in the reports were bound *as directors* to know the condition of the bank, and conclusively presumed, therefore, to know the falsity of the reports, and that *the reports being a corporate act*, are their act as well as that of those actively participating. * * * The *corporation* may be bound by the act of its constituted officers, but when it is sought to charge *officers individually* for *ultra vires* acts, or for *misconduct*, it is only those who *participate* therein who are liable, in the absence, of course, of conspiracy or indirect participation, which was not only unproved, but was affirmatively disproved. As to Thompson, Stuart, Phillips and Hamer, it follows that the judgment must be affirmed."

This quoted point in the opinion of Judge IRVINE was concurred in by all of the judges and commissioners, and is authoritative; although *on other points* NORVALL, J., delivered the ruling opinion. *Participation* was made the test of liability. And, with the addition of the element of *scienter*, this is the precise test employed in Sec. 5239 U. S. Rev. Stat.

To the same point HAMER, J., in his opinion in the instant cases said:

"Neither is he (a national bank director) liable for the frauds and wrongs of the officers of the bank, unless he has personal knowledge thereof, or participates in such fraudulent acts. If it were not so, there would be great difficulty in securing men to assume the position of nation-

al bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers." (Printed Record Jones National Bank Case, 501, p. 52; *Jones National Bank v. Yates*, 93 Neb. 127.)

In view of the complete exposition of the rule of liability in *Yates v. Jones National Bank*, 206 U. S. 158-181, the foregoing review of the statutes and decision may be superfluous. They are presented because of the claim urged by plaintiffs in error that the decision in *Thomas v. Taylor*, 224 U. S. 73, so far qualifies and modifies *Yates v. Jones National Bank*, as to permit a recovery against directors by *imputing* knowledge to them of the falsity of the report from the mere facts of attestation and official relationship. It is claimed that the same circumstances from which liability was adjudged in *Thomas v. Taylor* were shown in the present cases. Too much is claimed for the latter precedent, which has no bearing or significance in the case of Mr. Thompson, as made on the records under review.

It is to be noted, at the outset, that *Thomas v. Taylor* is a flat and express affirmance of the rule of liability declared in *Yates v. Jones National Bank*. To this effect Mr. Justice McKenna in the opinion (224 U. S. 80, 81) said:

"All through the argument of plaintiffs in error runs the insistence that the common-law action of deceit does not lie against the directors of a national bank, and that the only measure of their responsibility is laid down in the national banking laws. This is admitted. It was conceded by the appellate division as having been established by *Yates v. Jones National Bank, supra*, and the question in the case comes to the simple one, whether the appellate division rightly decided that the findings in the case at bar satisfied the test of liability declared in the *Yates Case*.

"In that case a broad consideration of the national banking laws was given, and it was deduced from the ' that the report which Section 5211 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3498) required must contain a 'true' statement of the condition of the bank, and that 'the making and publishing of a false report is prohibited.' These, however, it was said, were implications, but that the liability of the directors was fixed by the express provisions of the laws, and its extent was measured 'by the promise not to knowingly violate, or willingly permit to be violated, any of the provisions of' the title relating to national banks.

"This test is the foundation of the action. The complaint charges plaintiffs in error with *actual* knowledge. The allegation is that when plaintiffs in error attested the report 'they knew the same was not correct, and was false, and said statement was thus attested by them with the intention of deceiving the public, and, among others, the plaintiff' (defendant in error). And the appellate division says: 'That the report was false, and *known* to the defendants to be false, they do not deny, nor do they attempt to explain their conduct.' This would seem like a finding of fact of *knowledge* of the falsity of the report on the parts of plaintiffs in error. Indeed, in distinguishing the case from the *Yates Case* the court did so on the ground that in that case 'there had been a recovery against directors without proof of *scienter*, which proof the statute requires,' and added: 'Such proof has been supplied in the present case.' "

The conclusiveness of the quoted observations is obvious. But the whole argument of plaintiffs in error in the present suits, ignoring the distinct adherence of the opinion to the doctrine held in *Yates v. Jones National Bank*, and the application of that doctrine to the record then under review, is rested upon the condemnation by the court of an argument of counsel which distorted and perverted the language of its previous opinion. Counsel argued, says the opinion, that the act requires "proof of something more than negli-

gence *and recklessness*, and that *nothing short of an intentional violation* will suffice;" and supported the argument by a reference to *Yates v. Jones National Bank*. In so far as this argument was based on the opinion cited, there was an obvious interpolation of the words "and recklessness," and an omission of the qualifying words "in effect." Counsel had taken liberties with the language employed by the court which amounted to a perversion, which the court took occasion to condemn, by recalling the precise words of the opinion, and pointing out the departure therefrom by counsel, as follows:

"The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, —that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than *recklessness*,—not that there should be an intentional violation,—but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. *They had notice* from the Comptroller of the Currency that $194,000 of items counted as assets of the bank were doubtful and should be collected and *charged off*. This 'was a direct *warning* to them,' as the trial court said, 'by the bank examiner and Comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful.' They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank, is a violation of the law."

In the final analysis, approval of the judgment against the attesting directors was justified by the undisputed proof that the directors had previous *notice*, through a *warning* letter of the Comptroller, that items aggregating nearly twice the capital stock, were counted assets, which were doubtful and should be collected or charged off. It turned

out that many of these identical items were valueless, and liability was only adjudged to the extent that losses were sustained *on items to which the attention of the attesting directors had been specifically challenged*. In other words, it was based on knowledge and notice received, in writing, previous to attestation of the false reports on which liability was predicated. The directors offered no explanation and no justification for the attestation, made after obtaining *knowledge* of the large deficit in admissible assets. The rule of *Yates v. Jones National Bank* was applied without change or modification.

The authorities heretofore cited demonstrate that there is no tenable ground for modifying or altering the rule previously expounded and applied to these cases. To knowingly violate the law, implies *knowledge* of facts which would render the act one that is forbidden by law. To knowingly participate in a false and fraudulent report implies *knowledge* of falsifications and frauds. To knowingly permit the officers to make such report implies both *knowledge and assent* to the falsifications and frauds. One cannot *permit* an unlawful act *knowingly* without any notice or knowledge of facts which indicate it to be unlawful. These conclusions have been repeatedly announced by this court in the opinions to which reference has been made.

As we have previously pointed out, Mr. Thompson did not attest or participate in any report subsequent to July 9, 1891. The earliest letter from the Comptroller in this record is of date September 8, 1891. No act of Mr. Thompson is challenged on the ground that he failed to give heed to any information conveyed to him by the Comptroller. So the particular facts that controlled *Thomas v. Taylor* have no analogy in the case of Mr. Thompson, and that particular aspect of the decision has no bearing, direct or remote, upon any issue raised on the present record affecting him.

Under a separate chapter of this brief we present a review of the evidence, as far as it is contained in the

printed record, to show that proof of a scienter—that he *knowingly* made, or *knowingly* permitted making and publication of false reports—is wholly wanting, and that the evidence is not sufficient to warrant or sustain a judgment against Mr. Thompson within the rule of liability defined by statute.

VII.

The interpretation and application to a motion for a rehearing of a provision in the state constitution making concurrence of a majority of the judges of the Supreme Court necessary to any decision, and the interpretation and application to the Chief Justice of the State Supreme Court of a disqualifying state statute forbidding any judge to sit in a case in which he is interested or has been counseled, involve matters of mere local law, not cognizable by this court on writs of error, and present no questions of lack of due process.

The equal division of the judges of an appellate court on a motion for a rehearing leaves its previous judgment in force.

An issue of whether a judgment has the concurrence of a majority of the judges of the court which rendered it, must be resolved by a consideration of the number who concurred therein at the time of its rendition, and not by the equal division of the judges upon a motion for a rehearing.

If, upon any theory, the questions stated are open to review, the conclusions reached by the State Court will be found to be correct and in harmony with the rules and decisions of this court.

Plaintiffs in error question the validity of the judgments of reversal on the ground that there was not a concurrence therein of a majority of the judges, by assignment 23 (*Jones National Bank v. Yates*, No. 501), as follows:

"23. The court erred in reversing appellant's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI, Section 2, *of the Constitution of the State of Nebraska*, whereby appellee has been deprived of his property without due process of law, and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the Constitution of the United States.

"This court still had jurisdiction of the case at the time it came on for final determination on appellee's motion for a rehearing, and when the final order was made herein there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case."

By the section of the state constitution referred to in the quoted assignment, the Supreme Court of Nebraska is constituted of seven judges, the concurrence of four of whom is necessary to pronounce a decision. The record shows entry of judgments of reversal January 31, 1913. The official report shows (93 Neb. 121) that REESE, Chief Justice, did not sit, and that of the six judges who participated, *four*, a constitutional quorum, concurred, and *two* dissented. The judgment so entered still stands, and it appears to have had the concurrence of the constitutional number of judges when entered. So much even the quoted assignment seems not to question.

The record shows a subsequent order, entered May 17, 1913, for an oral argument on a motion for a rehearing. The argument having been had, there was an entry made on the Journal January 7, 1914, as follows:

"This cause coming on to be heard upon the motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court, and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose, voted against allowing a rehearing, and Judges, Sedgwick, Letton and Fawcett voted to allow a rehearing, and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared

said motion to be carried; and upon due consideration whereof, the court doth find probable error in the judgment of the court heretofore entered herein. It is therefore ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed, and a rehearing herein ordered.

"Thereupon the following protest was filed: 'Hamer, Rose and Barnes, JJ., dissent from the order granting a rehearing herein, *and protest against the entry thereof on the journal* of this court, for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the Chief Justice having been consulted by the plaintiff, and having so announced when the case was on for hearing. *Shumway v. State*, 82 Neb. 163." (Printed Record, *Jones National Bank Case*, No. 501, pp. 65, 66.)

The protest, in the form quoted, is a part of the journal entry of the order granting a rehearing. For the reason stated therein, the Chief Justice had, on every occasion when the causes were called, announced his disqualification, had withdrawn from the bench while they were under consideration, and had left the decision entirely to his qualified associates. A like course had been pursued by the Chief Justice upon the oral argument of the motion for a rehearing, with the acquiescence of his associates and of all the parties to the suits.

By the protest entered on the journal three of the judges were impelled to *make public* the fact that the Chief Justice, notwithstanding his self-announced disqualification, had, in the secret councils of the court, cast the deciding vote, when he found his associates equally divided upon the motion for a rehearing. It later became known that the Chief Justice, in the same manner, had caused the entry of the previous order for an oral argument on the motion for a rehearing, although he declined to sit when the court heard the oral argument. It was conceded that the Chief Justice intended no wrong, but, nevertheless, his grievous error was a shocking breach of

propriety, and his participation rendered the order for a rehearing void, as stated in the quoted protest. The disqualification was declared by a state statute, and is therefore a mere local rule touching upon the interpretation of the highest state court is supreme and final.

Upon the Chief Justice's participation being thus called to the notice of the parties, Mr. Thompson (as did the other defendants) moved (1) to vacate the order of January 7, 1914, for a rehearing; (2) to vacate the order of May 17, 1913, for an oral argument; and (3) to correct the journal entry of its proceedings so as to show an equal division of the qualified judges on the motion for a rehearing, and to order that such equal division is a vote of adherence to previous judgment of reversal. The motion recited the particulars in which the proceedings were challenged, and assigned the disqualification of the Chief Justice, his announcement thereof, and the acquiescence of his associates and all of the parties to the suits in his retirement, and was supported by circumstantial testimony, by affidavit, of three witnesses. (Printed Record, *Jones National Bank Case*, No. 501, pp. 66-75.)

After these motions were noticed for hearing the Chief Justice filed a written statement (Printed Record, *Jones National Bank Case*, No. 501, pp. 75-77), in which, among other things, he said:

"When the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and on each occasion when the case came up in any form, if in court, *I withdrew*, if in the consultation room, *I kept silent*. I was acting in entire good faith and believed I should take no part in the decision. * * *

"It is true that I said from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument, and never took any part in the discussion of the merits of the case."

Upon the direct issue thus presented the State Supreme Court, by a vote of 5 to 1 (the Chief Justice not sitting), held that the Chief Justice was by a state law disqualified to sit, and that his participation rendered the order for a rehearing void. It further held that an equal division of the judges upon a motion for a rehearing was an adherence to the former judgments of reversal, and that to vacate its own previous judgment, or to grant a rehearing to review its own judgment, requires the concurrence of a constitutional quorum of the court. The order in which the Chief Justice participated, being held void, was vacated and an order (concurred in by five judges) was entered denying the motion for a rehearing and adhering to the previous judgments of reversal. (Printed Record, *Jones National Bank Case*, No. 501, pp. 92-93, 97.)

The state court's decision on the sensitive issues of propriety, and the invalidity of the exercise by a disqualified judge of judicial functions, was sound law and ethics; it lifted all odium from the court; it silenced all murmurs and complaints of partiality and bias, incident to participation of an interested judge who had once withdrawn because of a self-professed and self-proclaimed interest; it kept the stream of justice pure and vindicated the letter and spirit of the disqualifying local statute. The motion to vacate was of grave import to the bench, the bar, the suitors for justice and the citizens of Nebraska, and it was highly creditable to the court that its decision on the issue of propriety was not influenced by the individual views of its members on the motion for a rehearing.

It is submitted, (1) that the issues of whether the Chief Justice was qualified and, incidentally, whether the order in which he participated was void, and whether, under the constitution of the state the allowance of a rehearing required the concurrence of four judges, are matters of local law of which this court cannot take cognizance; and (2) if those issues are open, an approval of the State Supreme Court's decison is imperiously demanded by the

highest considerations of justice, ethics, and sound public policy. The following doctrines are sound in principle and well sustained by authority:

1. Section 1174 Revised Statute Nebraska, 1913, provides that "A judge or justice is disqualified *from acting as such*, except by mutual consent of the parties, *in any case wherein he is a party or interested* * * * or where he has been attorney for either party in the action or proceeding, and such mutual consent *must* be in writing and made part of the record." Under this statute the want of judicial power because of a disqualifying interest does not depend upon an express challenge of a suitor. It is the official duty of the disqualified judge to become his own recusant, and to withdraw and wholly abdicate his judicial powers in the particular case. *Walters v. Wiley*, 1 Neb. Unoff. 235; *Oakley v. Aspinwall*, 3 N. Y. 547; *Horton v. Howard* (Mich.), 44 N. W. 1112; *People v. De La Guerra*, 24 Cal. 73.

2. The disqualification of the judge invalidates all acts involving an exercise of judicial discretion, including a ruling on a motion for a rehearing. *Cramp & S. v. Internat. C. M. Co.*, 228 U. S. 645; *Harrington v. Hayes Co.*, 81 Neb. 231; *Salm v. State*, 89 Ala. 56, 8 So. 67; *People v. De La Guerra*, 24 Cal. 73; *Shannon v. Smith*, 31 Mich. 453; *Gordon v. Conor*, 5 Idaho 673, 51 Pac. 749; *State v. Wofford*, 111 Mo. 526, 20 S. W. 236; *Frevert v. Swift*, 19 Nevada 363, 11 Pac. 273; *State v. Finder*, 12 So. Dak. 423, 81 N. W. 959; *State v. Burks*, 82 Tex. 584, 18 S. W. 622; *Perkins v. Haywood*, 124 Ind. 445, 24 N. E. 1033; *Lacy v. Barrett*, 75 Mo. 469; *Horton v. Howard* (Mich.), 44 N. W. 1112; *Oakley v. Aspinwall*, 3 N. Y. 547.

3. It is proper for the court, on motion, to vacate its own previous order where the same is void because made or participated in by a disqualified judge. *Case v. Hoffman* (Wis.), 74 N. W. 220; *Oakley v. Aspinwall*, 3 N.

Y. 548; *Secard v. Tasker*, 143 N. Y. Supp. 257. Since this court has no concern in the mere forms of local procedure, *Wm. Cramp & Sons v. Internat. C. M. T. Co.*, 228 U. S. 643-654, must be regarded as a precedent sustaining the view that the order for a rehearing was rightly vacated.

4. The equal division of the judges of an appellate court on a motion for a rehearing to review its own previous judgment, leaves that judgment in force. *Carmichael v. Eberle*, 177 U. S. 63; *Shumway v. State*, 82 Neb. 152, 165. The application of this rule was forced on the State Supreme Court by the requirement of the State Constitution that the concurrence of four judges is necessary to a decision. The judgment of reversal had the concurrence of *four* judges, and to have permitted those final judgments to be vacated by *three* judges would have permitted a minority of the court to nullify judgments which, by the constitution, could only be rendered by a concurring majority of the whole court, and would have completely circumvented and nullified the constitutional provision.

Since rule 30 of this court specifically declares that no petition for a rehearing will be granted unless "a majority of the court so determines," it requires unusual hardihood to present here an assignment that due process is wanting in an order of the state court which merely decides that, after final judgment has once been entered upon an appeal, an equal division of the judges on a motion for a rehearing leaves the previous judgment in force. The frivolity and absurditty of the assignment are emphasized by the decision in *Carmichael v. Eberle*, 177 U. S. 63, that an equal division of the judges of the Supreme Court of the territory of New Mexico, upon a motion for a rehearing, was an adherence to its previous judgment entered by a concurring majority of the court, and left the previous judgment in force.

The rule, that an equal division on a motion for a rehearing leaves the previous judgment in force, was not promulgated by the State Supreme Court in the cases now under review. That rule was previously applied in a homicide case in which there was a capital sentence. *Shumway v. State*, 82 Neb. 152, 165. A short explanation will serve to make plain the significance of the *Shumway Case*. A judgment of affirmance was rendered July 17, 1908. (82 Neb. 152.) At that time the court was constituted of three judges only. A motion for a rehearing was made, on which the court heard oral argument, and which was not decided until January 23, 1909. (82 Neb. 165.) Meanwhile, at the November 3, 1908, election, the people adopted an amendment to the state constitution, whereby the number of judges of the Supreme Court was increased to seven, and four additional judges, appointed pursuant to that amendment, had qualified and were in the discharge of their judical duties. Verification of these historical facts appears in the report of *State v. Dean*, 84 Neb. 344. When the motion for a rehearing was determined, the constitution, as amended, required concurrence of four judges to pronounce a decision. Judge ROSE, then a member of the court, had, previously as assistant attorney general, participated in the prevailing argument that had resulted in the affirmance of Shumway's capital sentence, and was, therefore, disqualified, by the statute previously mentioned, from acting as a judge in that particular case. He retired, as did the Chief Justice in the present cases, and left the determination of the motion for a rehearing to his six qualified associates. In that case, as in the present suits, the remaining six judges were equally divided on the motion for a rehearing. The report shows the ruling opinion on the motion by LETTON, J. (82 Neb. 166), to have been concurred in by BARNES, J., and ROOT, J. There was a dissenting opinion by FAWCETT, J. (82 Neb. 170), concurred in by REESE, C. J., and DEAN, J. An order was entered (82 Neb. 170) overruling the mo-

tion for a rehearing, and R. Mead Shumway, the convict, was executed, pursuant to the previous judgment of affirmance as the return of the death warrant issued by the clerk of the State Supreme Court will show.

The interpretation of the state constitution, which left in force the judgment affirming a capital sentence against Shumway, was applied, in precisely the same circumstances, so as to leave in force the previous judgments rendered in the instant cases. Only one judge questioned the soundness of the controlling precedent. The contention that the rule of due process, required by the 14th amendment, was violated by these proceedings, is not only frivolous, but is, in view of their strict harmony with the rules and decisions of this court, already cited, so far-fetched as to be grotesque. There is nothing of substance in the assignment of error under consideration, beyond an appeal to the court to review the interpretations of the State Supreme Court of the state constitution and the disqualifying state statute. It is elementary that decisions of the State Supreme Court involving mere constructions of local laws, are final, and not subject to review by this court. *Kiernan v. City of Portland*, 223 U. S. 151; *King v. West Virginia*, 216 U. S. 92; *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U. S. 217. The point is so elementary that we forbear to extend references. The claim that an equal division on the motion for a rehearing, deprived the judgments of reversal of all force and virtue, is utterly destitute of merit, and presents no federal question for review, upon any aspect of the present records.

VIII.

The issue of whether, upon the whole case, the evidence justified or required a finding in favor of the defendants, is not presented to this court by the printed record.

A large part of the evidence is not printed, and since this court only examines the printed record, it must presume, in favor of the finding of the State Supreme Court, that the evidence before the State Court, which is omitted from the printed record, justified and required a finding upon the whole case in favor of defendants.

Plaintiffs in error filed a written designation of the portions of the evidence contained in the bill of exceptions which they desired to have printed, in which they designated fragmentary portions, only, of the testimony. (Printed Record, Bill of Exceptions, pp. 765-772.) This designation, in numerous instances, directed the omission of all the testimony given by specified witness. Designations 1 to 3 are as follows:

"1. Bill of Ex. p. 1: title appearances and certificate of the clerk of the district court.
"2. Bill of Ex. pp. 13 to 14: stipulation.
"3. Bill of Ex. p. 15: first four lines at top of page."

The above are fairly representative and illustrative of 148 designations, which conclude with the designation of the bottom of page 1884 of the bill of exceptions. Designations 27 and 72, among others of like character, are as follows:

"27. Bill of Ex. p. 222: testimony of Hall Young, omit in printing.
"72. Bill of Ex. p. 581: testimony of H. T. Jones may be omitted in printing."

Portions of the many hundreds of pages omitted in the designations of plaintiffs in error have been brought into the printed record by some additional designations made

by defendants, but a very considerable portion of the great body of the testimony and documentary evidence is not contained in the printed record. This fact is obvious by a casual inspection of the printed record, so that the points here urged are raised on the face of the printed record.

In *Grand Trunk R. Co. v. Cummings*, 106 U. S. 701, it was said by Mr. Chief Justice WAITE:

"The evidence introduced on the part of the company is not in the bill of exceptions, * * * Under such circumstances it must be presumed, in the absence of anything to the contrary, that when the case was closed on both sides, there was enough in the testimony to make it proper to leave the issues to be settled by the jury."

In *United States v. Copper Queen C. M. Co.*, 185 U. S. 497, it was said in the opinion by Mr. Justice PECKHAM:

"When the court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement, or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial, so that the record shall affirmatively show that fact. *Russell v. Ely*, 2 Black, 575, 580. In the cited case the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that, according to a well known rule, the court, under such a condition of the record, was bound to presume that there was that in the witness's testimony which justified the instruction."

There is here no stipulation by counsel that the printed record contains all the evidence. Plaintiffs in error took their own course in printing such parts of the evidence as they deemed important, and are only entitled to have considered such points of law as arise upon the printed record. That which is not printed is not available. It will be presumed that the obviously omitted parts of the testimony

contain evidence which justified or required the State Supreme Court to resolve the issue of fact, of whether the defendants had *knowingly* violated or *knowingly permitted* the violation of the statute requiring the making and publishing of reports, in favor of the defendants, and against the plaintiffs who held the burden of proof. It is submitted that this consideration, alone, should result in an affirmance of the judgments of the State Supreme Court.

IX.

The records do not present for review the point assigned by No. 9 of the assignment of errors, that the State Supreme Court erroneously decided the National Banking Act precludes the maintenance of an action for fraud and deceit based on voluntary acts of directors entirely without the scope of the act.

Rev. Stat. U. S. Sec. 709 (Judicial Code, Sec. 237) conditions the right of review in this court upon the circumstance that the decision of the state court was *against* the title, right, privilege or immunity claimed under the federal statute. Since the assignment in question asserts that the decision of the state court was in *favor* of the validity of the federal right, the statutory condition, on which jurisdiction of the court depends, does not exist, and the point asserted in the assignment of errors is not open to review. The cases to this effect are so numerous, and the doctrine so elementary and well settled, that we forbear to burden the court with references.

We assume that the very recent amendment of December 23, 1914, whereby there was added to section 237 of the Judicial Code, a provision authorizing this court, by *certiorari*, to review judgments of the highest courts of the states, although they may have been in *favor* of the federal right asserted, has no application to these pending suits, which are brought here upon writs of error. The

limitations upon the powers of this court to review such judgments upon writs of error are, apparently, not affected by the amendment of December 23, 1914, which merely confers discretionary power, by a special proceeding, to review judgments of the state courts, although they may have been in favor of the federal right asserted. These suits had long been pending and had been advanced and assigned for hearing before the amendment was enacted, and this circumstance, as well as the provision for a special proceeding by writ of *certiorari* for exercise of the enlarged powers conferred on this court, indicates that the amendment cannot affect or enlarge the court's appellate powers in the present suits, upon writs of error.

If the point, however, can be said to be open to review in these proceedings, it is obviously without merit. The defendants have never, at any time, during the long course of the controversies, claimed immunity under the federal statutes against liability for voluntary private acts; and the State Supreme Court in pronouncing the judgments under review did not so hold or decide. It is our understanding that all of the judges of that court were in accord on the proposition that the record contained no evidence whatever to sustain judgments against the defendants upon non-federal grounds. That is, there was no evidence that the defendants made any oral misrepresentations, as was specially found by the trial judge, and the averments to that effect were false. And there was no evidence that any of the present defendants ever participated in any statements or representations which came to the plaintiffs, other than to attest some reports to the Comptroller, which the National Baking Act required to be made and published. It was the entire absence of proof of liability on non-federal grounds that led to their elimination, and necessitated a determination of the federal question. To this effect the remarks of HAMER, J., addressed to the failure of proofs, in his opinion, were as follows:

"It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they or either of them had any knowledge that any published statement or cards containing any information as to the condition of the bank were ever sent to the plaintiffs, or any of them, by any officer or agent of the bank." (Printed Record, *Jones National Bank Case*, No. 501, p. 51; *Jones National Bank v. Yates*, 93 Neb. 125.)

Touching the evidence affecting Mr. Thompson, HAMER, J., said:

"That he was not informed in any way of the fact that published statements of the condition of the bank, were sent by any agent or officer of the bank to the plaintiffs, if any such were sent. * * * Defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain, and they do not claim that he ever had any conversation with, or made any statement whatever to the plaintiffs, or any of them." (Printed Record, *Jones National Bank Case*, No. 501, p. 52; *Jones National Bank v. Yates*, 93 Neb. 126.)

The ground expressed by LETTON, J., for his concurrence in the judgments rendered was that under the decision of this court that "the measure of responsibility concerning the violation by directors of *express commands* of the national bank act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act," he thought "a case had not been made." (Printed Record, p. 51; *Jones National Bank v. Yates*, 93 Neb. 131.) LETTON, J., proceeded on the assumption that no case had been proved on non-federal grounds.

The dissenting opinion by SEDGWICK, J., also proceeds upon the assumption that there was no proof of liability on non-federal grounds, and is confined to a discussion of the asserted claims of liability based on the reports made

to the Comptroller of the Currency. Because of these expressions and incidents we have understood that there was no division among the judges of the state court on the proposition that there was an entire failure of evidence to support the charges that defendants had either made or participated in any statements other than the reports to the Comptroller.

But if the opinion of HAMER, J., may be regarded as the ruling opinion on points other than the one in which LETTON, J., concurred, and if it may be derived therefrom that the State Supreme Court decided (as it did not in fact do) that the National Banking Act afforded immunity to directors from purely private and personal acts on which liability is predicated, this independent ground, that there was no evidence of liability on any charge of a non-federal character, definitely stated in the opinion, cuts away all support from the contention presented by the assignment of error under consideration.

If the court must examine the evidence to ascertain whether the State Supreme Court denied recovery on account of purely private and unofficial acts, on the ground that the National Banking Act afforded the directors immunity from liability for acts purely personal and unofficial, the record will prove that there was no evidence of such private acts on which liability could be predicated. Of course, the judgments should not be reversed for the purpose of permitting the assertion of a ground of liability that is not sustained by any evidence. We now present a sufficient review of the evidence to demonstrate that there was no proof that *Mr. Thompson* did any of the acts, charged, except to attest four or five official reports.

X.

There was a total failure of proofs on the issue that Mr. Thompson made or participated in unofficial or voluntary statements or representations of the resources and liabilities of the Capital National Bank. The record does not, therefore, present any ground of liability on non-federal grounds.

The charge contained in the petitions that Mr. Thompson made *oral* representations which deceived plaintiffs into making deposits was fiction and sham. This issue was disposed of in the trial court by the following special finding:

"**In respect to the second and third requests of defendant, David E. Thompson, the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing or responsibility of said bank to the plaintiff, and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank.**" **(Printed Record No. 501, Jones National Bank Case, p. 27; No. 502, Bank of Staplehurst Case, p. 27.)**

The above finding in favor of defendant was not excepted to by either plaintiff, and is conclusive of the issue in all appellate proceedings. The inquiry under this head is, therefore, limited to a consideration of whether there was evidence to show that Mr. Thompson made or participated in any *written* reports, or representations concerning the financial condition of the bank, other than to attest some four or five *official* reports, in the course of approximately nine years in which he was a director. This inquiry will determine whether he was shown by the proofs to have made or participated in the so-called voluntary and *unofficial* statements, advertisements and cards, separate and apart from the attestations required by the express terms of the National Banking Act.

Upon this issue the solitary witness in behalf of the *Jones National Bank* was its managing officer, Harry T. Jones. So far as he spoke to the subject of the alleged unofficial statements of the *Capital National Bank*, his substantive testimony is embraced in the following questions and answers:

(Printed Record, p. 375, 376.) Q. Now what was the custom of the *Capital National Bank* with reference to sending out statements of its condition to its customers?

Mr. Rose: Each of the defendants objects as incompetent and immaterial, and the witness not qualified to answer. Objection overruled. Each of the defendants excepts.

A. The Jones National Bank always received statements from the *Capital National Bank* immediately upon the publication of a statement:

Q. And in what form did those reach the bank, and through what medium?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial under the issues. Objection overruled. Each of the defendants excepts.

A. We received them *from the bank* in two forms. One is what I call on a printed slip. What I mean by that is, as the form would appear in the newspapers, that same form would be printed on slips of paper like the one I hold in my hand. The one I refer to on a business card was of the same date, but in a more condensed form, and usually the statement would bear the names of the directors of the bank—

Mr. Rose: Each of the defendants objects to this as not the best evidence. Objection overruled. Each of the defendants excepts.

A. —appeared a cut of the bank building, the name of the bank, the amount of capital stock, surplus, and names of the officers.

Q. Now the slips you refer to, in what form were they printed?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, not the best evidence, no foundation laid, and not within the issues. Objection overruled. Each of the defendants excepts.

A. They were printed in the form, *exactly*, as published in the newspapers.

Q. And the cards, you say, were in a more condensed form?

A. Yes sir. By that I mean on the card under the head of cash would be included the actual cash, cash items and the amounts in their correspondent banks, subject to check on draft by the bank. And on the opposite side, under the head of deposits would appear all the deposits, including the individual deposits subject to check, the time certificates of deposit, the demand certificates of deposit and the country bank deposits.

Q. Now what did you do with those statements when they reached your bank, Mr. Jones?

A. I would always examine them and see the condition of the bank. That is a rule not only with the Capital National Bank, but with all banks with which we done business. It was the only method that the bank has of ascertaining the exact condition of the banks with which it is doing business. (Printed Record p. 377.)

Q. And did you preserve these cards and slips for any length of time?

A. Yes sir.

Q. Have you them now?

A. I have not.

(Printed Record p. 378): Q. How was the condition of the bank indicated? * * *

A. It showed the loans and discounts and the cash and cash items, and how the capital stock and deposits of the bank were invested.

Q. What did it show on the other side, which is labeled liabilities? (Objection overruled.)

A. It showed the amount of capital stock, the surplus, the individual profits and the amount of deposits. * * *

A. It always showed (capital stock) the sum of $300,000. * * *

Q. It showed that it was not impaired?

(Printed Record, p. 379): Yes sir, every statement showed a surplus, and a certain amount of undivided profits.

At this point in the examination of Harry T. Jones he was asked concerning his having seen and examined specific official reports to the Comptroller in the newspapers. And then a suggestive form of examination was gone through concerning the unofficial delivery of like statements to him. His examination concerning the published official report, Exhibit X 979, was followed by the following questions and answers (pp. 379, 380):

Q. Did you see it in any other form?

Mr. Rose: Each of the defendants objects to that as incompetent, because the question itself is contradictory. It necessarily couldn't be this exhibit and be in any other form; or it couldn't be this exhibit. Objection overruled. Each of the defendants excepts.

A. I did.

Q. Did you see the statement of the bank for the same day that this purports to be, and giving the assets and liabilities as they are here, but in a different form?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid. Objection overruled. Each defendants excepts.

A. I did. The condensed form which I refer to is the business card or statement.

Q. How did it compare as to showing the assets and liabilities with the published form?

Mr. Rose: Each of the defendants objects as no foundation laid; calling for a mere conclusion of the witness without furnishing any basis to use for comparing it and verifying it; and not within the issues. Objection overruled. Each of the defendants excepts.

A. As to the total amount of resources and liabilities they agreed; but, as I have said heretofore, in the card form it was more condensed. All the cash items were under the head of cash—that would include the amount

they had on deposit with their several correspondents, subject to check or draft—they treated that as cash.

The same process was then gone through with in an omnibus fashion (pp. 381, 382), as follows:

Q. Now with reference to these exhibits X. 077 to X. 088, except exhibit No. X. 081, which is a card, I will ask you if you received, or if you saw the statements of the bank for those same dates, but in different forms?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; not within the issues, and assuming a fact not proven. Objection overruled. Each of the defendants excepts.

A. I did. I saw them in two forms.

Q. What were they? (Objection overruled.)

A. In the newspapers and what I term the printed slip, which is an *identical copy*, using the same form as it appeared in the newspapers, and of the statement on what I term the business card.

Q. And how did the amount as shown on this business card, or the card that you received, *compare* with the amounts as shown by this slip, as you call it; and with the reports as they appeared in the paper? (Objection overruled.)

A. The total amount of resources and liabilities always agreed; had there been a disagreement it would have shown there was something wrong. (Last part of answer was stricken on motion.)

Jones then testified over like objections and exceptions (pp. 382, 383), as follows:

Q. Did the newspapers published at Lincoln, the Lincoln Journal and the Call, during the time the Capital National Bank was inexistence and doing business, contain any cards or advertisements *of the Capital National Bank?*

A. They did.

Q. Did you see them in the newspapers as they came to you?

A. I saw many of the published advertisements in both the State Journal and the Lincoln Call.

Q. You read them in those papers?
A. I did. * * *
Q. Have you the papers in which you saw those notices as they came out?
A. No sir. I did not preserve a file of the papers.
* * * *
Q. Now the cards and slips that you referred to, came to you, I believe you said, through the mails?
A. Yes sir.
Q. In an envelope directed to the Jones National Bank, and *from the Capital National Bank?*
A. They did.

We have now quoted the entire showing of the Jones National Bank bearing on the issue of whether *Mr. Thompson ever made* or participated in any *voluntary* or *unofficial* written statements, of any character, concerning the Capital National Bank. The testimony does not *in any manner*, connect the name of *Mr. Thompson* with any such alleged statement. Harry T. Jones makes no pretense of having received them from *Mr. Thompson*, and mentions no fact from which it is inferable that Mr. Thompson had any knowledge of the incidents. He claims to have received cards and printed slips *identical with official reports* (which makes them out to be the *official reports*), from the *Capital National Bank*, and to have seen advertisements of the *Capital National Bank;* but presents no proofs that they were the acts of *Mr. Thompson*. The argument that this showing presents a non-federal ground to sustain a judgment against *Mr. Thompson*, is, to borrow one of the expressive figures of Lincoln, "as thin as soup made from the shadow of a pigeon, that had starved to death."

The case of the *Bank of Staplehurst* is likewise destitute of proof that Mr. Thompson made or participated in any *unofficial* statements of the *Capital National Bank*. *E. Jacobs* was the sole witness who spoke for the *Bank of Staplehurst* touching the alleged *unofficial* and *voluntary*

statements. His testimony to this point, as found in the printed record, is as follows:

(pp. 405, 406): Q. How many statements of its financial condition did the Capital National Bank publish each year?

A. Five.

Q. You may state whether or not you saw all of them while you were cashier of the Bank of Staplehurst, and doing business with the Capital National Bank?

A. I have seen them all as near as I remember.

Q. Now did you receive them in any other form?

A. I seen them in a condensed form in the shape of a business card.

Q. Where did you see those?

A. They were sent to the bank about as regular as the statement came out.

* * * *

(p. 407): Q. Now, Mr. Jacobs, these *card statements* that you have testified to and that you were not able to find, tell the court, in substance, what they contained, and especially with reference to the statements that were contained in the newspapers?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; no foundation laid; not within the issues; nor binding upon any one of the defendants. Objection overruled. Each of the defendants excepts.

A. They were in a more condensed form, in the shape of a business card, where the deposits were all in one—you might say it corresponded with the published reports, only it was more in a condensed form.

(p. 408): Q. And what else appeared on the card? (The same objection was overruled.)

A. The capital stock, the surplus, the undivided profits.

Q. And do you remember the capital stock as shown to be on those cards? (Same objection was overruled.)

A. The capital stock was $300,000.

Q. And did those cards purport to state the financial condition of the bank at the particular date for which the

statements in the newspapers purported to give? (Same objection was overruled.)

A. Yes sir.

Q. Now were there any names on the cards? (Same objection was overruled.)

A. Yes sir.

Q. State what they were and how they appeared on the card? (Same objection was overruled.)

A. Mosher and Outcalt and Walsh, as officers; D. E. Thompson, Hamer and Yates, and several others as directors.

Q. Was Stuart's name on them?

A. Stuart's name was on there, too.

Q. And Phillips?

A. And Phillips. I can't remember all the names.

Q. Can you give us the form of the card, just about what it said, what it *purported* to state? (Similar objection was sustained.)

A. Well, it was in kind of business card form, the names on one side, and the statement of the bank on the other side.

On cross-examination (Printed Record p. 415) *E. Jacobs* testified he did not know Mr. Thompson personally and never conversed with him about any subject whatever.

Not one *voluntary* and *unofficial* bank statement was offered or read in evidence. Not one appears in the record. No secondary evidence of the contents thereof was given, unless it can be said that the argumentative statements of *Jones* and *Jacobs* that the footings on all card statements agreed with the footing of official statements, and that *Jones'* "printed slips" (the like of which was not mentioned by Jacobs) were in the identical form of the official statements, may be said to prove their contents by reference to the *official* statements. To argue that this proved their contents, is to concede that they were, in fact, the official statements, and governed by the rule of liability prescribed in the National Banking Act, as determined by this court on the previous writs of error in these identical suits. But let us pass this point.

What does the testimony of *Jones* and *Jacobs* show touching *Mr. Thompson's* participation in any unofficial report? What is there in the quoted testimony to prove that these so-called *unofficial* and voluntary statements were the acts of *Mr. Thompson*, on which liability in an action of tort may be adjudged against him? Absolutely nothing. Proof of this necessary foundation connecting *Mr. Thompson* with them, to admit proof of their contents to be received in evidence, is entirely wanting. There is no proof in the record that *Mr. Thompson* made or participated in them or in their circulation. It is needless to search the testimony of other witnesses upon this point. Except as *Jones* and *Jacobs* spoke, the record made by plaintiffs is silent.

The testimony of *Jones* and *Jacobs* was objected to for incompetency and want of foundation. The applicable rule of evidence was settled in Nebraska by *Gerner v. Mosher*, 58 Neb. 144, as follows:

"The *corporation* may be bound by the act of its constituted officers, but when it is sought to charge *officers individually* for *ultra vires* acts, or for *misconduct*, it is only those who *participate* therein who are liable."

That rule of the highest court of the state, as applied to a non-federal ground of liability, is, no doubt, conclusive upon this court on the present writs of error. At the same time, it is in harmony with the holding of this court in *Briggs v. Spaulding*, 141 U. S. 132.

On appeal in the Supreme Court of the State, and on the writs of error in this court, Mr. Thompson has preserved his objections, and insists that in absence of proof of his participation in the so-called unofficial reports, the testimony directed to that issue cannot be considered. In determining an issue of fact the appellate court can only consider the evidence that is competent and properly received.

While plaintiffs offered no proofs of Mr. Thompson's participation in the alleged *unofficial* statements, and their proofs were not sufficient to tender that issue, *Mr. Thompson*, as a witness in his own behalf, spoke directly to his *non-participation*. He was the only direct witness on that subject, and to complete the review of the evidence we quote his testimony from the printed record:

(Printed Record p. 460.) Q. What personal knowledge did you have of the bank's sending out to its country bank depositors printed slips embodying the presumed totals of the reports of the bank to the Comptroller of the Currency?

A. Well that is a matter that I never gave any thought to; never knew anything about what their custom was, what they did in the bank about that sort of thing; no knowledge whatever.

Q. It wasn't a matter that you personally participated in?

A. No sir. Knew nothing of it.

Q. What if any knowledge did you have of the publication, or translation and publication of any of the reports of the bank's condition in the German language, in any German newspaper?

A. I had no knowledge of it.

Q. When did you first hear such a matter suggested?

A. On the witness stand here yesterday.

Q. Did you have any personal participation in that?

A. No sir.

On cross-examination *Mr. Thompson* testified to the same subject as follows:

(Printed Record pp. 517, 518.) Q. Did you know that the Capital National Bank carried a daily advertising card in the daily papers of Lincoln during its existence and while you were connected with it?

A. No sir. I would have no recollections as to that.

Q. You would have no recollection of seeing any card in which they advertised the bank, giving the names of the directors, and the capital, stock and surplus?

A. I wouldn't say that I did, or didn't; that would be a matter of advertising, and I don't read the advertising very often.

Q. You are a reader of newspapers?

A. I am not a reader of advertisements in newspapers.

Q. And I don't suppose you ever noticed any of the cards in the newspapers?

A. No sir. I have no recollection of noticing any.

Q. And never remember of having noticed any of the published statements of the bank's condition?

A. I have no recollection about the matter.

Q. You don't look at advertising matter, you say?

A. I do not. I don't have occasion to read advertisements. I usually know about what I want.

Q. Isn't it true that your eye will catch advertising matter, if you don't make a practice of reading it?

A. It is very likely.

Q. It is likely that you recall reading advertisements of Peruna in the newspapers?

A. Those matters are all a matter of the general conduct of a bank; something I didn't have anything to do with the placing of advertisements, and I would have no occasion for reading them.

On being recalled *Mr. Thompson* further testified (Printed Record, p. 763) as follows:

Q. Do you speak or read the German language, Mr. Thompson?

A. No sir.

We have quoted without abridgment all of the testimony on the issue of whether the so-called *unofficial* statements were the representations of *Mr. Thompson*. On that issue, upon which plaintiffs held the burden, the only testimony in the record is that *Mr. Thompson* did not participate therein and had no connection therewith. The testimony will not support a finding that *Mr. Thompson* participated in any such statements, or that they can be made the foundation of a judgment for tort against him on non-federal grounds. Upon this issue the record presents, not

an argument merely, but a demonstration, absolute and final, that the finding in the Supreme Court of Nebraska in favor of Mr. Thompson, on all of the alleged non-federal grounds of liability, was forced by the total failure of evidence, and was not due to a misinterpretation of section 5239 Rev. Stats. U. S. The references given demonstrate the insufficiency of the record to present a *prima facie* case of liability on non-federal grounds, the preservation of which can, in any event, call for a review of the holding of the State Supreme Court touching the scope and operation of that section of the federal statute.

XI.

The official statements attested by Mr. Thompson were upon the evidence adduced, too remote in point of time to have influenced plaintiffs to make the deposits remaining to their credit at the date of the failure of the bank, or to have been a proximate cause of the loss sustained by plaintiffs.

The *Jones National Bank*, in its petition alleged that it kept an open, active deposit account with the Capital National Bank, in which the balance varied on account of withdrawals and deposits. Between January 1, 1893, and January 21, 1893, its scheduled deposits amounted to $12,263.70, and its withdrawals aggregated $5,263.88. (Printed Record, pp. 5, 6.)

The *Bank of Staplehurst* alleged the same course of dealings, as did the *Jones National Bank*. Its transactions during the last three weeks with the failed bank, as alleged in its petition, showed deposits totaling $18,095.59, and withdrawals of $14,946.82. (Printed Record, pp. 5, 6.)

Both of these plaintiffs averred in their several petitions that, had *true* statements been made, they would have shown that the Capital National Bank was not "sound, solid and solvent, and that it was not a safe institution in which to do business, and plaintiff would not have made loans and deposits with said bank." (Printed Record, p. 7.)

This motive of self-interest, which plaintiffs aver guided them in their business transactions, we accept as the recognized standard by which, not only their own conduct, but also that of *Mr. Thompson*, is to be judged. Each of the suitors will be understood to have acted with reference to his own pecuniary advantage, so far as his knowledge disclosed to him the course of conduct that would be to his advantage. It is submitted that, as a matter of law, on the undisputed evidence, the reports attested by Mr. Thompson were all too remote in point of time to have

influenced plaintiffs in making the Capital National Bank a depository at the time of the failure, or to have been a proximate cause of the loss of which they complain.

Harry T. Jones, managing officer, and the only witness on behalf of the *Jones National Bank* to explain the motive inducement for its deposits in the Capital National Bank, testified as follows:

(Printed Record, p. 386.) Q. What reliance, if any, did you place upon those statements in depositing the money in the bank there and doing business with them, and *allowing it to remain there from day to day?*

A. I placed full reliance and credit in the statements; it is the only method that a bank has of knowing the condition of the bank with which it is doing business.

Q. If you had known of *any* of the discrepancies between the report and the actual condition of the bank, or of any of the fictitious entries to which you have testified as an expert, or of any of the irregularities, what would you have done, as an officer of the Jones National Bank?

A. *I would have withdrawn every dollar of the money.*

On cross-examination (Printed Record p. 395) Harry T. Jones testified further to the same subject as follows:

Q. * * * You say you scrutinized each new report at the time it came out?

A. Always.

Q. And, if I understand you correctly, the import of your testimony was that if whenever you saw one of these reports * * * you found any indication that the bank's condition was questionable, you would immediately have withdrawn your entire deposits while you had an opportunity?

A. I certainly would.

Q. So that *the last statement* that came out, *each time*, would be the *inducement each time* for you to leave your deposits there?

A. To a certain extent. Yes sir.

Q. And even though you saw indications in the last reports that the pecuniary condition of the bank was ques-

tionable, would you have left your money there on the *faith of a previous report* that showed up good?

A. I think not.

In the case of the *Bank of Staplehurst, E. Jacobs*, its managing officer, was the only witness who undertook to show its motive inducement for its deposits in the failed bank. He testified as follows:

(Printed Record, pp. 410, 411.) Q. The question is: What reliance did you place upon those statements?

A. I took full reliance on them that they showed the exact condition of the bank.

Q. State whether or not you believed them to be true?

A. I believed them to be true.

Q. And would the Bank of Staplehurst have made these deposits in the Capital National Bank from time to time, *or permitted them to remain there at any time*, had they known that these reports or statements were untrue?

A. No sir. *I would have them out the next day.*

On cross-examination (Printed Record pp. 414, 415) *E. Jacobs* testified further on the same subject as follows:

Q. That is, if the report had been true, and it had reflected the fact that the bank had had large losses, and wasn't prospering, you would have drawn your money out?

A. If the *last report* had come out with its true condition *I would have drawed my money out.*

Q. And you wouldn't have paid any attention to *any previous condition* of the bank?

A. No sir.

Q. You were interested in what the bank's condition was at the *present* month?

A. Yes sir.

Q. And you didn't care what the bank's condition was at any time previous to that?

A. No. *That wouldn't be any business policy at all.*

Without stopping here for further references, the National Banking Act requires at least five reports each year to the Comptroller, and both of the witnesses said they had scrutinized each of the five official reports each year as they came out. There were upwards of forty such

reports made and published during the period that *Mr. Thompson* was a director. The trial court found that *Mr. Thompson* did not attest more than five reports of the following dates: December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890, and July 9, 1891. The petitions each allege that the Capital National Bank did not suspend until January 21, 1893, more than one and one-half years after *Mr. Thompson's* latest attestation of any report.

The managing officers of both plaintiffs who sue *Mr. Thompson* have unequivocally committed themselves to the proposition that the making and maintenance of their separate deposits, throughout the period of upwards of a year and a half that elapsed after Mr. Thompson had attested any reports, was induced by the favorable showing contained in the reports subsequently attested by other directors, in which he in no way participated. Both affirmed that, but for the favorable condition reflected in each subsequent report, as it came out, their funds would have been withdrawn from the Capital National Bank, and they would have discontinued the making of deposits. They had absolute and continuing control of their deposits, and could have withdrawn them any day and closed their accounts.

If the merit of the cases made by plaintiffs be tested by the testimony of their managing officers, the record will demonstrate that the deposits for which they sue were not induced and did not remain in the Capital National Bank because of any report attested by *Mr. Thompson*. Liability is not here predicated on negligence, but rests exclusively on the proposition that plaintiffs were deceived by the official reports in which *Mr. Thompson* participated. Proof that the alleged loss was induced by reliance on *Mr. Thompson's* false statements is indispensable. The assets and liabilities of national banks are constantly changing, as the statutory requirement for five reports each year

recognizes. The petitions allege that each of the plaintiffs carried a constantly varying account. As a matter of law an ancient report of resources and liabilities gives no index to the *present* condition of a national bank. No banker would make a deposit in January, 1893, on the faith of Mr. Thompson's attestation of a report of date December 28, 1886, or August 1, 1887, or October 2, 1890, or December 19, 1890, or July 9, 1891. Each plaintiff is shown to have studied the altered condition of the bank as shown by each of the subsequent reports, which wholly superseded the prior ones. In these circumstances, it is submitted that, as a matter of law, there must come a time when the former reports will be too remote to induce a present deposit, and that the lapse of a year and a half, in a financial institution that makes five reports each year, is so remote that an action of deceit will not lie upon it for loss of *present* deposits. Aside from this consideration, the proofs are that plaintiffs *in making the deposits lost in 1893 did not* rely on the reports that came out on and prior to July 9, 1891. It is proved by the testimony that the losses were not entailed by reliance on reports so remote as those attested by Mr. Thompson. These considerations should dispose of the case of *Mr. Thompson*.

We shall now show, by record references, that the evidence wholly fails to support the issue tendered by plaintiffs that *Mr. Thompson knowingly made*, or *knowingly permitted*, or *knowingly participated* in any false official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, required by Sec. 5211, Rev. Stat. U. S.

XII.

There is no evidence that Mr. Thompson knowingly attested or knowingly permitted or knowingly participated in any false official reports. Proof of a scienter is wholly wanting. The record forced on the State Supreme Court the finding of the insufficiency of the evidence to establish liability of Mr. Thompson under U. S. Rev. Stat. Sec. 5239.

But one aspect of the evidence is left for consideration. Did plaintiffs sustain the *onus* of proving that Mr. Thompson knowingly attested false official reports? We have, in all stages of the litigation, rested the defense of Mr. Thompson on the unimpeachable rectitude of his own conduct. Having sued for deceit, upon alleged false representations contained in the official reports, plaintiffs have the burden under U. S. Rev. Stat. sec. 5239, of proving the moral guilt of *Mr. Thompson* in knowingly participating in false official reports; it is only for this that the statute visits upon the participating director the pecuniary forfeiture sought to be adjudged against him.

The trial court, whose judgments were reversed on appeal, undertook to rid the case of the federal questions, by specifically stating "that the liability of the defendant David E. Thompson, in an action of deceit under the principles of the common law, is not founded upon the attestation of the *official* reports." (Printed Record, case No. 501, p. 44.) It was also found that Mr. Thompson "had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller attested by him, but in attesting such reports the court finds that *the defendant relied upon* the statements made to him by the president and cashier of the bank" etc. (Printed Record, Case No. 501, p. 27.) Superadded to this was a recital of *imputed* bad faith because he did not so perform the duties of a director as "to ascertain the truth or falsity of such reports before the same were attested by him." It was therefore found by both of the state courts that Mr. Thompson did not

consciously participate in falsifying the condition of the bank in any official report. The trial judge was aware that under the statute, as previously applied in the identical suits by this court, bad faith and a knowing falsification could not be *imputed* to Mr. Thompson from *mere neglect*, and hence he did not rest liability upon the official reports.

As a further premise to a recitation of the testimony, it is important that the latest report attested by Mr. Thompson was that of July 9, 1891. It has never been seriously argued that there was any circumstance proved that would cause Mr. Thompson to question the good faith or integrity of Mosher or Outcalt, the managing officers, or to suspect the prosperity and solvency of the bank, until a considerable period after the date of the last report which he ever attested. We submit it is established that Mr. Thompson confided in the stability and prosperity of the bank to the time of the failure, and until that time believed that the president and cashier had been faithful and honest in the discharge of their trust.

The trial court, however, fixed upon the *month* of September, 1891, without specifying any precise day, as a dividing point of time, previous to which the directors, who are now parties, had no sort of notice or grounds of suspicion of any falsehoods in the reports, or the integrity of the assets of the bank, and after which knowledge of such falsifications and of the doubtful character of some of the assets should be imputed to them. There is in the bill of exceptions (Printed Record, p. 73) a letter from deputy and acting Comptroller R. M. Nixon addressed to *C. W. Mosher, President*, without any direction that it be called to attention of the directors, which is, presumably the explanation of the court's fixing upon September, 1891, as the dividing point of time, after which knowledge should be *imputed* to the directors. This letter is an unsubstantial basis, since there was no proof that it ever came to the notice of the defendants.

The recitals of the trial court were as follows:

"The court finds that *from and after September, 1891*, the said Ellis P. Hamer, and the defendants Yates and Thompson and each of them had knowledge and knew that the statements official and otherwise of the bank were being made and published.

"The court further finds that said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, *from and after September*, 1891, had knowledge and knew that said statements" contained material false representations. (Printed Record, Case No. 501, p. 45.)

The dividing point of time thus fixed by the findings of the trial court is fatal to the case of plaintiffs against *Mr. Thompson upon the official reports*. We do not accept these findings of the trial court, in so far as they are adverse. In so far as they recited that *Mr. Thompson* participated in any unofficial statements, we have already demonstrated that they were wholly unsupported. They were likewise unsupported, in so far as they recited *Mr. Thompson's* participation in official reports after September, 1891. In both respects they were contrary to the undisputed evidence, as was pointed out by the State Supreme Court. The argument here urged is that this dividing point of time, "from and after September, 1891," is a finding in favor of the defendants and against the plaintiffs on the issue of *scienter*, as applied to all acts done during and prior to the month of September, 1891. Mr. Thompson's last attestation was of the report of July 9, 1891, upwards of two months prior to the date when the finding first *imputes* any knowledge of falsifications to any of the directors.

The special findings, quoted elsewhere, show that Mr. Thompson did not attest a single report during any one of the years 1884, 1885, 1888, 1889, and 1892. There were two periods of two consecutive years in which he did not attest a single report. He attested one report in each

of the years 1886, 1887 and 1891, and two in 1890. The point of inquiry now is, whether he *knowingly* made, *knowingly* permitted, or *knowingly* participated in any falsifications appearing in any of the five reports mentioned. Did he act, at the time of the attestations, with guilty knowledge of falsifications, within the meaning of U. S. Rev. Stat. Sec. 5239? No circumstantial proofs against him reached back near to the date of his acts. The only testimony that goes to this issue is that of *Mr. Thompson*, himself.

It was the theory of plaintiffs that the Capital National Bank entered business as a hopeless insolvent. The history of the institution, as testified to by *Harry T. Jones* (Printed Record, pp. 183, 184), was that the original State Bank of *Marsh Brothers, Mosher & Co.* commenced business in January, 1882, with a purported capital of $100,000. On June 23, 1883, it merged in the Marsh National Bank, with a purported capital of $100,000. The Marsh National changed its name to the *Capital National Bank*, and increased its capital to $200,000, and new account books were opened under date of June 2, 1884. It was to provide the additional capital of $100,000 that Mr. Thompson, and other local men of high repute, were solicited for stock subscriptions, and invited by Mosher and Outcalt to sit in the directory of the enlarged bank.

Harry T. Jones went back into these ancient records to ascertain the occasion which induced Mosher and Outcalt to take new men and new capital into the concern. H compiled from the records a schedule of the losses previously sustained, on the basis of which he testified that when this change of organization took place the bank had sustained losses aggregating $119,540.22, which exceeded its entire capital by $19,540.22. (See Exhibit 00, Printed Record, p. 194.) To this, according to the testimony of *Harry T. Jones*, should have been added some losses on Harvester paper, and other slow and questionable items, greatly increasing the above total. The losses, however,

were said to have been hidden in padded accounts of worthless stocks and bonds, spurious, overdrawn collection accounts, fictitious items carried under the designation of bills of exchange, and the like.

Walter T. Scott, a witness for plaintiffs, testified to a declaration made by *Mosher* in connection with a reorganization and change of name of the bank: "They wanted to get R. E. Moore and D. E. Thompson, and such men as that, in, because *they would give stability to the bank*," etc. (Printed Record, p. 351.) In quoting *Scott* we do not indorse his credibility. He was shown to be a reprobate and moral degenerate, and his *veracity* was strongly impeached. But, whether he spoke truly or falsely, the *testimony* offered presented only the theory that *Mr. Thompson* was the victim of a swindle perpetrated by *Mosher* and *Outcalt*. The motive ascribed for Mosher's desire to connect *Mr. Thompson*, was to obtain his honored name as a source of public faith and credit for the ruined bank.

The showing noted implies that Mr. Thompson was, in respect to his stock subscription and his initial official connection with the *Capital National Bank*, the *victim* of a gigantic swindle perpetrated by Mosher and Outcalt, not only upon him, but upon all those whose subscriptions and connections were made in like circumstances, upon the public, and even upon the Comptroller who approved the showing of assets and granted the charter to the New Bank. It was the theory of plaintiffs that the *Marsh National Bank*, conducted by Mosher and Outcalt had failed; that their banking adventure had run its course to the end; that they stood over a powder magazine, at the counter of a ruined bank, and that, to prolong its miserable existence, desperate means had to be employed to replenish some part of the lost capital. In this extremity Mosher and Outcalt sought out the most conservative and influential men of the community, and invited them to subscribe for stock and sit in the directory of a new bank which should take over the assets and patronage of a supposedly flourishing

business, and continue under their own management. We quote from *Mr. Thompson's* cross-examination his explanation of the incident of his stock subscription:

(Printed Record, pp. 514, 515.) Q. You were acquainted with both Mosher and Outcalt before you became interested in the Capital National Bank?

A. No sir; I think I knew Outcalt in a way, but again showing perhaps my weakness, and lack of going into things as may be I sometimes should do to protect myself, I never had any acquaintance with those men at all—that is Mosher at all, and Outcalt I think I had simply known in a way for some little time before that, until Outcalt, I think it was—it may have been Mosher, came down to my office in the railroad building and told me that they were going to increase the captial stock in the bank and change its name, and wanted me to take some stock, and after talking the thing over with them I agreed to do it, and that is the way I went into the bank; I had no acquaintance before that with them, what you would call an acquaintance.

Q. How long did you live in Lincoln prior to that time?

A. I came back to Lincoln from Kansas—the Sante Fe road probably in November or December, 1878, and I had been there all the time, when I wasn't away from home; I wasn't like a resident would be, I was a railroad employee and *away from home most of the time.*

Q. How was it when you became superintendent?

A. I never had any business with anybody up-town in a business way until I went in that bank in 1884; that was the beginning as I remember it of everything of a business character in Lincoln, and then as time went on these other things came to me. Now when that was presented to me they told me who were going in the bank and the question of good faith never entered my mind as a matter of fact when I paid a premium and cash for the stock, and to do what I did I don't think my good faith could be questioned very much; I wouldn't be throwing money into a rat-hole, as that seemed to be, if I had known it."

The undisputed evidence is that *Mr. Thompson*, on the occasion referred to in the last quoted testimony, sub-

scribed for stock in the Capital National Bank of the par value of $14,000, and paid therefor a premium of 9 per cent., making its cost $15,260. (Printed Record, p. 429.) When the stock was, in 1886, increased to $300,000, Mr. Thompson took $11,000 of the increase at a premium of 15 per cent., making its cost $12,650. The aggregate cost of his $25,000 of stock in the bank was $27,650. (Printed Record, p. 429.) We quote from *Mr. Thompson's* testimony the following:

(Printed Record, p. 431.) Q. I want to ask you Mr. Thompson, if you had any knowledge that that bank was without any capital, whether you would have put your money in there, and subscribed to the stock?

A. I certainly never would have done it.

Q. Did you know at that time who had been the managing officers of the *Marsh National Bank?*

A. Well, I simply knew as I would know anything that I hadn't any acquaintance with at all. I never had had any holding with the bank.

Q. Had you ever been a customer or depositor of that bank, previously, in any form?

A. No sir.

Q. Had you any previous acquaintance with either Mosher or Outcalt?

A. No. I hadn't. * * *

Q. Well, what within your knowledge was the standing and reputation of those men for business character and integrity?

A. It was first class.

Mr. Thompson attended the meeting at which the Capital National Bank took over the business. At that meeting *Mosher* was elected president, *Outcalt*, cashier, and *Walsh*, vice-president. Professor Stuart, W. W. Holmes and C. W. Mosher were appointed a committee for the purpose of taking over the assets of the old bank. Both Stuart and Holmes were men of the highest reputation. (Printed Record, pp. 431, 432.) *Mr. Thompson's* testi-

mony as to the arrangements made at this meeting for administering the bank was as follows:

(Printed Record, p. 432.) Q. Who were the active officers who had charge and control of the institution?

A. The active officers were Mosher, as president, and Outcalt, as cashier.

Q. You may state whether it was intended that they should devote their entire time to the business of the bank, or not?

A. Why, it was so understood at the time, that was the arrangement.

Q. Now, in actual practice, in the conduct of the affairs of this bank, from the time it entered business under the name of the Capital National Bank, who, to your knowledge, immediately and directly, conducted and administered the bank business of the institution? (p. 433.)

A. Mosher, as president, and Outcalt, as cashier; and for several years Professor Stuart and W. W. Holmes as executive committee; and later Dr. Hamer followed Mr. Holmes—some little time after the death of Mr. Holmes, he succeeded him.

Q. How much of your personal time did you devote, if any, to the affairs of the bank, and the administration of the bank?

A. None at all, except to attend meetings when I was in town. *I was much of the time away from Lincoln,* but when I was there I gave time enough to attend their annual meetings.

The foregoing testimony, which proves that *Mr. Thompson* was a confiding investor, paid a premium for his stock, at the solicitation of Mosher and Outcalt, and trusted, without restraint, the organization completed at the meeting in which he participated, is uncontradicted. Mere proof that *Mr. Thompson* was the *victim of a swindle* does not make a case of deceit against him in favor of plaintiffs under U. S. Rev. Stat. Sec. 5239.

We next exhibit the testimony of *Mr. Thompson* concerning the circumstances under which he attested some

four or five official reports to the Comptroller during his eight and one-half years of office.

(Printed Record, p. 435.) Q. Now, what, if any, precaution did you take to ascertain the correctness or integrity of the reports before you attested them?

A. Well, I don't think ever I attested a report without asking the cashier, or asking Mosher—I think Mosher always brought them to me for attestation: This is right, is it? And the answer was yes; and I attested it.

Q. Did you ever attest any that did not appear to have been previously sworn to as correct by either the president or cashier of the bank?

A. No. They were always sworn to before being brought to me.

Q. What would be your honest belief in the correctness of the statement, if sworn to by these men?

A. I believed them to be correct.

Q. Did you believe so at the time?

A. I certainly did.

Q. Did you ever look over, or check over, any of the books of that bank?

A. I never did.

Q. Did you ever go back in the work room where the clerks and servants of the bank were working on the books and look over them there?

A. No.

Q. Did you ever examine the archives and securities of the bank for any purpose?

A. I never did. That was left to the executive committe, always.

Q. Did you appoint anyone to do that duty, or participate in the appointment?

A. The directors appointed the executive committee, whose duty it was to do that.

* * * *

(Printed Record, pp. 442, 442.) Q. What was your belief in the solvency and stability of that bank *up to the very time of its suspension?*

A. Well, I had no question of the solvency of the bank. I don't suppose a man could have been more astonished

over anything than I was to receive a telegram from Mr. Mullen that the bank had failed. I received it while in Terre Haute.

Q. Now, what knowledge, at any time, did you have, if any, that there were any false statements, or false entries, in any report to the Comptroller, made by that bank, which bore your own attestation?

A. I had no knowledge that there were any false statements in any of them.

* * * *

(Printed Record, p. 445.) Q. Up until the time of the suspension of the bank, did you ever have any knowledge that any false entries were made anywhere in the records or books of accounts there?

A. No information from any source, not even from the bank examiners who I always talked to.

Q. Nor from any teller in the bank, or clerk?

A. No sir.

Q. Nor from any officer or director?

A. No, sir.

Q. Nor from any personal observation of your own?

A. No, sir, from no source whatever.

* * * *

(Printed Record, p. 461.) Q. At the periods of time when you were absent from Lincoln what opportunity did you have, or what part did you have in the making of any reports of this bank to the Comptroller of the Currency, or in the publication of any statements? * * *

A. No part whatever.

Q. Did you have any knowledge whatever of the proceedings when, I think you said, you were in Europe?

A. No, sir. At no time when I was absent did I know anything of their proceedings.

Q. *State what, if any, part you had in the making or publication of the report, other than to merely attest it, at any time?*

A. *I had no part whatever in it.*

Q. *Did you have any part in the reports which were not attested by you?*

A. *No sir.*

Q. Did those ever come to your attention? Or were they ever checked over by you?

A. No, sir.

Mr. Thompson, in answer to questions put to him by plaintiff's counsel, on cross-examination, testified to the same issue as follows:

(Printed Record.) Q. Now, in reference to various statements of the condition of the Capital National Bank: When these various statements were made that bear your signature, what effort did you make before permitting them to go out in that way, to ascertain whether or not they were true?

A. Well, my only effort to know the truthfulness of any statement that was ever made there, was simply through the executive committee—the finance committee—and through the officers of the bank.

Q. You never looked over any of the assets yourself?

A. No, sir, never.

Q. Never counted any of its money?

A. Never counted any of its money.

Q. Never made any examination into the actual assets at all?

A. No, sir, I never did.

Q. Never examined any of the books of the bank?

A. No, sir. I never did. There was a committee that always had that in charge, a committee appointed by the directors, a finance or executive committee, and the officers of the bank, who always did that. I never had anything to do with that—anything on the inside of that bank?

* * * *

Q. When these statements went out purporting to give the condition of the bank over your signature, you hadn't at that time any knowledge concerning its actual condition?

A. Nothing at all, *except the information I would get from those I trusted.*

Q. But so far as personal knowledge went you knew nothing?

A. So far as personal knowledge went I knew nothing.

Q. And you were aware of that fact?

A. Well, there never was a question entered my mind,

never had in anything I was interested in, that there could be anything wrong.

Q. Well, you were aware of the fact that you didn't really know anything about its condition?

A. *It never entered my mind that way. I thought I did.*

* * * *

Q. And yet you made those statements in which you stated there are certain amounts of liabilities and assets and cash?

A. I made those statements after the sworn statements of the officers.

On re-direct examination Mr. Thompson was asked (Printed Record, p. 524): When you signed the four reports during the existence of the bank, to which your attention has been challenged on cross-examination, or rather when you attested them, you may state whether or not you believed the statements contained in them to be true?" And he answered: "Yes, sir, indeed I did."

Mr. H. J. Whitmore, the accountant employed by plaintiffs, testified to the results of the examination into the personal dealings of *Mr. Thompson* with the bank, as follows:

(Printed Record, p. 157.) Q. * * * Now what was the highest amount of indebtedness that the books of the bank show that Mr. Thompson had at any one time?

A. $10,000.

Q. And for how long a period of time did he have as high an indebtedness as that to the bank?

A. From the 27th of August, 1887, to September 13th, 1887.

Q. At all other times when he had any indebtedness, it was for a smaller amount than ten thousand dollars?

A. Yes sir.

Q. Do the books show that all of his notes were paid?

A. Yes sir.

* * * *

Q. Now, I want to ask you what is your conclusion from an inspection of those notes (entries) as to whether they appear to represent regular and legitimate transactions with the bank?

A. I think they do.

Q. Is there any exception, when you could deduce any other conclusion, from any entry in the book concerning them?

A. No sir.

The foregoing testimony (including that of plaintiff's accountant) showing the integrity of *Mr. Thompson's* intentions, his faith in the bank's organization, his belief in the rectitude of all of the *official reports* which he attested, his non-participation in the reports which he did not attest, and the strict regularity of all his personal dealings with the bank, is not only unimpeached, but is uncontradicted. There is further proof in the record, however, that he had good grounds for the attestations which he made, and that he, at all times up to his telegraphic notification of the failure, believed in the skill and honesty of the officers and the stability of the bank. To these facts *Mr. Thompson* further testified as follows:

(Printed Record, p. 433.) Q. What personal effort on your part did you make to ascertain the condition of the bank?

A. Well, all the effort that could be made by canvassing the situation with the directors and executive committee who were a member of the directory, at the time of the meetings. * * *

A. The bank examiners were both men * * * that I knew very well, and I always asked them the situation as applied to the bank after they had made examinations, whenever I would meet them.

Q. State whether or not at any time you called for * * * or received reports of the condition of the bank by the president or cashier?

A. Well, at the meetings, they were always called for, and always received.

* * * *

Q. Now, you may state whether at any time when you were present and took part in the proceedings, when dividends were declared, there was any period of time when the reports of the officers to you did not show that there was a net profit exceeding the amount of the dividends? * * * *

A. No, sir. Never.

Q. And enough to put the requisite sum to surplus?

A. Always enough to put what was required to surplus, and had something over.

Q. At the time you acted in respect to declaring dividends what was your opinion and belief as to the truth of the showing?

(P. 434.) A. There was always a statement made by the officers of the bank and laid on the desk where the directors met, showing the gross and net earnings of the bank for the period that had passed since the meeting before.

Q. The question was, what belief or reliance you had upon the truth of that personally?

A. Why it was considered and thought to be absolutely truthful.

Q. So far as you thought yourself?

A. I had no question about it. Thought it was a truthful statement, of course.

Q. You may state whether from your inquiries of the bank examiners, you ever, from that source, obtained any information that would lead you to infer that the bank was not pecuniarily solvent?

A. No. On the contrary, the information I always got from them was always good.

Q. What was your personal belief from the time the bank was organized until it suspended as to the personal character and integrity of C. W. Mosher, and his skill as a banker? * * *

A. I thought he was perfectly correct.

* * * *

A. (Concerning Outcalt) I regarded him as an upright and capable officer, and a man of a good deal of wealth.

Q. And until the failure of the bank, how were the two men regarded generally in the community in which they did business?

A. As business men? As bankers?

Q. Yes?

A. Very highly.

A. And how, personally, did you regard the standing of your fellow directors in the bank, other than the president and cashier?

A. Well, very highly. I thought I was the cheapest one of the bunch.

A record of the minutes of a directors meeting of January 8, 1889, introduced by plaintiffs (Printed Record, p. 340) contains the following: "Mr. Thompson moved that directors Holmes & Stuart be appointed a committee to examine the notes of the bank, and also to make as many of such examinations of notes and books as they may see fit." There is also spread of record (same page) under a subsequent date, a report signed by the two directors named, certifying: "As per instructions of the board of directors we have examined the paper of Capital National Bank and find same satisfactory." The minutes of January 8, 1889, and of each subsequent meeting (pp. 340-344) contain showings of net profits justifying the payment of the dividends declared. The minutes of February 20, 1892 (p. 344) contain the following: "Upon motion of *Mr. D. E. Thompson*, E. P. Hamer was put upon the discount committee, in place of *W. W. Holmes*, deceased."

These incidents recited in the minutes indicate, plainly, *Mr. Thompson's* belief that the organization was an efficient one, and that he supposed the examination of the assets by a special committee, which reported, in writing, that they were found to be satisfactory, showed the affairs of the bank were in order. The authority of the commit-

tee to make as many examinations both of the notes and the books as they saw fit, was a continuing one, and he therefore felt, as he testifies, that the bank was properly conducted and in right condition. This belief was confirmed by the statement of net earnings shown in each report on which a declaration of dividend was based, so that the declaration and payment of dividends at semi-annual periods, instead of arousing suspicion, only confirmed his faith in the prosperity of the bank.

After testifying, as previously quoted, that he believed in the solvency of the bank up to the time of suspension, *Mr. Thompson* stated, circumstantially, the incident of his first knowledge of fraudulent conduct, as follows:

(Printed Record, p. 242.) Q. What was the first intimation you obtained from any source of any alleged wrong doings, or criminal misconduct of the affairs of that bank?

A. The first knowledge I had of any criminal conduct was after I got home from Terre Haute. (After the suspension.)

Q. State the source of it, without any explanation? Who told you?

A. Well, Mosher told me first.

Q. Did you ask Griffith? (The bank examiner who took the bank in charge.)

A. I met Griffith on the train, and he told me of the condition things were in there; but he didn't talk about criminal actions and I think that wasn't the subject of any of our conversations.

Q. Now when was the first time that you learned of any criminal misconduct, and what was the source of your information?

A. Well the first time was the night of the day that I arrived home from Terre Haute. * * * I went to Mosher's house that evening and I said to him: "What does this mean, Mosher? What have you been doing?" And he says: "I have done everything a man can do." I says: "Do you mean to tell me that what I hear about that bank is true?" He said: "Yes." I said "What are you

going to do about it?" And he said: "I want to get to the penitentiary as quick as I can get there."

Q. Did you have any knowledge of his faithlessness before that?

A. *Not a thing in the world.* They hadn't even arrested Mosher up until that time. The bank closed on Saturday and didn't open on Monday. I don't think I could possibly get back before Tuesday from Terre Haute, although I am not certain as to when I arrived. I came from there here, immediately, and it is a matter of some 24 hours from there to Lincoln; and I didn't, probably, get back until Tuesday, and at that time Mosher was in his house at home. They didn't arrest him then.

Mr. Thompson was less than 30 years old when he purchased stock and became a director of the Capital National Bank. Without educational training, he commenced railroad service at the age of 17, and continued actively in that service till January, 1890. From 1881 to 1890 he was a railroad superintendent, with heavy responsibilities and exacting duties. It was not possible for him to undertake or perform any general administrative duties in the bank. To this effect Mr. Thompson gave the following testimony:

(Printed Record, p. 437.) Q. * * * During the period that you were a director what other calls were there on your time?

A. Well, from the time I went in the Capital National Bank until 1890 I was superintendent of this Burlington road here, this Northwestern part of it, 1100 miles.

Q. What portion of it did you construct?

A. From Seward, on northwest here, nearly to Edgemont, South Dakota. After '90, when I left the road—I left the road near the end of December and I was a month, about, in Mexico, and came back here at the end of January, and immediately after that I went to Europe, coming back several months afterwards—and on my return I took charge of the Lincoln Gas & Electric Light Company, and the Farmers and Merchants Insurance Company. That I had been an officer in since its organization; and I also, at the same time, owned a lot of hotels scattered

around over the state and in South Dakota.

Q. About how many?

A. I think at that time I had nine. I had as high as thirteen, that is a half interest in them.

Q. Any connection of any sort with any other bank?

A. Yes. I was president of the Aurora State Bank.

* * * *

(Printed Record, p. 438.) Q. Did your duties as superintendent of the railroad require any long continued absences from Lincoln?

A. Well, very many of them, both long and continued.

Q. Have any conditions of health required any long or continued absence?

A. Well, I had very bad health for a good many years, so bad that in 1885 I was advised to go to Carlsbad in Bohemia, which I did. And in 1888 I had to go again; and in 1890 I had to go again. In 1890 was after I left the service of the road.

* * * *

(Printed Record, pp. 449, 450.) A. * * * I went to Mexico December 14th, 1889, and I got back from there on January 6th, 1890. December '89, I went there. There is no question about that in my mind, without any sort of reference, because I left the Burlington road in December, 1889. My salary, however, did not terminate until the end of January, 1890. But when I left the road, I took a car that they loaned me and took a lot of my friends and went with Governor Thayer and party, and went to Mexico. On this trip we left Lincoln on the 14th of December.

Q. What time did you go to Europe in that year?

A. I left for Europe on the 2nd of February, 1890.

Q. What time did you return from Europe?

A. I returned from Europe on the 9th of August.

In detailing the circumstances of his becoming connected with the Capital National Bank (quoted at length elsewhere) *Mr. Thompson* (p. 515) said: "I wasn't like a resident would be. I was a railroad employe *and away from home most of the time.*"

In explaining that he was unable to verify his attestation of the report of December 28, 1886, *Mr. Thompson* said:

(Printed Record, pp. 461, 462.) A. I was superintending this railroad building up in Wyoming and Dakota, and the west end of Nebraska. Had charge of all the work that would come under the superintendent in construction of a road.

Q. Do you recall any specific instance of that year that would make your absence necessary?

A. Yes sir. That was the year we had a great deal of trouble up there, I remember; and for that reason I remember that I was a very large share of the time— in fact most of the time right in the center of the winter—there, away from home.

* * * *

(P. 426.) A. * * * We had immense quantities of snow and all the troubles that go with construction and snow together up there that winter; and was away a good share of the middle winter months, when the trouble was the thickest.

While Mr. Thompson repeatedly testified that he always attended the directors meetings when he was in Lincoln, minutes found in the printed record (pp. 334-345) show that he did not attend the meetings held on the following dates: Second Tuesday in July, 1885; Second Tuesday in January, 1886; June 21, 1886; July 13, 1886; July 10, 1888; January 14, 1890; July 11, 1890; January 12, 1892, and January 22, 1893.

After Mr. Thompson's retirement from railroad service he was abroad till August 7, 1890. He then took the direct and responsible management of the Farmers & Merchants Insurance Company, and the Lincoln Gas & Electric Light Company, and at the same time retained control of his personal enterprises. During 1891 he expended $176,000 in reconstruction of the Gas and Electric plants, which he borrowed on his personal credit and no part of which was borrowed from the Capital National Bank. (Printed Rec-

ord, pp. 439, 440.) His services as director of the bank from 1884 to 1893 were "without any sort of compensation." (Printed Record, p. 428.)

The coincident employments and activities of *Mr. Thompson*, in connection with other enterprises in which he had the burden of responsible management, and the incidents of his life which kept him away from the bank and from Lincoln, during the larger part of the term of his office of director, are definitely established by uncontradicted testimony. All this was known to his fellow directors and the stockholders. It was not possible that *Mr. Thompson* could assume personal responsibility for the administrative conduct of the bank, nor that his fellow directors and stockholders expected him to do so. The utmost seriousness and good faith of his acts, in conjunction with his fellow directors, in selecting, as they all thought, capable and honest managers and assistants, and in making such inquiries as would satisfy him that the funds were prudently invested, and the affairs safely and profitably administered, stands unquestioned by any proofs in the record.

It would have been a vain and idle thing for *Mr. Thompson* to undertake any check of the management by an examination of the books or assets. He lacked all educational qualifications for a task of that sort. In answer to specific inquiries touching his qualifications in this behalf, *Mr. Thompson* testified:

(Printed Record, pp. 435-437.) A. Well sir, my father and mother both died before I was nine years old. Until that time my home was in the country, where there were no schools or school privileges, except the country schools. That was a mile and three-quarters from where I lived. After they died—my mother died when I was seven, and my father when I was nine—I went to town to live with an uncle, and from that time until I was thirteen years old I went to school. My education, so far as it applies to anything possible for me to have gotten out of an educa-

tional institution of any kind, was before I was thirteen years old. * * *

A. From the time I was thirteen until I was seventeen, I learned a trade, and when I was seventeen I commenced to work for this Burlignton road. * * *

A. My first work for the Burlington road was *trucking* there in the Lincoln freight house. After that I was *brakeman* on a freight train between Plattsmouth and Lincoln. After that I was *baggageman*. All that came within a year. And at 18 I was a conductor. From 18 to 21 I was a conductor here on the Burlington road. The superintendent who was here at that time went to Atchison, Topeka & Santa Fe, at that time, and took me with him. After that I came back here and ran a freight train for two or three months, when I was made train master. And after something less than a year I was made superintendent of the Burlington railroad, division superintendent.

Q. Now during all that period did you ever perform any work on books?

A. No, never.

Q. Did you ever keep a set of books in your life?

A. No. That would be impossible for me.

Q. Could you go through the Certificate of Deposit account or the deposit ledger of that bank personally and find head or tail of any account, or check it up? Could you do it?

A. I could not.

Q. Could you at any time during your term of office as director?

A. Well, never, at any time during my life could I have done a thing like that.

* * * *

Q. And you wouldn't have taken, if tendered, any office in the directory? Could you have taken any committee office in the directory that would have required that sort of work, to perform your duties?

A. It never occurred to me until this moment, but there was a time when that thing was suggested, that they put me on one of these committees. And I said: "It is impossible, gentlemen. I couldn't do that sort of thing. I have no knowledge of that sort of work."

The circumstantial recitals, quoted from the record, were not intended as an assertion that Mr. Thompson was deficient in general business capabilities. It is admitted that few men equal him in endowment, in natural and acquired judgment of men, and in ability to command and utilize the technical skill of men specially trained. But few men can so well direct to practical ends the laboriously evolved theories of men of special training. An essential factor in his ability to discharge high responsibilities, was his appreciation and ready avowal of his own limitations. He assumed no responsibility for details that he could not comprehend. His lack of both educational and practical training, for the detailed and technical duties of banking, is so obvious, that it would be idle to present any discussion of the necessary inferences suggested by the quoted testimony. It was shown, however, that, in his relation to the bank, he acted precisely as he did in connection with varied enterprises which he controlled and successfully managed. To this effect we quote his testimony from the record:

(Printed Record, pp. 436, 437.) Q. You have had some business experience outside of your connection with this bank?

A. Yes. I have been very active all my life.

Q. Been the directing head of a number of important concerns?

A. Yes sir.

Q. And in your private, or in your other enterprises that you ran as the directing head, what has been your custom in regard to delegating the duties of accounting to others?

A. All business enterprises that I have been interested in I have always gotten somebody in the office who I thought was capable and honest, and, of necessity, have been compelled to let him, whoever he was, conduct the office.

Q. And did you trust these officers of the Capital National Bank any more fully than you did your own employees or the employees of the concerns that you directed?

A. Well, I never had a trust misplaced before; and I have had lots of experience with men in responsible places.

Q. Did you entrust these men any more fully than you have entrusted other men?

A. *In exactly the same way.*

Q. In what different particular did you perform the duties of director, in this bank, than you acted when you were running other and independent business?

A. *No difference whatever.*

On cross-examination Mr. Thompson said (Printed Record, p. 488):

"If it were necessary for me to understand the books of the Gas Company, or of the Insurance Company, or of any bank that I have been interested in—if I had to, under the law, understand the intricacies of those books—I couldn't have been in business. I would be shoveling dirt on the section, like I had to in the beginning." And also (p. 488): "Well, if I were going to invest in a corporation, I would have somebody inspect their assets, or else I would do it on faith."

An illustration of *Mr. Thompson's* trusting and confiding disposition towards those into whose hands he puts his affairs, is the following answer found on page 450, printed record:

"A. Well, Mr. Mullen, all these years, in all 25 years, has been nearer myself, than I have myself. He has had perfect, absolute charge of all my private affairs, whether I have been away or whether I have been here, all the time. *Mr. Mullen has carried, for many years, from me, an absolute power of attorney to do whatever he pleases, no matter what it is.* He has never pleased to do anything wrong yet; but he may do like Mosher. He may fail me, but I am not worying over that any."

An incident that followed close upon the bank failure proved that, *even after the failure*, Mr. Thompson not only had no conception of the magnitude of Mosher's frauds,

but that he risked his personal responsibility on the proposition that the bank's assets were sufficient for the discharge of all liabilities. Mr. Thompson was surety on the bond of E. B. Stephenson as City Treasurer of Lincoln. The City treasurer had $21,560.39 on deposit in the bank when it failed. N. C. Brock offered to purchase the claim of the treasurer against the bank at 75% of its face. He consulted Mr. Thompson, who was obligated, as surety on the bond, for any loss. The advice given him by Mr. Thompson, according to the testimony of E. B. Stephenson (Printed Record, p. 543) was as follows:

"Mr. Thompson, with more anger than he ever displayed, before or since, in talking to me about anything, said that I ought to have more sense and more patience than to listen to gossip on the street about the failure of the Capital National Bank, and its assets and capabilities for paying out, and that he thought I ought not to suffer that loss. That if the bank's affairs were handled properly there were ample assets there to pay the depositors."

Mr. Thompson's testimony regarding the same incident was as follows:

(Printed Record, pp. 526, 527.) A. The treasurer, Stephenson, had something like twenty thousand dollars in there, as I remember it; and he came to me and said that he had been offered by Mr.—N. C. Brock, of Lincoln, had offered him seventy-five cents on the dollar for his claim, and asked what he thought I should do about accepting it. And I said to him I didn't think he ought to do it. He went away and came again. He came to me several times, probably three or four, each time rather pressing me to say to him that it would be best that he accept this seventy-five cents on the dollar that Mr. Brock had offered him. Mr. Brock had bought some other claims there and paid seventy-five cents for them. And each time he came I insisted in my talks to Mr. Stephenson that it would be a loss to him if he accepted that, and that he ought to stand for what the bank would give him. The outcome of it was

that, instead of getting seventy-five cents he got seventeen cents, and I got the privilege of paying something on the bond.

Q. In case the claim had been sold for 75c on the dollar, had Mr. Stephenson made arrangements by which he could discharge his whole liability, and not let any loss fall on you as bondsman? Had that subject been mentioned?

A. Mr. Stephenson said in his conversations with me that if he accepted the 75c he could clear his obligation with the City. That, with his own personal funds, seventy-five cents on the dollar would give him enough so he could take care of the obligation.

THE COURT: Why did you stand against that?

A. Mr. Stephenson was a friend of mine, and I didn't like to see him lose the money. Mr. Stephenson has been a friend of mine for many years, and I thought, in advising him as I did, that I was advising him to the end of getting the best results for himself.

The incident thus verified by two witnesses, both of whom are fellow townsmen of the man who made the offer, is not disputed. It speaks powerfully of *Mr. Thompson's* continued belief, even after the failure, in the integrity and value of the bank's assets. On that belief he risked a liability which ultimately fell upon him, that he could well have escaped if he had been willing that the treasurer should have suffered a loss of 25% of his deposits. *Mr. Thompson's* conduct must be judged, "not by the event, but by the circumstances under which he acted." This circumstance is inexplicable, except upon the theory of Mr. Thompson's faith, at that time, in the adequacy of the assets to pay all deposits in full.

The Lincoln Gas Company, and the Farmers & Merchants Insurance Company, which Mr. Thompson controlled and managed, and other institutions in which he was concerned kept active deposit accounts in the bank to the date of its suspension. Mr. Thompson testified that the deposits in the accounts which he absolutely dictated

amounted to between twenty-eight thousand and twenty-nine thousand dollars. (Printed Record, p. 441.) This fact was confirmed, in detail, *by Harry T. Jones.* (Printed Record, pp. 738, 739.)

At the same time, Mosher & Outcalt were owing him on their joint note $22,500. Mosher was guarantor of a loan of $10,000 made by Mr. Thompson to J. W. Furgeson, and Mosher was also trustee of $2,000 of stock of the bank for the benefit of Mr. Thompson's daughter. The insurance company, of which Mosher was treasurer, was a financial institution, that on account of the failure of the bank which was its depository, Mr. Thompson was obliged to sustain with his personal credit. Mr. Thompson also sustained with his personal credit The American Exchange Bank of Lincoln, of which he was vice-president. Mr. Thompson also paid an assessment of $1,000 on his bank stock, and he and the companies controlled by him, in which Mosher and Outcalt had been interested, became enmeshed in much litigation. No other individual suffered so much from the failure. According to the standard of self-interest, as the governing motive of business transactions, which the plaintiffs assert controlled the deposits which they made, *Mr. Thompson* must have thought, to the very last, that the bank was sound. There is no other explanation of his failure to withdraw the $28,000 of deposits which he absolutely controlled, as both *Jones* and *Jacobs* swore they would have done on the first suspicion of the bank's instability.

Mosher's connection with enterprises controlled by Mr. Thompson has been the subject of criticism by counsel for plaintiff. But that circumstance only confirms the previous faith of Mr. Thompson in Mosher's integrity, to which he repeatedly testified.

Repeated incidents of Mr. Thompson's examination as a witness emphasize his high standard of moral rectitude. There were but few instances in which he betrayed any irritation, and these merely displayed his aversion to the petti-

ness, narrowness and subterfuges resorted to by examining counsel. One of these incidents was an inquiry, in reference to his participation in placing the bank advertisements, of whether he could recall reading advertisements of Peruna (p. 518). Ignoring counsel's attempt at witty diversion, Mr. Thompson explained that placing of advertisements was a matter of the general conduct of the bank, with which he had nothing to do. Another incident was a sneer at John R. Walsh, formerly a banker of prominence in Chicago, whose letter of credit Mr. Thompson carried to Terre Haute just prior to the failure of the Capital National Bank, and who was, at the time of the present trial, in a federal prison. Mr. Thompson was prompt to acknowledge the assistance Mr. Walsh had given him and the banking situation in Lincoln during the panic of 1893, and to say: "I have always had a very kindly feeling for Mr. Walsh, *although he is in prison now*" (pp. 493, 494). Another incident was an insinuating suggestion by counsel that Mr. Thompson's' secretary, *Mr. Mullen*, was "in position to take the blame for anything if it were necessary." The answer of Mr. Thompson to this insinuation was: "No Mr. Mullen isn't a man that would take the blame for anything he wasn't responsible for; and you know that, and everybody that knows him knows that." (Printed Record, p. 517.)

These, and other similar incidents, which put counsel in the wrong, and from which counsel suffered by comparison with the witness, were employed in the argument to demonstrate the masterful intellectual powers of Mr. Thompson. But, in truth, they showed only the moral aspects of the witness. Instinctively he avowed his former business associations, and gave credit where it was due, to the fortunate and the unfortunate. It was the reflection of his sturdy business morals that exposed the shams and pretenses of examining counsel, rather than his high intellectual endowment; and it was the moral element that gave force and conviction to the witness's intellectual processes.

We have now faithfully exhibited the proofs directed to the issue of whether *Mr. Thompson* knowingly made or knowingly participated in any falsehoods contained in the four or five official reports which bore his attestation. (Mr. Thompson was unable to verify his attestation of the report of December 28, 1886. Printed Record, p. 461.) No other witness spoke to the questions covered by the testimony of Mr. Thompson above set forth. It will be vain to search the records for contradictions. There are none. Except as *Mr. Thompson* spoke to these facts, the record is silent. Against the pretenses of plaintiffs that proof was offered against *Mr. Thompson* on the issue of *scienter*, and that he *participated* in reports of a later date than July 9, 1891, *which he did not attest*, we have quoted the testimony, circumstantially, in the precise words found in the printed record.

The record shows affirmatively, and without contradiction, that Mr. Thompson had no knowledge of falsification in the official reports attested by him; that he did not, in any manner whatever, participate in any report, official or unofficial, except to attest five reports mentioned in the special finding previously quoted; and that he had no part in these five reports, except to attest them upon oral assurance of the president or cashier, whose knowledge was superior to his own, that they were correct, and after they had first been verified by the oath of one of the managing officers of the bank.

The record conclusively establishes that these attestations were made by *Mr. Thompson* in good faith, and that he believed implicitly in the soundness of the bank up to the time of its failure. The record shows without contradiction that *Mr. Thompson* did not attest any report heedlessly or recklessly, nor without previous information of its correctness, obtained from the president or cashier, whose knowledge was superior to his own. To the contrary, he always acted on information from that source which he credited, and which, as a director, he had a right

to credit. The Act of Congress which created and defined the duties of his office, permitted the directors to delegate administrative duties to the president and cashier; and Mr. Thompson's reliance on their sworn and oral verifications, and his belief that he had, from that source, such reliable information of the correctness of the report as gave good grounds for the attestation, were justified.

No direct testimony was offered or received to show knowledge in *Mr. Thompson* of falsifications in any one of the reports which he attested; neither was there proof of contemporaneous circumstances, transactions or declarations to show, circumstantially, that he had such knowledge. Mr. Thompson spoke circumstantially and in detail concerning his official acts, and the uncontradicted showing leaves the essential element of *scienter*, not only unproved, but affirmatively disproved. The question of policy, whether the director's liability should be absolute, or conditioned on a wrong *knowingly* done, was for the Congress, which wisely determined it by U. S. Rev. Stat. sec. 5239. Had it been intended that the director's liability should attach upon mere proof of the falsehood contained in the report, the forfeiture would not have been conditioned on guilty participation in a conscious, or *knowing*, wrong or fraud.

If the degree of faith reposed in the bank and its officers be measured by the extent of the personal misfortune, then *Mr. Thompson* was more confiding than the other depositors who claim relief against him. If his conduct as a director be tested by the methods he employed in the concerns which he personally managed, *Mr. Thompson* is shown to have applied the same identical methods to the affairs of the bank in which he participated. If, before attesting a report, he should require such information of its correctness as he would credit in ascertaining the condition of a concern which he personally managed, his conduct also meets that requirement. From whatever angle the evidence is viewed it exhibits an entire failure of proof on the essential element of *scienter*. Mr. Thompson has at all stages saved the con-

tention that there is an entire want of evidence to establish liability against him under the federal statute. That has been his reliance, and if the sufficiency of the proofs is an open inquiry, it is submitted tha upon that issue final judgment must go in favor of *Mr. Thompson*, and against plaintiffs in error.

XIII.

The theory of liability presented in the brief of plaintiffs in error, as applied to Mr. Thompson, is an abandonment of the cause of action for deceit. It has been repeatedly adjudicated that the charge of deceit, or false representations, is the only cause of action pleaded that, in any event, is maintainable by plaintiffs.

It is suggested in the brief of plaintiffs in error that liability against Mr. Thompson in this action may be predicated upon his neglect to perform administrative duties. We have shown elsewhere that this theory is false and has been repeatedly rejected in the pending litigation. The only wrongs alleged in the several petitions, which are personal to the individual plaintiffs, are that the plaintiffs were deceived by false statements made by defendant. We have also shown that any cause of action for neglect of administrative duty is not one that can be maintained by individual plaintiffs, but is an asset of the bank in which all of the stockholders and creditors are interested, which must be prosecuted in the name of the receiver for the use and benefit of all creditors and stockholders.

The brief of plaintiffs in error also suggests extreme notions of the duties of directors, which have no application to the pending actions of deceit. This suggestion was fully exploited in the argument of plaintiffs in error on the former hearing in this court and was ruled adversely to plaintiffs in *Yates v. Jones National Bank*, 206 U. S. 158. If the common law rules were open and admissible, the authorities cited under this head could have no application to the pending issue.

Martin v. Webb, 110 U. S. 8, like the other cases cited, has no bearing, direct or remote, upon the issue of agency in the present suit. That case presented the sole question of whether a bank was bound by a release in the name of the bank, executed by the cashier. The imputed knowledge of the directors, mentioned in the opinion, related solely to matters involved in the dealings of third persons with the *corporation* in behalf of whom, alone, relief was sought on the ground that the cashier had exceeded the authority of his agency for the corporation.

It will be fruitless to pursue the further references. We do not contest the doctrine that a corporation should be bound by the acts of its own officers, within the real or apparent scope of their authority, touching the subject-matter of the agency. Under that doctrine the official acts of the officer are the acts of the corporation, imputed to the corporation as a matter of law. No one doubts this. But any personal relation of agency of an officer of the bank to act in the personal right of an individual director, is not presumed. In his personal right the director acts for himself or by some agency of his personal selection and creation. Authority of an officer of the bank to act for a *director* of the bank, as distinguished from the *corporation*, is not presumed. The officer's right to represent the corporation is the very subject-matter of his agency. His right to represent the individual director is not of the subject-matter of his official agency. (*Gerner v. Mosher*, 58 Neb. 144.)

XIV.

The mere fact of attestation does not foreclose the issue of knowledge, against the attesting director. This court decided on the former hearing that the burden of proving the director "knowingly" attested a false report, is by U. S. Rev. Stat. sec 5239, thrown upon the plaintiff.

It is also suggested in the brief of plaintiffs in error that the attestation of the official reports was an affirmation of positive personal knowledge, and consequently a fraud, within the meaning of the federal statute, if the statement turned out to be untrue, without regard to the director's honest belief in the truth of the statement and without regard to the existence of reasonable grounds for the attestation. This point is concluded by the judgments rendered on the previous writs of error in this court. This theory would relieve plaintiffs of the burden of showing that the director knowingly made or participated in a false statement; because, according to plaintiffs' contention, the attestation is a direct and positive assertion of the director's knowledge, so that the attestation proves, by the director's own declaration, that he had actual knowledge of its falsity. Under this theory, the only proof required on that element of the case would be that the statement was not true in point of fact. The adoption of that theory would have required the affirmance of the judgments upon previous hearings in this court. It is entirely clear that the point is concluded by the previous judgments in this court.

The same argument was presented by counsel to this court at the previous hearings, as the brief on file will show, and as the report of that brief in 51 L. ed. (U. S.) 1005 indicates. Notwithstanding the presentation of the argument, the former opinion in these cases (206 U. S. 171, 172) quoted from *Gerner v. Mosher*, 58 Neb. 135, the definition of the Nebraska Supreme Court of the word "attest," and expressly repudiated the same argument that is presented in the briefs on the present hearing.

The issue now presented is: "Is the decision of the State Supreme Court in harmony with the governing rules of liability which this court announced upon the previous writs of error?" The tedious and laborous exploitation of the points, already ruled adversely to plaintiffs in error, imposes a needless burden upon the court and furnishes no assistance in the solution of the issues raised on the record.

It is repeatedly suggested in the brief of plaintiffs in error that the case involves the issue of whether directors have any obligation to exercise their functions. It is entirely patent, however, that the sole issue in the case is whether Mr. Thompson, as an individual, knowingly made and published false reports which deceived plaintiffs to their injury. The presentation of the sham issue suggests an unwillingness to argue or exploit the only ground of liability presented by the pleadings.

U. S. Rev. Stat. Sec. 5239, does not make the liability of the director *absolute*, but *conditions* the liability upon the wrongful act being *knowingly* committed. The element of *scienter* thus expressly written into the statute, involves an inquiry in some form concerning the good faith of the director charged with personal liability. This presents a strong analogy, if not an identity, to the situation involved in *Ripley v. U. S.*, 220 U. S. 491.

Ripley v. United States, 220 U. S. 491, involved an issue of *good faith* of an inspector of government contract work. The finding of the Court of Claims *imputed* bad faith to the inspector. In rejecting the finding as equivocal and inconclusive, MR. CHIEF JUSTICE, in the opinion said:

"It was the clear duty of the court below in dealing with the question of bad faith on the part of the government inspector, not to leave that subject dependent upon an ambiguous expression, susceptible of being construed one way or the other, but to explicitly find whether or not that which it states was manifest was or was not known

to the inspector, and whether that subordinate official acted in good faith in the various refusals recited as having been made to the laying of the crest blocks, and the reasons assigned for those refusals."

The case being remanded for specific findings again came before the court and in *Ripley v. United States*, 222 U. S. 144, MR. CHIEF JUSTICE said:

"Thus, in the first place, while paragraph 1 finds that the inspector knew, at the time he made the refusal to permit the placing of the crest blocks upon the foundations, that they had sufficiently consolidated to be able to receive the blocks, this is qualified by the statement that such knowledge on the part of the inspector was but derived from the period which had elapsed between the building of the foundations and the time when the refusal to permit the laying of the crest blocks was made. But this qualification causes the paragraph to be ambiguous as to the existence or non-existence of good faith on the part of the inspector, since there is nothing in the paragraph which directly or indirectly establishes that the mere lapse of time, in view of the nature and character of the work, the materials which had entered into it, and the situation in which it was placed, to have been in good faith when he refused to permit the crest blocks to be laid."

Where the question of *good faith* is in issue, as it necessarily is in issue under the statute requiring proof of a *scienter*, the onus of proving *knowledge* and *bad faith* is upon the plaintiff.

XV.

The alleged testimony of R. C. Outcalt should be excluded from consideration.

In one or more instances, plaintiffs' brief refers to alleged testimony of R. C. Outcalt. But the testimony of Outcalt was not taken in the present suit nor upon the present issues, and no notice or opportunity of the defendants to appear and examine the witness or cross-examine him, with reference to the present issues, was ever afforded. The printed record (p. 653) shows the following proceedings in relation to the admission of the alleged testimony of Outcalt:

"Mr. Thomas: Plaintiffs offer in evidence the following portions of the testimony of Mr. Outcalt in the case of Kent K. Hayden Receiver against David E. Thompson and the other defendants in this action, and others, tried in the Circuit Court of the United States for the District of Nebraska, some time during the year 1897.

"Mr. Rose: Each of the defendants objects to the offer of the testimony as hearsay, incompetent, no foundation laid; not taken in any manner authorized by law to entitle it to be received in this case, nor taken in any proceeding had between the same parties nor under the same issues, nor authenticated in any manner whatever to entitle it to be received, and not binding upon either of these defendants, and in a matter and action entirely between other parties.

"We admit that the testimony, or purported testimony of R. C. Oucalt in the record presented here in court bears the signature of R. C. Outcalt, written in his own hand at page 790 thereof; said testimony beginning at page 704 and extending to and including page 790.

"Mr. Thomas: It is not contended on the part of the plaintiffs that the parties to this suit were the same, nor that the issues were the same, and all that is contended is that the Receiver in that case brought an action against the parties in that action who are the defendants in this action, and that this testimony here pertains to matters which are involved in this action, and we contend that it ought to

be admissible as being an admission of Mr. Outcalt, and as such evidence against the defendants in this action upon the theory that it is an admission of a joint tort feasor.

"Mr. Rose: On that theory our previous admission is that it is the signed declaration and bears the genuine signature of Mr. Outcalt, and we further admit that the record here present is the record of Mr. Outcalt's evidence taken in the suit referred to and prosecuted in the Circuit Court of the United States for the District of Nebraska.

"But with this admission we still insist on the objections that it is hearsay, incompetent, no foundation laid; not taken in an manner authorized by law to entitle it to be received in this case, nor taken in any proceedings had between the same parties nor under the same issues, nor authenticated in any manner whatever to entitle it to be received, and not binding upon either of the defendants, and in a matter and action entirely between other parties.

"Objection overruled.

"Each of the defendants excepts."

The judgments were reviewed in the State Supreme Court upon appeal where defendants insisted that Outcalt's declarations were incompetent. There was no contention made in the Nebraska Supreme Court that the testimony of Outcalt could be considered in determining the sufficiency of the evidence. The evidence was not taken or received in conformity either to the laws of the state of Nebraska or the acts of congress. It was not admissible as a declaration of Outcalt. Outcalt is not a present defendant and the statements were not made while the bank was in existence. The question of evidence was controlled in the state court by *Stratton v. Oldfield*, 41 Neb. 702, in which reference was made to *Logan v. United States*, 144 U. S. 263.

XVI.

The insinuations against Mr. Thompson contained in the brief of plaintiffs in error, pages 97-110, are based wholly on garbled statements of the evidence, and are unsound in their deductions and morals.

They are without legal significance, because they are all based on incidents occurring long after any attestation was made by Mr. Thompson; and they do not reach the issue of scienter, which must affect him at the time he acted.

Insinuating characterization cannot supply the absence of proof on an essential element of plaintiffs' case. Such characterizations may appeal to a particular taste in presentation, but it is demonstrable that not a single incident referred to in the phenomenal presentation bears upon the issue of Mr. Thompson's knowledge of any falsity embraced in the official reports attested by him, nor on his good faith and honest belief in their correctness. Recalling that the burden of the plaintiffs in error is to prove by a preponderance of the evidence that Mr. Thompson knowingly made and published false statements by which plaintiffs were deceived, let us pursue the task of demonstrating that the studied aspersions continued in the brief, beginning at page 97, are pointless.

At page 80 of their brief, counsel enumerate the dates of the reports which the proofs show were attested by Mr. Thompson, as follows: December 28, 1886; August 1, 1887; December 1, 1890; July 9, 1891. The issue is whether Mr. Thompson *at the time he acted*, the latest date being July 9, 1891, had knowledge of any falsifications in the official reports; or whether he knowingly attested a report which contained false statements.

The first incident mentioned as a circumstance against Mr. Thompson, to prove that he acted with knowledge, is the Comptroller's letter of September 8, 1891. But that letter could not have been the vehicle of knowledge to

Mr. Thompson, when he acted at the prior date of July 9, 1891. In exploiting this incident, counsel call attention to the circumstances that it was made "shortly *after* the official report of July 9, 1891, which had been signed by Mr. Thompson, and called specific attention to the fact that the official report misrepresented the item of overdrafts in the sum of nearly $43,000.00." But the letter, which was addressed, not to Mr. Thompson, but to C. W. Mosher, copied in the brief at page 83, makes mention, not of the report attested by Mr. Thompson, but of an intervening report of August 19, which was not attested by Mr. Thompson. Again, the letter referred to contained no direction that it be brought to the attention of Mr. Thompson or any other director. There is no proof that it ever came to Mr. Thompson's notice. Mr. Thompson testified, unequivocally, that he had never seen it until his attention was directed to it, in the old record at the time of the present trial in Seward County. To this fact we quote his testimony from the printed record, (p. 462) as follows:

"Q. There is a certified copy of a purported letter by the Comptroller of the Currency addressed to Mr. C. W. Mosher, president of the Capital National Bank, of date September 8, 1891, which purports to have been written by R. N. Nixon, deputy and acting Comptroller. Had your attention been called to that letter during the trial and the alleged copy of a copy?

"A. I read it this morning in the record; that is the only time.

"Q. What is the fact whether that letter was called to your attention during the existence of the bank?

"A. It was not; the first time that ever I saw that letter was this morning, while I had that record, and will add that I never looked over the part of it that that letter is in; this morning when you called my attention to it was the first time I ever saw it."

Plaintiffs offered no proof of any character that the letter referred to ever came to the attention of Mr. Thompson. There was no foundation laid even for the introduction of the letter and it cannot, of course, be considered for any purpose against Mr. Thompson.

The next incident mentioned is an alleged meeting of the directors in a diminutive little room connected with the entrance to the safety deposit vaults, which the brief states was *after* the receipt of the letter of September 8, 1891. This alleged incident, like the letter of September 8, was at too late a period to have any relevancy upon or significance to the issue of *scienter* as applied to Mr. Thompson's attestation of any report, the last act of attestation having been long before the incident occurred. The incident mentioned was flatly denied by Mr. Thompson and was supported only by a single witness, *Walter T. Scott*, a moral degenerate and reprobate, whom *Harry T. Jones* had picked up on the streets of Lincoln and brought to Seward. Scott claims to have been, at the time in question a delinquent debtor of the bank and to have come to the bank in the afternoon, after closing hours, on the call of Mosher. The sole testimony addressed to the incident, by plaintiffs was Scott's testimony (Printed Record, p. 353) as follows:

"A. I think they were having a meeting there of the stockholders when I went in.

"You mean directors or stockholders?

"A. Directors, or whatever you call them, and there was a number of them there; there was Mr. Mosher and Mr. Outcalt, and A. P. S. Stuart and H. J. Walsh and D. E. Thompson and several others; I didn't see them all, but when Mosher came out of the room,—when I went in they was talking pretty loud, seemed to be quarreling about something; some letter they had got from the Comptroller, and Mosher when he came out he seemed flushed and angry, and I overheard Mr. Thompson say that he thought the whole thing was rotten right through and he was going to get out of it."

On cross-examination (p. 363) Scott testified as follows:

"Q. Did you hear Mr. Thompson make any mention of what it was that he thought was rotten.

"A. He just said he thought the thing was rotten all through and he would get out of it.

"Q. What was it he referred to,—you didn't catch what he referred to, did you?

"A. No.

"Q. And you don't know to this day what he referred to?

"A. No, I don't; I suppose it was about the bank.

"Q. You didn't hear him say anything more than that?

"A. No sir; I wasn't in there only as I told you, just about two or three minutes."

The purpose of introducing Scott was to impute knowledge to Mr. Thompson, not otherwise shown, of the letter of September 8th. In this the effort failed, as the quoted excerpts from Scott's testimony prove. There was nothing mentioned that connected the conversation with the subject-matter of Nixon's letter.

Mr. Thompson (Printed Record, pp. 455, 456) in a detailed and circumstantial way, exposed the falsity of Scott's testimony. We quote the following questions and answers from Mr. Thompson's testimony:

"Q. Did you in the forepart of September, 1891, or at any time in that month, attend a meeting of the stockholders or directors after banking hours in the little room leading to the customers' safety deposit boxes?

"A. Well I never attended a meeting at any time in that room.

"Q. Was there any meeting of any sort held at such time and under such circumstances, at which you were present in the month of September, referred to by Mr. Scott, in 1891 in the room specified?

"A. No, I never attended a meeting at any time in that room, it would be practically impossible to hold a meeting in that room."

Mr. Yates also denied his presence at any such meeting. The incident imputed to Mr. Thompson of expressing disapproval of some supposed misconduct would not be discreditable, but would merely betray the conceptions of *Harry T. Jones* and *Walter T. Scott* of Mr. Thompson's business rectitude. It would also imply his previous faith in the bank and could not affect his liability for deceit based upon the reports which he previously attested. But the testimony was false and the incident fabricated.

Sister Ida of the Tabitha Home, a charitable institution, of which Scott was for ten years an inmate (Printed Record, p. 607), W. H. Mendenhall, an employe of the Tabitha Home (p. 610), Mrs. R. A. White, a member of the board of Tabitha Home (p. 611), H. B. Miller, the physician of Tabitha Home (p. 619), William C. Rhode, the health officer of Lincoln (p. 623), Fred Foster, City Attorney of Lincoln (p. 624), and Claude Wilson, an attorney at Lincoln (p. 626) all testified that the reputation of Scott for truth and veracity was bad. Dr. Miller, upon an intimate and long standing acquaintance with Scott's habits and propensities, pronounced Scott a moral degenerate, and if permitted to class that species of degeneracy as insanity, would pronounce him insane.

In so far as the incident referred to has any bearing upon even the moral aspect of Mr. Thompson's conduct, this court would hardly, on the showing mentioned, criticise the State Supreme Court for reaching a conclusion that no derogatory inferences could be drawn from it against Mr. Thompson.

The next incident mentioned in the brief is the sale by Mr. Thompson at the price of $125 per share of bank stock of the par value of $18,000. But this incident, like the Nixon letter and the fabricated meeting following the letter, comes too late to have any significance on the issue of *scienter* as applied to any attestations of official reports made by Mr. Thompson. The transaction was had Novem-

ber 14, 1891, more than four months after the latest report attested by Mr. Thompson. The *bona fides* of the transaction in question was clearly established by the proof. Practically the only testimony in the record upon which the *bona fides* of the transaction must be judged is that of Mr. Thompson himself, who was questioned at great length. In his direct examination (Printed Record, pp. 443, 444) Mr. Thompson testified as follows:

"Q. Now, you may just give the reason for disposing of that stock,—you may state, who did you sell it to?

"A. I sold it to Mosher and Outcalt through negotiations with Mosher.

"Q. At what rate?

"A. At a premium of 25 per cent.

"Q How many shares did you sell?

"A. $18,000 face value; $22,500 was what I was to receive for it.

"Q. Now you may just state briefly the reasons and circumstances under which you sold that stock to Mosher.

"A. The reason for selling the stock to Mosher was this: In coming from Chicago on the evening train,—leaving there in the evening and reached Lincoln the next day, I got on the sleeping car and went to my berth, and sitting in the section just ahead of me was a woman and on the right side just opposite was Mosher. The woman I recognized was a woman of the town, in Lincoln, and there was nothing said between Mosher and myself all the way home; simply said 'How do you do' but there was no more conversation between us, and I went to the porter,—he was a porter that I knew very well and a man that had been on the road a great many years,—and I said, 'Porter, who are these people here?' I wanted to see if he knew who they were, and he said, 'I don't know who they are, but' he said, 'they just had an awful time,' and I said, 'What do you mean?' 'Well,' he said, 'just an awful time between them' and I fancied that she had probably been drinking, from what he said Any way Mosher and she were together, and they were going back home. When we got in Lincoln that morning, after we got in

there I telephoned to Mosher that I wanted to see him, and he came over and I said, 'Mosher, I am going to sell my stock in your bank, and if you want it you can have it, and if not somebody is going to get it.' And he said, 'Why?' I said, 'There is no use for us to talk about why, you understand perfectly why' I said, 'I talked to the porter about your trip to Chicago, and that's all I have got to say about it, but my stock is for sale.' And he said he would buy it and asked me what I wanted for it, and I said 'Whatever is right,' and he said, 'Is 1-25 all right?' And he said 'Will you take Outcalt's and my notes?' and I said 'Yes.' 'Well,' he said, 'how about security?' I said 'You needn't give security unless you want to; you can have the stock and give me your notes' and he said he would give gas stock security and that was the transaction. And it was done as quickly as we are talking about it here now, because I didn't spend any time abusing him. I told him what it was for, and he knew what it was for. I wanted him to take all of it, but he said he would take all but $1,000, and I let it go that way and things went on except after that I didn't have very much to do with him. No reason except just a personal reason, that was all.

"Q. Now had you ever had any grievances against Mosher, or difficulty with him?

"A. No, I never had.

"Q. Except the instance of his social degradation, in that respect.

"A. No there never was a word between us about anything else, so far as I know of, but I had heard of this sort of thing before and that was the culmination of it, and that is the way I finished it."

The wife of Mosher was the daughter of Mr. Henry Mansfield, a man of affairs and a warm personal friend of Mr. Thompson. The influence of that relationship in arousing Mr. Thompson's resentment, was brought out on cross-examination (Printed Record, p. 492) as follows:

"A. As I say, Mr. Mosher up until that time I always liked; I thought very kindly of him. I liked Mrs. Mosher

and I liked the whole Mansfield family; they were people I had come to know and I liked them; and that night on the train made me pretty angry at Mosher and I went after him just about as hard as I was capable of going after any man for anything."

Mr. Thompson further testified, (p. 491):

"A. Well, Mr. Mosher and I were not very friendly after that. Of course, there were business reasons why we had to be civil * * *. A. We were on good business terms, so far as it was necessary to be. Mosher was interested in both the gas company and the insurance company and I had to be on reasonably good terms with him."

This transfer of stock was almost contemporaneous with that of R. E. Moore to Dr. Hamer, another director, and the price was the same as that paid by Dr. Hamer. It will serve no purpose to review the further testimony, which is voluminous and is found in the printed record at pages 402 to 505, inclusive. All of the testimony establishes the transaction as above related. Mr. Thompson was able, without difficulty, to maintain its validity and enforce his securities against a contest by the creditors of Mosher and Outcalt. The circumstance that the plaintiffs, in their brief, forebore the presentation of the evidence directed to the *bona fides* of the stock sale, while holding the burden of impeaching the sufficiency of the finding of the state court upon the evidence, indicates that the evidence is overpowering. The references given are sufficient to indicate that upon the present writs of error this court should not seriously consider disturbing the finding of the State Supreme Court that the evidence was not sufficient to overcome the *bona fides* of the stock transfer in question, nor to indicate that Mr. Thompson knowingly attested a false report at some period long anterior to the date of the transaction.

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The next incident mentioned, by way of vituperation only, is that Mr. Thompson retained stock in the Lincoln Gas Company, of which he was the president and manager, and accumulated more as he could purchase it. But the recited incident, while true, only tends to establish Mr. Thompson's faith in the business character of Mosher. The testimony is undisputed that Mr. Thompson had imperious and absolute control of the management both of the gas company and of the Farmers and Merchants Insurance Company. The reference at page 100 to the circumstance that Mr. Thompson owned in excess of $100,000 of the stock of the gas company, which he transferred some seven years subsequent to the failure of the Capital National Bank, is so far removed that Mr. Thompson is not called upon to take any issue upon the unfounded assertion relating to purely private affairs having no connection with the suit. There is no proof, however, to impeach the absolute rectitude of Mr. Thompson's dealings with the stock of the companies of which he was manager.

The next incidents referred to (plaintiffs' brief, pp. 100, 101) are a letter of the Comptroller which bore date February 16, 1892, and a reply thereto, dated February 19, 1892, and a further short letter by the directors to the Comptroller, of date October 14, 1892. But these instances like the others referred to, are long subsequent to the date of the last attestation of an official report by Mr. Thompson. One letter is upwards of seven months after Mr. Thompson's latest attestation and the other is upwards of one year and four months. They, therefore, have no significance upon the issue of *scienter*, as that issue must affect Mr. Thompson on and prior to July 9, 1891.

The testimony of Mr. Thompson, to which reference is made in the brief, in connection with these instances, prove circumstantially his utmost good faith and belief in the integrity and value of the assets, which were the subject of discussion, and disprove every imputation against his good faith.

In this connection reference is made to the incident of Mosher's paper carried by the bank, but the fact is that none of the irregularities were ever disclosed to Mr. Thompson. The record showing (Printed Record, p. 445) is embraced in Mr. Thompson's testimony, as follows:

"Q. Did you have any knowledge that the notes of Mosher and Outcalt were in the bank in any considerable sum, or in any sum?

"A. No, I had no knowledge of any of those things; they never came to my attention in any way, through any of the meetings of the bank; there never was any report from the executive committee, either, that criticised any of the conditions in the bank,—that is at none of the meetings at which I was present.

"Q. Did you ever authorize the bank's taking paper of Mosher to the extent of $85,000?

"A. No sir, I didn't even know of it.

"Q. Or of Outcalt to the extent of $75,000?

"A. No sir; I didn't even know of it.

"Q. Or in any sum whatever?

"A. No—Never.

"Q. Did you ever concur in their borrowing from the bank?

"No sir.

"Q. Were you ever given an opportunity,—was the question ever presented to you?

"A. No sir,—never in any shape whatever."

There are in plaintiffs' brief numerous assertions that a director could not have been ignorant of the frauds perpetrated by the managing officers; but as applied to Mr. Thompson those assertions are directly in the teeth of the uncontradicted evidence. Mr. Thompson testified (p. 441) that he believed in the solvency and stability of the bank up until the time of its suspension; (pp. 441, 442) that he had no knowledge of false entries or statements in the reports to the comptroller; (p. 445) that he had no knowledge of false entries in the bank's books, nor

that the bank was carrying paper of the Western Manufacturing Company; (p. 459) that he had no knowledge of the manipulations of the items of bills of exchange nor that credits were wrongfully made to the interest paid account, nor that there was a false footing of the deposit ledger; (pp. 459, 460) nor that the certificate of deposit account was at any time overdrawn. The record shows without dispute that the frauds perpetrated by the managing officers were concealed from Mr. Thompson. This explains the course pursued in the vituperative brief, of declining to enter upon any discussion of the entire proofs directed to any particular point or incident. The undisputed proofs remove every aspersion cast upon Mr. Thompson, upon every incident brought into the inquiry, whether relevant or irrelevant to the issue.

Reference is next made to the circumstance that a Mr. Dorgan, in Mr. Thompson's absence, on the morning after the failure of the bank, filed a chattel mortgage from Mr. Mosher to Mr. Thompson, but the undisputed testimony of Mr. Thompson (p. 763), touching the authority of Mr. Dorgan, is as follows:

"Q. Was Mr. Dorgan employed by you in any capacity what ever or authorized to represent you in any capacity whatever, in the month of January, 1893?

"A. No sir, then nor at no other time.

"Q. He never was employed by you as agent in any capacity of any sort?

"A. No sir.

"Q. Did you have any knowledge prior to yesterday, that it was even claimed that he had preteneded to file any instrument in your behalf in Lancaster County?

"A. I never heard of it before."

This Mosher chattel mortgage, delivered and filed after the failure, was not made under any pre-arrangement of any sort (p. 764) and it was proved that Mr. Thompson never claimed any rights under it, but promptly repudiated it.

It is stated in the brief of plaintiffs (p. 108) that "Mr. *Jones* testified that this account (the gas company account) received a credit of $10,000 growing out of the fraudulent certificate of deposit for $100,250, issued in the name of J. E. Hill, Treasurer." It is true *Harry T. Jones* stated that such was his conclusion from his examination of the books of the bank, but it was indisputably proved by unimpeachable independent testimony, that the *inference* of *Mr. Jones* was *false*. (See to this point the testimony of J. K. Honeywell, Secretary and Bookkeeper of the gas company, Printed Record, pp. 530 to 536.) The source of the credit was the proceeds of a note of the gas company negotiated in Ohio, which was subsequently paid by the gas company. On the face of all the proofs there is not even a dispute as to the *bona fides* of the credit to the gas company of which Mr. Thompson was president and managing officer.

There is next a reference to the circumstance that the Farmers and Merchants Insurance Company, of which Mr. Thompson was manager, had assumed liability upon two checks that had been given to savings banks in Lincoln just prior to its suspension and on which the savings banks, by reason of its suspension, had suffered a loss. The circumstance is, in itself, highly creditable to Mr. Thompson, who detailed the incident at page 444. The insurance company had a large cash balance accumulated at the beginning of the year. Just prior to Mr. Thompson's departure for Terre Haute, where he was when the bank failed, he had given three withdrawal checks in order to reduce the company's idle balance and obtain interest from savings banks. Two of these banks had failed to make withdrawals upon the checks from the Capital National Bank before the failure. In this situation Mr. Thompson thought the delivery of the checks was so short a time before the failure, that the insurance company should save the savings banks harmless from the loss. There is no other significance to the transaction. It occurred after the

failure of the bank and could have no possible bearing upon the issue of *scienter* as applied to attestation of official reports by Mr. Thompson.

The repeated references in the brief to conveyances of real estate by Mosher to Mr. Thompson are absolutely without significance on the issue of *scienter* as applied to Mr. Thompson's attestations of official reports. They were long subsequent to any attestations of official reports by Mr. Thompson. They followed, and were incident to a pledge of gas stock to Mr. Thompson as security for the purchase money note for the bank stock. The substance of the voluminous testimony directed to these transactions is embodied in the following general statement taken from the examination of Mr. Thompson (Printed Record, Bill of Exceptions, p. 495):

"He asked me if I would as soon have land as security as the gas stock. I said yes. There was very little talk about it; but I said I would, and he brought me over deeds to several pieces of land up in York and Hamilton counties. I don't know just how many or which pieces he brought, then, or later. With the exception of the piece in Lancaster County, which had no mortgage on it, they all had large mortgages. I wasn't looking for bears, or anything of the sort. I was very willing to give him what he wanted, and to take what he offered to me as security for that note. Then when he came and asked me to change some pieces, that I had, for others that he wanted to give me, saying that he had sold, or could sell some of those that I had, I very readily exchanged with him. And the thing ran along in that way until the time of the failure; and then I could see, without putting on my spectacles that the whole thing had been done to bunco me. That was his scheme."

The rectitude of Mr. Thompson's personal and official conduct is securely established by the ample recitals quoted from the record. There is no ground, based on the record, for disapproval of the finding of the State Supreme Court,

that this and other incidents mentioned in the brief of plaintiffs in error, tend to establish his good faith, and to disprove the charge of *scienter*.

In reference to the Donald, Lawson & Simpson account, we have heretofore explained that when the increased capital was subscribed and Mr. Thompson and other influential men became stockholders, and coincident with the change of the name to the "Capital National Bank," there was a meeting held for the purpose of organizing the new bank and taking over the assets of the old bank. At this meeting a committee was appointed to check over the assets and effect the transfer, consisting of W. W. Holmes, A. P. S. Stuart and C. W. Mosher. At that meeting Mosher and Outcalt mentioned that there was an account with the failed bankers, Donald, Lawson & Simpson, of New York, and that account would not belong to the new bank; but would be taken care of by Mosher and Outcalt. It was reported to Mr. Thompson that the item had been taken out of the bank (p. 430). It was indisputably proved that Mr. Thompson confided in the arrangement then made and had no knowledge whatever that any part of the item ever entered the assets of the Capital National Bank. (p. 430.)

The contention that the findings of the State Supreme Court are unsupported puts on the plaintiffs in error the *onus* of analyzing all of the evidence directed to the particular point at issue. When the evidence is opened every incident disclosed by the record, with which Mr. Thompson had the slightest connection, proves his high character and the ethical purity of his business and personal transactions. Had the judgment been otherwise than in his favor it must necessarily have been reversed upon a review in this court, for want of any evidence in the record to establish his moral delinquency, *in any transaction*, or to show that he knowingly attested an official report which contained any false statements. From whatever angle the

record is viewed, the proofs force the conviction that the judgment of the State Supreme Court is correct. It should therefore be affirmed.

Respectfully submitted,

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for Defendant in Error, David E. Thompson

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FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

NO. 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISE HAMER, ADMINISTRATRIX, ETC.

NO. 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND LOUISE P. HAMER, ADMINISTRATRIX, ETC

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

SUPPLEMENTAL BRIEF OF DAVID E. THOMPSON, DEFENDANT IN ERROR, PRESENTING THE QUESTION THAT THE COURT IS WITHOUT JURISDICTION.

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for David E. Thompson, Defendant in Error.

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SUPPLEMENTAL BRIEF OF DAVID E. THOMPSON, DEFENDANT IN ERROR, PRESENTING THE QUESTION THAT THE COURT IS WITHOUT JURISDICTION.

Subject to the court's grace, we desire, in behalf of defendant in error David E. Thompson, to submit the following presentation of the issue of jurisdiction, by supplemental brief.

The plaintiffs in error laid no foundation in the state courts for the review of federal questions in this court.

The decision of the state supreme court upon the federal question involved was in response to a claim and issue tendered by the defendants in error.

The judgments complained of were entered by the State Supreme Court, January 31, 1913. The entries vacating the orders for rehearing and denying rehearings were entered April 3, 1914. The writs of error were allowed April 27th, 1914, and were docketed in this court May 26, 1914. This court, therefore, must look for its authority to review the decisions of the Supreme Court of Nebraska in question, to Section 237 of the Judicial Code, as it existed prior to the amendment of December, 1914, (U. S. Rev. St. Sec. 709), which provides as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error. * * *"

When the cases were here on the previous writs of error sued out by the present defendants in error, a motion to dismiss the writs for want of jurisdiction was filed by the present plaintiffs in error, supported by a brief in which it was repeatedly asserted and pointed out that the *plaintiffs below* tendered no issues and made no claims based upon any federal statute. At page 19 of the brief referred to, supporting the motion to dismiss, it was said:

"The amended petition appearing on pages 7 to 12 of the printed record need hardly be copied by us at large, but we assert that not one sentence, line or paragraph thereof appears in the whole petition setting up a federal right belonging to the defendant in error whereby the defendants in error were made to rely or claim under or by virtue of a federal law."

The power of this court to review the judgments then under consideration existed only because the plaintiffs in error in those cases were shown by the record to have specially set up and claimed immunity under Section 5239 of the revised statutes of the United States, and the federal right so claimed had been denied by the judgments of the highest court of the state, as the brief of *Mr. Thompson* and the *reply brief* filed therein show.

The petitions of the plaintiffs presented the theory that the liabilities charged against defendants were independent of and unaffected by any statute of the United States. They made no allegations that the Capital National Bank was a national banking association, nor that the defendants were directors of a national banking association, nor that any of the acts complained of were done pursuant to any act of Congress, or as directors of any national banking association. There was no allegation that either one of the financial statements annexed to the petitions and marked Exhibits A and B were addressed to the Comptroller of the Currency, and the name or title of the Comptroller did not appear in either exhibit or in the petition. The designations, in a very general form, of financial statements complained of, other than Exhibits A and B, were as follows:

"This plaintiff avers that on and between July 23, 1884, and January 21, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of the said time, made, allowed, caused and permitted to be made at divers intervals, false statements of the condition of said bank as to its resources and liabilities with the intent and purpose

of deceiving the plaintiffs and others as aforesaid, and caused, acquiesced in, allowed and permitted said false statements and each of them severally to be published in newspapers of general circulation in the city of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the state of Nebraska, and sent and caused to be sent to and received by plaintiff said false statements aforesaid through the U. S. mails and otherwise, and which were received by plaintiff." (Printed record in present suit *Jones National Bank case*, pp. 4, 5.)

The quoted averments charged no fault with any *official* statements to the *Comptroller of the Currency, published under command of the federal statutes.* The plaintiffs in the subsequent proceedings, had after reversals in this court, did not reform their petitions nor alter their attitude in the respects noted, but sought still to avoid the making of any claim under any authority of the United States, and plaintiffs actually obtained judgments upon the second trial in the district court of Seward County, Nebraska, *purporting to rest wholly upon nonfederal grounds.*

While the proofs were not sufficient to sustain any non federal ground of liability, Mr. Thompson anticipated a possible misapprehension or perversion of the proofs in this respect, and requested special findings defining the grounds upon which any adverse judgment should rest. In answer to one of such requests, the trial judge wrote in the journal of the court, the following words:

"Responsive to the request for a conclusion of law embodied in the first request, the court finds that plaintiff is entitled to recover in an action of deceit *under the principles of the common law, exclusive of the requirements of the national banking act.*" (Printed record, *Jones National Bank case*, p. 28.)

Upon entering the original findings, of which that quoted was one, the court orally announced that the proofs in his opinion were not sufficient to entitle plaintiffs to

recover *upon the official reports* under the authoritative rules announced by this court on the previous writs of error. However, the theory of the trial court must be drawn by the appellate courts from the entries upon the journal, and Mr. Thompson made further requests calculated to have the theory of the trial court's decision more clearly reflected in the journal. In answer to one of these requests, the trial court stated and entered upon the journal, the following:

"Respecting the third interrogatory, the Court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit *under the principles of the common law is not founded upon the attestation of the official reports referred to in the third interrogatory*, but that *such statements are corroborative of the unofficial and voluntary statements made by the bank*, as set forth in the answers to the first and second additional interrogatories, and *such liability* (that is, a liability 'under the principles of common law, not founded upon the attestation of official reports') is founded upon the truth of the allegations of plaintiff's amended petition and embodied in the general findings of the court." (Printed record, *Jones National Bank Case*, p. 44.)

The last quoted finding was apparently the adoption of an argument addressed to the trial court that the newspaper publications were voluntary and unofficial acts, because the *statute* did not compel the publication of the *verifying affidavit* of the president and cashier, nor the *attestation* of three directors. It thus appears that the plaintiffs, up to the time of the rendition of the final judgments which ended the authority of the trial court over the litigation, consistently sought to rest their right of recovery upon nonfederal grounds, and that it was the obvious intention of the plaintiffs, in the event the judgments resting upon the quoted findings were affirmed, to circumvent the previous judgments of this court upon the ground that the present judgments were rested upon nonfederal grounds of liability.

In the subsequent appellate proceedings, prosecuted in the state supreme court, the defendants were the moving parties, and the defendants, and not plaintiffs, presented claims under the statutes of the United States. The foundation for these claims was laid originally in the answers. The answer of Mr. Thompson alleged specifically that the Capital National Bank mentioned in the amended petition existed under and by virtue of the national banking act, and that defendant was a director of that bank. His answer also alleged that his obligations as a director were defined by the national banking act, and that the cause of action embraced charges which, if true, "constituted a violation by this defendant as a director or stickholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected, as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant there is necessarily involved the construction of said National Banking Act relating to the duties of directors and stockholders of national banks." (Printed record, Jones National Bank case, p. 11.)

In laying the foundation for appellate proceedings, Mr. Thompson, in a motion for a new trial, presented to the trial court, made, among others, the following assignments (printed record, Jones National Bank case, pp. 42, 43):

"19. Upon the evidence this defendant is entitled to judgment in his favor, as a matter of law.

"24. The facts and conclusions of law found by the Court show that the judgment is based wholly, or in part,

upon statements of the financial condition of the Capital National Bank 'published in the newspapers.' By the National Banking Act such newspaper publications of official reports were specifically required to be made and were not voluntary or unofficial acts, and the findings of fact and conclusions of law stated in said judgment in so far as they find or assume such newspaper publications to be voluntary and unofficial acts are in conflict with said act of Congress and with the law of the case established in and by the appellate proceedings heretofore had herein.

"28. The Court erred in each of its conclusions of law stated in answer to this defendant's 4th request for additional findings. In so far as it is therein found that defendant's common law liability rests 'upon the statements * * * setting forth the financial condition of the bank which were published in the newspapers' it bases a common law liability upon official acts enjoined by the National Banking Act, contrary to and in violation of Section 5239 of the Revised Statutes of the United States and contrary to the law of the case established in and by the appellate proceedings heretofore had herein. The finding of facts contained therein is not sustained by sufficient evidence, nor by any evidence, and is contrary to the undisputed evidence.

"30. The facts specially found against this defendant on the Court's own motion are not sustained by sufficient evidence nor by any evidence and are contrary to the undisputed evidence."

Upon the foundation thus laid, the defendants presented their claim of federal right, based on the provisions of the National Banking Act, to the supreme court of the state upon appeal. No federal right had been claimed by the plaintiffs in the trial court, and plaintiffs filed no pleadings, beyond dilatory motions in the supreme court, until subsequent to the entry of final judgments of reversal.

The judgments in the trial court showed upon their face that they were not rested upon any federal ground, and that they, in terms, excluded any right of recovery in

plaintiffs, based upon the provisions of the national banking act. It was not the judgment of the supreme court on appeal that excluded the plaintiffs from the right to recover upon the provisions of the national banking act. That end was accomplished by the findings and judgment of the district court of Seward County, not by any ruling adverse to the plaintiffs, but by a ruling invited by them in their own favor to which plaintiffs took no exception, and from which they prosecuted no appeal.

Certainly, the federal question was considered and determined in the supreme court upon appeal; but the issue and claim which presented to the supreme court on appeal the consideration of a federal question was *tendered exclusively by the defendants.* There was no denial of a federal claim or right to the plaintiffs. They made no such claim. The judgments below to which they took no exception, on their face excluded such claim in their behalf. There was, therefore, no denial to the plaintiffs by the state supreme court of any claims of federal right.

The purpose of the present writs of error, and no doubt their logical end in the event they are ruled in plaintiff's favor, is to reverse the judgments of the state supreme court, *and to reinstate the judgments of the district court of Seward County.* In other words, it is sought to reinstate the judgments of the trial court which, on their face, rest the liability of the defendants wholly upon nonfederal grounds, and contain express findings or conclusions that the defendants incurred no liability upon any official published statements made pursuant to the National Banking Act, notwithstanding the plaintiffs took no exception to any of the findings or conclusions of the trial court which definitely excluded the application of the federal statute.

The plaintiffs were quite content, throughout all the appellate proceedings which eventuated in reversals by the state supreme court, to rest upon those findings in their

favor, and thus be rid of the embarrassment of adhering to the rule of proof declared applicable by this court on the former writs of error. In the Supreme Court of Nebraska, the plaintiffs lost their judgments, based on nonfederal grounds, because the evidence failed to show that defendants made or participated in any financial statements of the condition of the Capital National Bank, other than the official reports. After the total failure of evidence to sustain the nonfederal grounds of liability had been exposed and the art of so framing the judgments as to exclude review by defendants in this court, had failed on appeal, the plaintiffs found themselves without exceptions to the exclusion of any federal right below, and without any standing to complain of the denial of relief under the provisions of the National Banking Act.

It is, therefore, respectfully submitted that the judgments of the Supreme Court of Nebraska involve no denial *to the plaintiffs* of any federal right *asserted by them*, and that upon the records showing the facts above detailed, this court is without power to entertain the present writs of error, or to review the judgments of the state court.

The deliberate and studied purpose of plaintiffs to assert a cause of action resting exclusively on nonfederal grounds, and the explanation of the absence of all averments that the bank was a national banking association, or that any of the alleged misstatements were contained in official reports, or that such statements were addressed to the Comptroller of the Currency, or published pursuant to the laws of the United States, or that in doing the acts complained of, defendants were officiating as directors of a national banking association, are quite obvious. The briefs of both sides assert, and the reports show, the following historic incidents of the litigation:

As *Bailey's case* was first brought in Lancaster County, where defendants resided, a removal petition was sus-

tained by the U. S. Circuit Court, where final judgment was rendered in favor of defendants, upon the sustaining of a demurrer to his petition. That judgment was sustained in the Circuit Court of Appeals, Eighth Circuit. *Bailey v. Mosher*, 63 Fed. 488. Since amendment could not oust the federal court of its jurisdiction, the companion cases of the *Jones National Bank, Bank of Staplehurst* and *Utica Bank*, were dismissed without prejudice, and brought in the county of the residence of plaintiffs, upon petitions which charged only nonfederal grounds of liability. The introduction by defendants of federal questions by affirmative averments in the answers, could not sustain removals. But defendants attempted to remove, upon the theory that the causes of action were not rested wholly on nonfederal grounds. Upon motions to remand, plaintiffs maintained the nonfederal character of the causes of action pleaded in the present suits. *Bailey v. Mosher*, 74 Fed. 15.

The plaintiffs have enjoyed the high privilege of a trial in the forum which they selected, in the state court, in the county of their residence, and have prevented removals into the appropriate federal court of their district, solely by their maintenance of the proposition that their petitions set forth causes for relief resting wholly on nonfederal grounds, and that the assertion of federal claims by defendants in their answers, were not good grounds for removal. In order to maintain that privilege, they have necessarily refrained from offering any amendments by which allegations of the federal character of the failed bank, and the official character of the financial statements complained of, and that defendants acted in the character of national bank directors, should be introduced into their petitions as parts of the statement of their causes of action. Had such amendments been made, even after the review in this court, defendants could have removed by a timely application, made after the *first assertion by plaintiffs* of rights under the statute of the United States.

Having successfully maintained their right to litigate in the state court, by a distinct disavowal of any claims under any statute of the United States, plaintiffs, upon suffering defeat in the highest court of the state upon a claim of federal right *set up by defendants*, are wholly without the privilege of suing out writs of error granted by Section 237 of the Judicial Code, as that section existed when the present writs were sued out. That section limits the privilege of the writ to the suitor who has taken the initiative in the state court in the assertion of a federal right, and conditions the right of review under the writ upon the denial of such federal right, in the assertion of which he took such initiative.

The records here not only show that *defendants* had the initiative and sole function of asserting the federal right upon which the state court pronounced judgment, but that plaintiffs distinctly and persistently *disavowed* all claims of federal right, to the time of the rendition of final judgments on appeal in the highest court of the state. It does not follow that because the distinct assertion of a federal right gave the *defendants* standing to prosecute error in this court, in event of an adverse decision, the *plaintiffs* should enjoy the same privilege, in event the decision should be in favor of the federal right, asserted *by defendants*. The assertion of the federal right *by the plaintiff in error*, is an indispensible requisite to the power of review on writs of error by this court.

Having shown that the plaintiffs consistently maintained their assertion of nonfederal grounds of liability, only, until after they had suffered adverse judgments in the highest court of the state, we now present the nature and effect of their presentation of federal rights for the first time by *motions for rehearings*, filed in the supreme court of the state, after the entry of final judgments.

The motion for rehearing in the *Jones National Bank case*, printed record, pp. 56-61 (printed record, pp. 56-61, Bank of Staplehurst case) was introduced by the following, among other recitals:

"The undersigned appellee respectfully requests the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in Yates v. Jones Nat. Bank, 206 U. S. 158; of the statutes of the United States upon which that case is predicated."

The second assignment of the motion for rehearing contains the following:

"It appearing therefore that this case is, *by the decision of this court*, based and predicated upon the national bank act and the violation of the provisions thereof, *it follows* that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construcion and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and Section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, *in effect*, denied a right and privilege conferred upon it by the constitution and statutes of the United States, of Title 62 of Rev. St. of the U. S. and especially Section 5239 thereof."

It is submitted that the foregoing assignment is on its face, not the complaint of the denial by the court of any federal right claimed by *plaintiffs*, but is, on the other hand, a complaint that in deciding in favor of the federal right, *asserted by defendants*, the court so misconstrued the federal statute as "in effect" to deny a right and privilege conferred upon plaintiff by the statute of the United States. The assignment was not presented as a complaint that any federal rights set up or claimed by *plaintiffs* had been denied, but that the court had erred in deciding a federal right asserted by *defendants*. This attitude of

the plaintiff in the motion for a new trial is definitely stated and defined in the *eighth* assignment, which after quoting the opinion of Judge Letton, characterizes and complains of the decision of the state supreme court in the following words:

"Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the *proof* in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. *The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e., reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official reports.* And the evidence contained in the record sustains the findings and judgments."

Assignment 11, of the motion for rehearing, is as follows:

"In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, *but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.*"

Assignment 14, of the motion for rehearing, is as follows:

"This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory."

The plaintiffs, thus, in their motions for rehearings, counted on the circumstances that the judgments of the trial court, appealed from, by express findings, rested plaintiffs right of recovery *wholly upon non federal grounds* and *excluded* the application of the statute of the United States. In choosing thus to restrict and confine their own claims to the so-called unofficial and voluntary statements, and by that means to preserve their right to trial in the state court, and to avoid the risk of a review upon writs of error prosecuted by their adversaries, the plaintiffs were exercising an undoubted privilege. If they had so reformed their petitions as to openly assert a cause of action founded upon a statute of the United States, at any time before judgment in the trial court, defendants by petitions for removal, based on the amendments which *first presented the claim of federal rights*, could have procured a trial on the merits in the federal court. Plaintiffs cannot alter their position in that behalf after suffering adverse judgments on appeal in the highest court of the state, and thus circumvent defendants, at that stage of the litigation, of the right of removal.

Complaints are made in the motions for rehearings, inconsistent, no doubt, with the theory of the assignments quoted, that the state supreme court misinterpreted the provisions of the National Banking Act; and it may become pertinent to point out the proceedings had upon those motions, to ascertain whether the claims of federal rights therein made are reviewable in this court.

The motions for rehearings were only entertained through the participation of the Chief Justice, who at the original hearing had certified to his own disqualification, because of his having previously been consulted by one of the plaintiffs—a disqualifying act under the provisions of a local statute—and the order allowing the rehearings contained the protest of three of the judges against its entry on the journal, on the ground that the participation of the disqualified member of the court rendered the order void (Printed Record, Jones National Bank case, pp. 65, 66). Mr. Thompson moved to vacate the order granting rehearings, on the ground that it was void, and that the equal division of the qualified judges upon the motions for rehearing was, in law, an adherence to the previous final judgments of reversal. The motion to set aside the order granting the rehearing was sustained and an order entered denying the rehearing (Printed Record, Jones National Bank case, p. 92).

The authoritative written statement of the proceedings on the motions for rehearing was made by Judge Barnes and entered in the journal of the court. The journal entry, signed by Judge FAWCETT, as acting Chief Justice, was as follows:

"When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same." (Printed Record, Jones National Bank case, p. 94.)

Since the void proceedings for entertaining the motions for rehearings were vacated, and set aside, and held for

naught, the records show that the motions for rehearings were not entertained, and the federal questions sought to be presented therein by plaintiffs in their own behalf were not litigated or decided. The motions for rehearings are, therefore, unavailing, and the claims set up for the first time therein are not subject to review in this court.

To maintain a writ of error under Section 237 of the Judicial Code, the federal right must have been claimed by the plaintiff in error in the state court in the manner therein prescribed. *Oxley Stave Co. v. Butler County*, 166 U. S. 648; *Greenbay & M. Canal Co. v. Patent Paper Co.*, 172 U. S. 58; *Michigan Sugar Co. v. Michigan*, 185 U. S. 112.

It must appear from the face of the record that the plaintiff in error asserted his federal right. *Maxwell v. Newbold*, 18 How. 511.

It is not sufficient that a federal claim was made in argument. In so deciding, Mr. Chief Justice FULLER, in *Yesler v. Board of Harbor Line Commissioners*, 146 U. S. 646, said:

"The averment in relator's petition is that, 'he is now and has been for thirty years last past the owner of the following described property, to-wit, the property commonly known as Yesler's wharf and dock and the upland abutting on the shore upon which said wharf and dock were constructed.' It is said *in argument* that he is an original patentee of the United States, under the 'Donation Act' of September 27, 1850, (9 Stat. at L. 496, Chap. 76) of a tract of about one hundred and sixty acres of land, entered by him in 1852, embracing all the upland mentioned in the petition and bounded on the west by the meander line of Elliott Bay. *But this is not so stated in the petition*, and whatever might be inferred as to the character and source of his ownership, it cannot reasonably be held that relator *by this allegation* specially set up or claimed a title, right, privilege, or immunity under the Constitution, or a statute of, or authority exercised under, the United States in this behalf."

The federal question must be raised before the entry of final judgment in the highest state court. *Simmerman v. Nebraska*, 116 U. S. 54; *Bobb v. Jamison*, 155 U. S. 416; *Morrison v. Watson*, 154 U. S. 111; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 540; *California National Bank v. Thomas*, 171 U. S. 441; *Scudder v. Coler*, 175 U. S. 32.

A number of the cases last cited hold that the federal question cannot be introduced into the record by petition for rehearing filed in the highest court of the state after the rendition by that court of final judgment. Obviously the suitor's only means of throwing upon the court the burden of deciding a federal claim, is to present his federal right before the entry of final judgment. The denial of a motion or petition for rehearing may well be based on the ground that the party presenting the motion or petition for rehearing has no standing to litigate issues not presented to the court for decision before his case had passed to final judgment. The settled rule of this court is that the mere denial of a motion or petition for rehearing, in which the plaintiff in error for the *first time* asserts a federal claim, does not constitute an adverse decision entitling the moving party in that proceeding to review the federal question in this court. *McCorquodale v. Texas*, 211 U. S. 432; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 118; *Chicago I. & L. R. Co. v. McGuire*, 196 U. S. 129; *Cleveland & P. R. Co. v. Cleveland*, 235 U. S. 50; *Miller v. Texas*, 153 U. S. 535; *Capital National Bank of Lincoln, Nebr., v. First National Bank of Cadiz, Ohio*, 172 U. S. 426.

The case of the *Capital National Bank*, last cited, and the four companion cases ruled by the same opinion, were incidents of the same bank failure out of which the present suits arose, were upon records showing the distinct presentation, in a motion for a rehearing, of the issue that the judgment was violative of the provisions of the Na-

tional Banking Act, and that such motion for a rehearing had been denied. In those cases there were allegations in the petitions of plaintiffs, filed in the court of original jurisdiction, that the Capital National Bank was organized under the National Banking Act, and that its affairs were being administered by a duly appointed receiver, who had possession of its assets. Until the motion for rehearing was presented in the supreme court, it had not been asserted by the receiver of the bank that any judgment which might be rendered for plaintiff would be in contravention of any provision of the National Banking Act. In that state of the record, this court denied its own power to review the judgments of the state supreme court.

It is submitted that the presenation of the federal right by the defendants, on their own initiative, which threw upon the state supreme court the burden of deciding the federal right which defendants asserted, cannot be availed of by the plaintiff, who had consistently rested his right to recover *on nonfederal grounds*, as a basis for the prosecution of a writ of error by the *plaintiff* to this court.

It is also submitted that the right to maintain the previous writs of error in this court, which were sued out by the defendants, did not rest upon any assertion *by the plaintiffs* in the state court of a cause of action based upon a statute of the United States. On the contrary the maintenance of jurisdiction under the previous writs of error in this court depended upon a record showing the *affirmative assertion by the defendants* (who were then plaintiffs in error) of federal rights which were denied by the decision of the highest court of the state. To this effect it was stated in the opinion of this court in *Yates v. Jones National Bank*, 206 U. S. 167, as follows:

"A motion to dismiss first requires attention. The asserted want of jurisdiction in this court is based upon the contention that no federal question was raised in or decided by the state court. But as will hereafter appear,

the record plainly shows that both in the trial and appellate courts an immunity was claimed under Sec. 5239 of the Revised Statutes, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is, therefore, jurisdiction even if, in other respects, jurisdiction might not be exercised, as to which we are not called upon to decide."

Upon the record facts detailed, and the authoritative judgments of this court cited, it is urged that the plaintiffs have laid no foundation for the present writs of error, that this court is without power to entertain the writs, and should dismiss them for want of jurisdiction.

We have not overlooked the December 23, 1914, amendment of Section 237 of the Judicial Code, conferring power on this court, by *certiorari*, to review judgments of the highest courts of the state in favor of the federal right claimed. The writ of *certiorari* is, of course, a writ of grace, and not of right, and can only issue upon the order of this court. The amendment does not seem to enlarge the right to the writ of error, which is a writ of right, and is subject to all of the limitations of the original section. The amendment does not appear on its face to operate retroactively, and we assume, as a matter of course, that the jurisdiction of this court must rest on the statute as it existed when the writs were sued out and docketed. The cases were docketed and pending in this court long prior to the passage of the amendment mentioned.

Respectfully submitted,

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
Counsel for Defendant in Error,
David E. Thompson.

JONES NATIONAL BANK *v.* YATES.

BANK OF STAPLEHURST *v.* SAME.

UTICA BANK *v.* SAME.

BAILEY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Nos. 163, 164, 165, 166. Argued April 5, 1915. Restored to docket for reargument June 21, 1915. Reargued January 12, 13, 1916.—Decided April 3, 1916.

Although plaintiff's petition does not refer in terms to a Federal statute which determines defendant's liability, if it appears that the case made is essentially one governed by that statute, the action inherently involves the Federal question of liability under the statute.

Even though the defendant in such a case may have averred in his answer that his liability, if any, must be determined under that statute, that assertion is simply a contention as to essential elements of the plaintiff's claim, and where the State court has denied liability under the Federal statute this court has jurisdiction to review the judgment of the state court under § 237, Jud. Code.

Under the local practice in Nebraska, where trial by jury is waived in an action at law, the findings made by the trial court have the same force and effect as the verdict of a jury, and the hearing in the Supreme Court is not a trial *de novo;* and where the judgment of that court, reversing a judgment of the trial court in favor of the plaintiff, is upon the ground that the plaintiff's case is legally insufficient under the Federal statute, the questions in this court are whether the findings of the trial court were supported by substantial evidence and justified recovery under the Federal statute.

The trial court, having found that defendants had knowingly made false statements as to the condition of a national bank of which they were directors, and that plaintiffs were entitled to recover from defendants their losses by reason of their reliance thereon, this court reverses the Supreme Court of the State and affirms the judg-

ment of the trial court; and *held*, that plaintiffs, as creditors of a national bank, may recover from those directors who knowingly made statements required by the National Bank Act that were false or who knowingly permitted, assented to and allowed the same to be made and published; and also *held* that in this case the findings of the trial court as to the condition of the bank and the knowledge by the defendant directors of the falsity of the statements made and published under the Federal statute, and the reliance thereon by the plaintiffs, were supported by substantial evidence.

93 Nebraska, 121, reversed.

THE facts, which involve the right of creditors of a national bank to recover their loss from the directors of the bank, are stated in the opinion.

Mr. J. J. Thomas, with whom *Mr. L. C. Burr* and *Mr. A. B. Hagey* were on the brief for plaintiffs in error.

Mr. Hallock F. Rose and *Mr. Frank E. Bishop*, with whom *Mr. Frank M. Hall*, *Mr. Joseph F. Stout* and *Mr. Arthur R. Wells* were on the brief, for defendants in error:

The findings of the state court are not subject to review in this court. *Dower* v. *Richards*, 151 U. S. 658; *Miedreich* v. *Lauenstein*, 232 U. S. 236.

The printed bill of exceptions does not contain all of the evidence and cannot be reëxamined to change the findings of fact. *Yates* v. *Jones National Bank*, 206 U. S. 158; *Kansas City R. R.* v. *Albers Co.*, 223 U. S. 573; *Creswell* v. *Knights*, 225 U. S. 246; *So. Pac. Co.* v. *Schuyler*, 227 U. S. 601; *Carlson* v. *Curtiss*, 234 U. S. 103; *United States* v. *Copper Co.*, 185 U. S. 495; *Kinney* v. *United States Co.*, 222 U. S. 283; *Grand Trunk Ry.* v. *Cummings*, 106 U. S. 283.

The judgment of the state Supreme Court upon the vote of the four judges does not deny the plaintiffs any Federal right and the motion for rehearing with only three judges in its favor must fail for lack of majority of the court and is not reviewable in this court. *Shumway*

v. *State*, 82 Nebraska, 152; *Consolidated Co.* v. *Norfolk*, 228 U. S. 230; *Iowa Central R. R.* v. *Iowa*, 160 U. S. 389; *West* v. *Louisiana*, 194 U. S. 258; *King* v. *West Virginia*, 216 U. S. 92; *Carmichael* v. *Eberle*, 177 U. S. 63.

The petitions do not state a cause of action against the defendants. *Yates* v. *Jones National Bank*, 206 U. S. 158.

Revised Stat., § 5239, requires a knowing violation of its provision in order to establish liability. *McDonald* v. *Williams*, 174 U. S. 397; *Potter* v. *Hill*, 155 Missouri, 232; *Utely* v. *Hill*, 155 Missouri, 232; *Mason* v. *Moore*, 79 N. E. Rep. 932; *Spurr* v. *United States*, 161 U. S. 728; *Rosen* v. *United States*, 161 U. S. 29; *South Company* v. *Silva*, 125 U. S. 247; *Thomas* v. *Taylor*, 224 U. S. 73.

The directors of a national bank are not obliged to manage or to administer its affairs, and are not responsible for the acts of its officers and agents which they did not knowingly participate in or assent to. *Briggs* v. *Spaulding*, 141 U. S. at 162.

The director does not attest the official report at his risk of its being false. He is not responsible without knowledge of its falsity. *Yates* v. *Jones Bank*, 206 U. S. 179; *Briggs* v. *Spaulding*, 141 U. S. 147.

The Nebraska Supreme Court correctly understood and applied the rule of liability of directors derived from the National Bank Act to the evidence. *Yates* v. *Jones Bank*, 93 Nebraska, 121.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Capital National Bank of Lincoln, Nebraska, suspended payment on January 21, 1893. The plaintiffs in error were unpaid depositors and brought these actions against directors of the bank to recover damages attributed to false representations of the bank's condition. With their denials of breach of duty, the defendants averred that their liability, if any, was to be determined

by the provisions of the National Bank Act. Judgment in favor of the plaintiffs, upon the verdict of a jury, was affirmed by the Supreme Court of the State. *Yates* v. *Jones National Bank*, 74 Nebraska, 734. It was held that the actions were for deceit, at common law, and the judgments were sustained upon that ground. Upon writ of error the judgments were reversed. 206 U. S. 158, 181. It was the view of the court, even if it were conceded "that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the Comptroller of the Currency, and published in conformity to the National Bank Act, that such latter statements were counted upon in the amended petition and were, if not exclusively, certainly principally, the grounds of the alleged false representations covered by the proof." *Id.*, p. 171. It was therefore concluded that the recovery had been based upon conduct of the defendants in the discharge of duties imposed by the Federal statute; that, with respect to such conduct, the statute (Rev. Stat., § 5239) furnished an exclusive test of liability; and that this test had not been applied. It was held that responsibility, by the terms of the statute, arose from its violation 'knowingly' and hence that 'something more than negligence is required, that is, that the violation must in effect be intentional.' *Id.*, pp. 179, 180.

Upon remand, the petitions were amended but there was no material change in the nature of the causes of action. By agreement, the several cases were tried together; and trial was had by the court without a jury. Official reports, as published, of the condition of the bank were introduced in evidence. Two of these (of December 28, 1886, and December 9, 1892) had been annexed to the petition, and the allegations were broad enough to embrace others. It appeared that the official reports of December 28, 1886, December 12, 1888, September 30,

1889, July 9, 1891, December 2, 1891, and December 9, 1892, had been attested by the defendant Yates; those of September 25, 1891, and September 30, 1892, by Ellis P. Hamer, the intestate of the defendant, Louisa Hamer; and those of December 28, 1886, August 1, 1887, October 2, 1890, December 19, 1890, and July 9, 1891, by the defendant, David E. Thompson. Each of these statements showed the capital stock intact and also surplus and undivided profits.

On behalf of the defendants, Yates and Hamer, the following special findings among others were requested:

"III. That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

"IV. That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank.

"IX. That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities.

"X. That neither the defendant Charles E. Yates nor the deceased Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case."

The trial court found "against each of the defendants and in favor of the plaintiff" respecting the third and fourth requests. On the ninth request, the court answered "in the negative" as to the report of December 28, 1886, and "in the affirmative" as to the report of December 9, 1892; and on the tenth request, the court found "in the affirmative." These rulings 'in the affirmative' were taken to be findings against these defendants, each of whom at once (on a motion to set aside the findings and for a new trial) filed exceptions,—the defendant Yates stating that the court "erred in finding against defendant on the ninth request as to report Dec. 9, 1892," and each of the defendants, Yates and Hamer, stating that the court "erred in finding against defendant on the tenth request."

Among the requests for findings submitted by the defendant Thompson were the following:

"4. Whether this defendant at any time prior to its failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency and referred to in the petition or the evidence were in any material respect false and untrue.

"5. Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency other than the five several reports dated respectively, December 28, 1886, August 1, 1887, October 2, 1890, and December 19, 1890, and July 9, 1891.

"6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith.

"7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently and with actual personal

knowledge that such reports or any one of them were in any material respect false and untrue."

As to the fourth request, the trial court found "in the affirmative," and the defendant Thompson filed his objection that the finding was "not sustained by sufficient evidence" and was "not consistent with the findings made in response to the sixth and seventh requests." As to the fifth request the trial court found "that the defendant attested only five reports mentioned in said request." As to the sixth and seventh requests, it was found:

"Respecting the sixth and seventh requests of the defendant the Court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, attested by him, but in attesting such reports the Court finds that the defendant relied upon the statements made to him by the president and cashier of the bank, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports and that the same were attested recklessly and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him, and in this respect the Court finds that the same were not made in good faith."

The trial court upon its own motion found in each case, as to all the defendants, as follows:

"The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time its liabilities exceeded its assets by more than a million dollars.

"The Court finds that from and after September, 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority, in their names and with their sanction and consent.

"The Court further finds that the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, from and after September, 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in fact false and untrue, as in plaintiff's amended petition alleged, and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the bank to be in a sound, solvent and prosperous financial condition when in fact it was at all times wholly insolvent and unable to pay its liabilities."

It was further found "that the allegations of plaintiff's amended petition are true." The trial court, as to each of the defendants, also set forth its conclusion that the plaintiffs were entitled to recover "in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act," and fixed the damages sustained. Motion for a new trial was denied.

Upon appeal, the judgments in the several cases were reversed by the Supreme Court of the State, and the actions were dismissed. 93 Nebraska, 121. The appeals were heard by six judges, two of whom dissented from the conclusion reached. Three judges concurred in one opinion (delivered by Hamer, J.), taking the view that the amended petitions contained "no material additional statement of facts," that they "still charge the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery," and that the plaintiffs "having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain," were not entitled to recover under the decision of this court as to the rule of liability established by the Federal Act. *Id.*, pp. 123, 130. The remaining judge (Letton, J.), whose concurrence was essential to the reversal, stated his views in a separate opinion. After pointing out that the issues were the same as when the case was presented to this court on the former writ of error, and that this court had held that a Federal question was involved, he said:

"I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained; but I have not examined the evidence so critically as would be necessary to determine this, for the reason that, under the holding of the Supreme Court of the United States as to the meas-

ure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone, I concur in the conclusion." *Id.*, p. 131.

The appellees moved for a rehearing contending, in part, that the court had erred in denying to them "the right to recover under the national bank laws." On this motion the court was equally divided and the motion was denied. And these writs of error to review the judgments of reversal and dismissal have been prosecuted.

1. It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer, in terms, to the Federal statute is not controlling. *Thomas* v. *Taylor*, 224 U. S. 73, 78, 79; *Grand Trunk Ry.* v. *Lindsay*, 233 U. S. 42, 48. It was alleged that statements published by the defendants, acting as directors and officers of the bank, with respect to its financial condition, were false, and were known to be false, and were made with intent to deceive plaintiffs and others. Two of these statements—official reports formally attested—were, as we have said, annexed to the petitions. The proof of representations chiefly concerned these reports and others of a similar sort. In contemplation of law, the question upon the case made by the plaintiffs was essentially one as to the liability of these directors for conduct governed by the Federal Act. The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions. Recognizing that these must be deemed to rest upon transactions falling within the purview of that statute, and that the plaintiffs' rights must be measured accordingly, the Supreme Court of the State reversed the judg-

ments and dismissed the actions. Although the defendants alleged in their answers that if any liability attached to them as directors it was determined by the Federal Act, the construction of which was necessarily involved, this was not properly speaking a matter of affirmative defence. What is called the defendants' assertion of Federal right was simply their contention as to the essential elements of the plaintiffs' cause of action. In *Thomas* v. *Taylor, supra*, the case was framed in deceit under the common law, but the appellate courts of the State decided "that it was the facts pleaded and not the technical designation of the action which constituted grounds of recovery." We accepted that decision, saying: "There is nothing in the national banking laws which preclude such view. Those laws are not concerned with the form of pleadings. They only require that the rule of responsibility declared by them shall be satisfied." If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application. Their case, as made by their pleadings and proofs, is not to be treated as of one character for the purpose of dismissing it in the state court and as of another sort for the purpose of denying their right to complain of the dismissal. We conclude that this court has jurisdiction.

2. It is apparent that there were no findings of fact by the Supreme Court of the State. The actions being at law and trial by jury being waived, the findings of fact made by the trial court—as we understand the local practice—had "the same force and effect" as the verdict of a jury. *Citizens Ins. Co.* v. *Herpolsheimer*, 77 Nebraska, 232; *Dorsey* v. *Wellman*, 85 Nebraska, 262; *Darr* v. *Hay Co.*, 85 Nebraska, 665; *Madison Bank* v. *Gross*, 98 Nebraska, 684. It was not a case of a trial *de novo* upon appeal as in an equity suit. *First National Bank* v. *Craw-*

ford, 78 Nebraska, 665. But, apart from these considerations, findings of fact by the Supreme Court would necessarily require the action of a majority of that court, and it is plain that the opinion of the three judges, unaided by the concurrence of the fourth, could not be regarded as embodying such findings. Justice Letton, whose concurrence in the result made the reversal possible, stated specifically the sole ground of his action, and his statement did not purport to be the resolving of questions of fact. After saying that he was inclined to the view that the evidence would support a judgment upon a cause of action at common law for deceit, and that "the findings of the district court" were "to that effect," he added that he was not satisfied that these findings were "unsustained by the evidence." He considered the presumption to be that they were "so sustained," but he had "not examined the evidence so critically as would be necessary to determine this," for the reason that in view of the holding of this court "as to the measure of duty and of liability of directors" under the Federal Act he thought that "a case had not been made." "For that reason alone" he concurred in the conclusion.

It is manifest that this was simply the expression of an opinion with respect to the legal sufficiency of the plaintiffs' case. That is, the decisive ruling—upon which the reversal rested—was that as matter of law, applying the Federal statute, the plaintiffs were not entitled to their recovery. And the judgment as entered upon appeal simply set forth that the court finding "error apparent in the record of the proceedings and judgment" reversed and dismissed.

In this state of the record, for the purpose of determining whether in thus reversing the judgments and depriving the plaintiffs of their recovery, the Federal question was wrongly decided, there are two questions to be considered (a) whether the facts found by the trial court

justified a recovery under the Federal law, and, if so, (b) whether there was substantial evidence to support these findings, as the duty to decide the Federal question in its very nature involves this further inquiry. *Dower* v. *Richards*, 151 U. S. 658, 667; *Stanley* v. *Schwalby*, 162 U. S. 255, 277, 278; *Kansas City Southern Ruy. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591, 592; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, 259; *Carlson* v. *Curtiss*, 234 U. S. 103, 106.

3. In addition to the general finding in each case that the allegations of plaintiffs' amended petition were true, we have noted that the court found specially that the bank had sustained losses greatly in excess of its purported capital stock; that it never "had any capital stock, undivided profits or surplus"; that it "was at all times insolvent and so continued up to the time it ceased to do business on January 21, 1893", when "its liabilities exceeded its assets by more than a million dollars;" and that the published statements shown by the evidence, embracing the official reports to which reference has been made, represented the bank to be "in a sound, solvent and prosperous financial condition" when in fact it was "wholly insolvent and unable to pay its liabilities." The official reports covered by the findings were those made to the Comptroller of the Currency and published at the times we have mentioned in pursuance of Rev. Stat., § 5211.[1]

[1] "SEC. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five

While, as pointed out on the former writ of error, the act did not expressly require that these reports "should contain a true statement of the condition of the association," yet "by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited." 206 U. S., p. 177. And as it is plain that the making of these official reports, found to be false, was a violation of the statute, the question is whether the findings make a case within § 5239 of the Revised Statutes, which provides that where the statute is "knowingly" violated or is "knowingly" permitted to be violated, as stated, "every director who participated in or assented to" such violation shall be liable individually for all damages thereby sustained by "the association, its shareholders, or any other person,"—a civil liability which may be enforced in the state court. *Id.*, pp. 180, 181.

As to the directors Yates and Hamer (the former having attested an official report to the Comptroller of the Currency as late as December 9, 1892, and the latter having attested an official report of September 30, 1892), the trial court not only found "against each of the defendants and in favor of the plaintiff" upon the special requests for findings that these directors did not knowingly participate in the violation of the act, but the trial court also found explicitly that each of these directors "from

days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

and after September, 1891" knew that the official statements as to the bank's financial condition which were shown by the evidence to have been published "contained material false representations of the financial condition of said bank, and were in fact false and untrue," and that these directors with knowledge "of all the matters and facts aforesaid" had "knowingly permitted, assented to, and allowed the same" to be made and published. The findings as to each of these directors abundantly supported the plaintiffs' recovery within the established rule of liability.

With respect to the defendant Thompson (the latest official report attested by him being the one of July 9, 1891), we have seen that the court found that he had "no actual personal knowledge of the truth or falsity" of the reports which he attested, but that in attesting them he "relied upon the statements made to him by the president and cashier" of the bank "without any investigation," and that "at the time of attesting such statements" he "knew that he had no personal knowledge" of their truth or falsity, and that they "were attested recklessly and without performing his duties as a director" to ascertain their truth or falsity before attestation, and in this respect that these reports "were not made in good faith." If this finding, fairly construed, did not import more than mere neglect or inattention, it would not be sufficient to sustain a recovery; for Congress did not make negligence the test of liability, but the fact that the act was violated knowingly, although there may be a violation "in effect intentional," and therefore within the statute, "when one deliberately refuses to examine that which it is his duty to examine." *Thomas* v. *Taylor*, *supra*. In that case the directors, having been warned by the bank examiner and Comptroller of the doubtful character of certain assets, still represented them to be good; and their reckless report in disregard of the official direction was found to have the

quality of an intentional breach of the defined duty. But in the present case, we are not called upon to determine what should be deemed to be involved in the finding that the attestation of the earlier reports, which were attested by this defendant, was made "without any investigation" and "recklessly." For there were later reports made on behalf of the bank and the defendant is not excused simply by the fact that he did not attest them. His liability was not merely with respect to attestation, but for knowingly "participating in" or "assenting to" the violation of the Act. 206 U. S., pp. 177–179. If the defendant Thompson participated in or assented to the making and publication of the official reports to the Comptroller of the Currency, which were made in the year 1892, knowing that they were false reports, he was liable to the plaintiffs deceived and damaged thereby under the express terms of the statute; and he could not escape this liability simply because, while he thus participated or assented, other directors gave the formal attestation. And the trial court found, not only with respect to Yates and Hamer, but as to the defendant Thompson, that each of them after September, 1891, knew that the official statements as to the condition of the bank, shown by the evidence, were in fact false, and that with knowledge of the facts stated in the findings with respect to the condition of the bank, the defendant Thompson, as well as the others, "knowingly permitted, assented to, and allowed" the same to be made and published. This was a sufficient finding of the ultimate fact of participation or assent, and constituted an adequate basis for recovery.

We conclude that the findings of the trial court, in the light of the Federal statute, supported the judgments it entered.

4. The plaintiffs in error, however, are not entitled to complain of the reversal as a denial of Federal right, even though the judgments were supported by the findings of

fact made by the trial court, if these findings themselves were not supported by substantial evidence.

As to the financial condition of the bank, there is no room for controversy. It would be difficult to conceive of a case of more scandalous maladministration than that which the testimony portrays. There was evidence of manipulation of accounts, of fictitious and falsified entries, of fraudulent concealments. It cannot be said that there was serious effort to meet this evidence. There was no attempt to palliate the offences which it appeared had been committed by the executive officers in the conduct of the bank's affairs. But these directors were not accountants; presumably they relied upon the books as containing accurate items, and there is no basis for the conclusion that they had knowledge of fictitious or falsified entries in the books, or of the fraudulent transactions which such entries were intended to conceal and which were revealed after the bank failed. With respect to such concealed transactions, we find nothing to show that the directors knowingly participated in, or assented to, a violation of the statute.

We pass, therefore, to matters of a different sort which lay easily within the ken of the directors. The bank had been incorporated as the Marsh National Bank, in the year 1883, with a capital stock of $100,000. The assets and liabilities of a preceding concern, Marsh Brothers, Mosher & Company, were transferred to the bank and became its assets and liabilities. In 1884, the name was changed to the Capital National Bank of Lincoln; the capital stock was then increased to $200,000, and in 1886 there was a further increase making the total capital stock $300,000. Yates, Hamer and Thompson became directors in 1884 and continued as such until the failure of the bank in January, 1893. There were seven directors in all, including C. W. Mosher, the president. It appears that, at the time of the failure, the bank's assets at their face

value, as shown by the books, were about $1,031,000. The liabilities, as shown by the books, including capital stock, amounted to about $1,017,000; these seem to have been in fact (including liabilities on rediscounts) about $1,760,000. Included in the assets above stated, the amount of $850,959.86 (in face value) was in bills receivable, of which $155,560.84 were classed by the receiver as doubtful and $397,073.63 as worthless. The actual showing on liquidation appears to have been even worse; the total amount realized from the bills receivable (aggregating $850,959.86) was $229,520.82, and the total amount realized from all the assets of the bank (including rediscounted items placed in the hands of the receiver for collection, and excluding stock assessments) seems to have been less than $400,000.

The evidence was that at the time of the failure there were on hand worthless notes of C. W. Mosher, the president, amounting to $85,281.67; of the cashier, R. C. Outcalt, $54,166.96 (less an offset of $570.99); and of the Western Manufacturing Company (signed by E. Hurlburt, Jr., Manager) $235,000. This concern was apparently but another name for C. W. Mosher; the testimony is that it had no assets and ceased to do an active business in 1889. There were also notes in the name of E. W. Mosher aggregating $107,085.45, which it was testified were worthless, save for a collection on collateral of less than $10,000. According to the schedules in evidence these worthless notes had been taken since June 1, 1892, that is, within a period of seven months before the failure. And while the totals of these accounts, respectively, were much larger than they had been formerly, the same accounts embracing loans to a considerable amount had long been carried and were included in the published reports. There was evidence that there had been about $200,000 of worthless notes in these accounts in January, 1892. While it is not necessary for the present purpose to

go further back, the testimony supports the finding of the trial court that the bank in fact not only had no surplus or undivided profits, but that its actual condition was one of insolvency.

In the fourteen months before the failure the evidence shows three of the official reports made to the Comptroller of the Currency and published in the newspapers in Lincoln; those of December 2, 1891, September 30, 1892, and December 9, 1892. The total resources in these reports are stated, respectively, as $1,143,946.88, $1,033,561.11, and $1,074,867.37. Each of these reports shows the capital stock unimpaired. As of December 2, 1891, the surplus is stated to be $32,000, and the undivided profits, $23,276.89; as of September 30, 1892, these items are $6,000 and $11,978, respectively; and as of December 9, 1892, $6,000 and $21,180.75. In January, 1892, the directors declared a dividend of five per cent, and in July, 1892, a further dividend of four per cent. There was evidence of serious discrepancies between the items in the published official reports and corresponding items as shown by the books. Without attempting to state the details disclosed by the voluminous record, it is sufficient to say that it was clearly shown by evidence substantially undisputed that these reports constituted grossly false representations of the bank's financial condition upon which the plaintiffs were invited to rely and did rely.

There was also substantial basis for the finding that the directors assented to the making and publication of these reports; for, as we have said, whether this or that director attested a particular report is not controlling upon the question of assent. The official reports required by law are the reports of the bank and not simply of those signing and attesting. As the reports of the bank, they are made under its authority and presumably with the assent of the board of directors. Taking the proved circumstances into consideration, and particularly in the light of the

activity of these directors, to which we shall presently refer, it is hardly conceivable that they did not know of the last-mentioned official reports which were made on behalf of the bank and published in Lincoln. Certainly, the fact of such knowledge on the part of each of them could properly be found. There is no suggestion that they made the slightest objection to the making or publication of these reports and the evidence was unquestionably sufficient to show their assent to this action on behalf of the bank.

The remaining question is with respect to the evidence of the knowledge of these directors of the falsity of these official reports or of such reckless disregard of the truth or falsity of their contents, as would show that the participation in, or assent to, the violation of the statute was "in effect intentional." Under date of September 8, 1891, the Comptroller of the Currency addressed a letter to president Mosher referring to a report of an examination of the bank and criticizing various matters. It was evidently in view of this communication that the trial court took September, 1891, as the time after which the directors had knowledge of facts showing the falsity of the reports. Without reciting the letter in full, it is sufficient to note that the Comptroller called attention to two loans (one being that of E. W. Mosher) exceeding the statutory limit; to the fact that at the time of the last report of the bank the overdrafts shown by the books largely exceeded those stated in the report; to overdue paper, with the statement that such of it as was good should be collected or made active by renewal with satisfactory security; to the excess of current expenses over undivided profits; and to the fact that the bank had a large liability on account of rediscounted paper, said to be caused by the falling off in deposits. It was suggested that some of the loans should be called in as soon as practicable, and the letter closed with the statement that

according to the examiner's report the board of directors had held only two meetings during the past year and that there was "no record of their having examined or approved of the loans and discounts." It was pointed out "that the conduct of affairs of a national bank is by law devolved upon the board of directors and that regular and frequent meetings are therefore very desirable." The defendants insist that they were not apprised of this letter until after the failure. There was evidence tending to show that it was considered at a meeting of the board in September, 1891, but in addition to explicit denials there was testimony to impeach the credit of the witness so testifying. There was, however, another letter from the Comptroller of the Currency under date of February 16, 1892, which admittedly was brought to the attention of the directors. This letter, in substance, repeated several of the criticisms which had been made in the earlier letter; it referred to the desirability of collecting as soon as practicable loans that had been carried for a number of years, and to the agreement of Mosher and Outcalt to reduce their liabilities and to close "the bulk of their outside interests" owing to which the business of the bank had suffered; it again emphasized the duty of the directors with respect to the conduct of the bank's affairs; and it concluded with a request for a reply over the directors' "individual signatures." The directors, including those whose liability is now in question, accordingly signed a reply, under date of February 19, 1892, which purported to furnish explanations and promised improvement. It was stated that the bank had always had a discount committee and that a vacancy caused by the death of a former member had been filled by the appointment of E. P. Hamer. The last-mentioned director also wrote to the Comptroller on February 23, 1892, to the effect that the manner of conducting the bank had not been satisfactory to him and, promising better man-

agement, he added: "Your letter is a move in the right direction, it indicates that we the directors should take a more positive position in the management which I for one shall do."

Apparently the Comptroller of the Currency was not satisfied. For it appears that he wrote another letter under date of August 31, 1892, which, having been lost, was not introduced in evidence. But the letter in reply, which the directors, including Yates, Hamer and Thompson signed individually (under date of September 19, 1892, as stated by defendants' counsel), is in evidence and its significance cannot be overlooked. Among other things, it stated:

"The dividend of July 1st was all right; the expenses since then have exceeded income by reason of having paid taxes & interest on certificates of deposits to an unexpected amount during July. The item of $8,000.00 losses referred to was an estimate of contingent losses & not any particular loss already incurred, but referred to some matters or process of liquidation, all items mentioned by you shall receive prompt attention."

There was thus sufficient evidence from these directors themselves that they were scrutinizing the affairs of the bank; that prior to the published official report of September 30, 1892, which was followed by the published official report of December 9, 1892, these directors were examining the condition of the bank, that they were considering the losses sustained, the expenses incurred, and the basis of the dividend declared in July. These were not casual statements, but deliberate assertions of activity of supervision in response to official complaint. It was plainly permissible, despite their disclaimers and denials, to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of the supervision which they pro-

fessed to be actively exercising. Assuming that they were ignorant of the frauds that had been committed and concealed by falsified entries, there was warrant for the conclusion that they could not have failed to acquire sufficient information to be aware that the representations in the official reports of the latter part of the year 1892 were materially false and calculated to deceive. The questions of fact, so far as they arose upon a substantial conflict in evidence, were for the trial court. *Citizens Ins. Co.* v. *Herpolsheimer*, *supra*; *Madison Bank* v. *Gross*, *supra*. It is not necessary for us to review the evidence in detail. It is sufficient to say that our examination of it has convinced us that the findings of the trial court, at least with respect to the last mentioned reports, had substantial support; and, in this view, we must conclude that the reversal of the judgments, as entered in the trial court, upon the ground of the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error.

The judgments of the Supreme Court of the State are reversed and the cases are remanded with instructions to reinstate the judgments entered in the District Court which are affirmed. *Stanley* v. *Schwalby*, 162 U. S. 255, 279–283.

It is so ordered.